(1975) 01 MAD CK 0007

In the Madras High Court

Case No : Appeal No. 373 of 1971

Golla Rama Rao — APPELLANT

Vs

Union of India and others — RESPONDENT

Date of Decision : 21-01-1975

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 80

Citation : (1975) 01 MAD CK 0007

Hon'ble Judges : Ismail, J

Bench : Single Bench

Advocate : S. Nainar Sundaram, V. Natarajan and V. Nicholas, for the Appellant;

Final Decision : Dismissed

Judgement

Ismail, J.—The plaintiff in O.S. No. 857 of 1967 on the file of the City Civil Court, Madras, is the appellant herein. He is a dealer in

tobacco and he used to get tobacco from various merchants from Andhra State and other places. On 23rd May, 1966, one Kotty Venkayya

doing tobacco business at Eluru despatched 11 bundles of tobacco weighing dry weight 759 kgs. under T.P.I. permit in his name by lorry. The

said lorry was unloaded on 25th May, 1966 at Madras. The third respondent, who is the Inspector of Central Excise, came and scrutinised the

permit and weighed the tobacco. On weighment, it was found that the gross weight was 1060 kgs and net weight was 994 kgs as against 759 kgs

gross dry weight and 693 kgs not dry weight, as found in the permit. In view of this excess weight, on the ground that the same was not covered

by a permit, the excess tobacco was seized Ex. B.2 dated 25th May, 1966 is the statement given by the appellant before the Collector of Central

Excise and Ex. B-3 dated 26th May, 1966 is the form of seizure report of the

Inspector of Central Excise. There had been correspondence

between the appellant and the Collector of Central Excise and an order was passed on 17th June, 1966, marked as Ex. A-5 by the second

respondent, the Collector of Central Excise, permitting the appellant to take delivery of the tobacco seized, on executing a bond Ultimately by an

order dated 28th July, 1966 marked as Ex. A-7, the Assistant Collector of Central Excise stated that the excess weight was due to the wetting of

the tobacco and that that constituted only 43% excess weight and up to 45% the excess could be allowed, and therefore, purporting to give the

benefit of doubt to the appellant, he directed the release of the tobacco. The appellant did not take delivery of the tobacco even then. Thereafter

the Collector of Central Excise wrote a further communication to the appellant on 6th October, 1966, marked as Ex. A-16, calling upon him to

take delivery of the tobacco which had been ordered to be released even on 28th July, 1966 itself. Contending that by the time the order was

passed on 28th July, 1966, the tobacco had become useless for the purpose of manufacturing snuff, the appellant did not take delivery and after

issuing a notice under S. 80, C.P.C., he instituted the suit for recovery of a sum of Rs. 6002-82, made up of Rs. 4002.18 being the value of the

tobacco seized and Rs. 2,000 the estimated loss of profit. The appellant in the plaint contended that the action of the authorities in seizing the

tobacco was illegal, mala fide and in excess of the powers given under the rules and regulations. The suit was resisted by the respondents on

several grounds which are reflected in the following issues framed by the trial court:

1. Whether the suit has been properly laid against the Union of India ?

2. Whether the proper notice under S. 80, C.P.C., has been issued ?

3. Whether the suit is barred under S.40(1) and (2) of the Central Excise and Salt Act of 1944?

4. Whether the seizure of the plaintiff''s goods was improper and against rules and regulations ?

5. Whether the goods were damaged because of the act of the defendants ?

6. Whether the plaintiff is guilty of laces to not taking the delivery of the goods and is not entitled to damages?

7. Whether the plaintiff has suffered loss of reputation and is entitled to damages

and if so, at what amount ?

8. Whether the plaintiff is the owner of the consignment and is entitled to claim the value thereof?

9. Whether the defendants have acted in excess of their power and authority and are liable for damages ?

10. To what relief, if any, is the plaintiff entitled?

The learned IV Assistant Judge, City Civil Court, Madras, by his judgment and decree dated 9th January 1970, dismissed the suit and against the

said dismissal the present appeal has been filed by the plaintiff in the suit.

2. I am not going into in detail the findings of the learned trial Judge on the different issues for the simple reason that I am agreeing with his

conclusion that the suit instituted by the appellant is liable to be dismissed because of the bar of limitation provided in S.49(2) of, the Central Excise

and Salt Act, 1944, hereinafter referred to as the Act. I have already referred to the fact that the seizure took place on 25th May 1966 and the

actual order directing the release of the tobacco was passed on 28th July 1966. The suit was instituted on 11th February 1967. S.40 of the

Central Excise and Salt Act, at the relevant time, consisted of two Sub-sections. Sub-S.(1) wasï¿½

No suit shall lie against the Central Government or against any officer of the Government in respect of any order passed in good faith or any act in

good faith done or ordered to be done under this Act.

Sub-s.(2) wasï¿½

No suit, prosecution, or other legal proceeding shall be instituted for anything done or ordered to be done under this Act after the expiration of six

months from the accrual of the cause of action or from the date of the act or order complained of.

Thus, it will be seen that there are vital differences between the two subsections. Sub-S.(1) refers to the Central Government or any officer of the

Government. It also refers to any order passed in good faith or any act in good faith done or ordered to be dune under the Act. If an order has

been passed in good faith or any act in good faith has been done or ordered to be done under the Act, sub-S.(1) gives complete and absolute

protection obviously because of the good faith on the part of the Government or the officer. Thirdly, sub-S.(1) refers to suits only. On the other hand, sub-S.(2) does not refer to either the Government or any officer of the Government, and it is in general terms. From the language of sub-S.

(2) itself, it is seen that it will apply to any person against whom a suit can be filed or maintained or action can be initiated or prosecution can be

launched. Secondly, sub-S.(2) does not refer to any good faith on the part of any person doing anything or ordering anything to be done under the

Act. Thirdly, sub-S.(2) refers to suit, prosecution or any other legal proceeding as against sub-S.(1) referring to suits only. Fourthly, sub-S.(2)

merely provides for a period of limitation for the institution of such proceedings as against the complete and absolute protection against suits only

provided for in sub-S. (1) and the said period of limitation is six months from the accrual of the cause of action or from the date of the act or order

complained of. In this case, as I have pointed out already, the cause of action is the alleged illegal seizure that took place on 25th May 1966. Para

graph 13 of the plaint states that the cause of action arose at Madras on 23rd May 1966, (a mistake for 25th May 1966), when the goods were

seized and subsequently when the notices demanding the damages were sent As far as the statute is concerned, it talks of accrual of cause of

action or the date of the act or order complained of. The act complained of in this case is the act of seizure which took place on 25th May 1966.

Even assuming that the cause of action to claim damages accrued to the appellant on 28th July 1966, when the tobacco was directed to be

released, still the suit instituted on 11th February 1967, was beyond six months from that date. Consequently, on the face of these facts as well as

the language of S.40(2), the suit is barred by limitation.

3. Mr. Nainar Sundaram, learned counsel for the appellant, realising this position only contended that S.40 (2) of the Act is not attracted to the

present case at all because the illegal seizure cannot be said to be comprehended by the language of S.40(2), when it used the expression ""anything

done or ordered to be done under the Act"". I am unable to accept this argument for mere than one reason. In the first place, the expression

anything done or ordered to be done under this Act"" merely refers to the factual steps taken in the exercise of the powers conferred by the Act

and it does not go to the legality or the propriety of the Act itself. That was the view taken by the Supreme Court in Firm and Illuri Subbayya

Chetty and Sons Vs. The State of Andhra Pradesh, with reference to a similar language occurring in S. 18-A of the Madras General Sales Tax

Act, 1939. That section also used the expression ''any assessment made under this Act'' and the argument that was advanced before the court was

that the expression ''any assessment made under this Act'' would apply only to a valid or legal or correct assessment. That argument was rejected

by the Supreme Court which stated:

The expression ''any assessment made under this Act'' is, in our opinion, wide enough to cover all assessments made by the appropriate authorities

under this Act whether the said assessments are correct or not. It is the activity of the assessing officer acting as such officer which is intended to

be protected and as it is shown that exercising his jurisdiction and authority under this Act, an assessing officer has made an order of assessment,

that clearly falls within the scope of S.18-A. The fact that the order passed by the assessing authority may in fact be incorrect or wrong does not

affect the position that in law, the said order has been passed by an appropriate authority and the assessment made by it must be treated as made

under this Act. Whether or not an assessment has been made under this Act will not depend on the correctness or the accuracy of the order

passed by the assessing authority. In determining the applicability of S.18-A the only question to consider is- ''Is the assessment sought to be set

aside or modified by the suit instituted an assessment made under this Act or not?'' It would be extremely anomalous to hold that it is only an

accurate and correct order of assessment which falls under S.18-A. Therefore, it seems to us that the orders of assessment challenged by the

appellant in its suit fall under S.18-A.

Applying the reasoning of the above judgment it clearly follows that so long as the appropriate authority takes an action or passes an order under

the provisions of the Act, S.40(2) of the Act will be immediately attracted and whether that act or action is right or wrong or illegal will not be

germane to the applicability of S.40(2) as such. As a matter of fact, if the expression ''anything done or ordered to be done under this Act'' means

only anything legally, properly or correctly done or ordered to be done under the Act, then the question of instituting any suit, prosecution or other

legal proceeding for such legal, proper or correct act or order cannot possibly arise, and therefore, S.40(2) itself will be devoid of any meaning or

incapable of application since such legal, proper or correct act or order cannot be complained of, as contemplated by the statutory provision.

4. The next contention advanced by the learned counsel for the appellant is that S.40 (2) of Act will not apply to the present case, because the

seizure of tobacco by the third respondent herein was a mala fide one. The trial court has come to the conclusion that the said contention of the

appellant is not made out and that the act was done in good faith. For the purpose of S.40(2), I am prepared to assume that the action of the third

respondent was not in good faith. Still the question for consideration is, whether S.40(2) will apply to such case or not.

5. As I have pointed out already, there is a clear distinction between S.40(1) and S.40(2). It is S.40(1) that refers to good faith and when good

faith is present, the protection given to the Government or the officer concerned is absolute and when the protection is absolute, there is no

question of a period of limitation being prescribed for filing a suit or launching a prosecution or initiating any legal proceeding against the

Government or the officer concerned. Only when because of want of good faith, the protection provided for in S.40(1) is not available, S.40(2)

will be invoked and the only limitation provided for in S.40(2) is with regard to the period within which action has to be taken. It 1 as to be

remembered that S.40(2) does not grant protection at all. It merely prescribes a period of limitation, just like the Limitation Act generally

prescribes a period of limitation for all actions. As a matter fact, Sub-Sec.(1) of S.40 applies only to Government and the officers of the

Government and Sub-Sec.(2) of S.40 applies to Government, officers of Government and others also and where in a suit the question of want of

good faith is alleged against the Government or the officers of the Government and it is found that the Government or its officers have acted in

good faith, there is no need for them to rely upon S.40(2) at all, since S.40(1) itself gives them complete protection on the establishment of good

faith and only when such good faith is not established, there will be need for them to rely upon S.40(2) by pleading the bar of limitation of time.

6. The above view of mine derives support from certain observations of the Supreme Court contained in the judgment of that court in Public

Prosecutor, Madras Vs. R. Raju and Another, etc., . That case dealt with the prosecution launched under S 40(2) against certain private

individuals and considered the applicability of S. 40(2) to such a prosecution. The Supreme Court observed

The section S.40 of the Central Excise and Salt Act, consists of two sub-Section. The first sub-Section speaks of bar of suits against the Central

Government or against any officer of the Government in respect of any order passed in good faith or any act in good faith done or ordered to be

done under the Act. The second sub-Section speaks of limitation of suits, prosecution or other legal proceeding for anything done or ordered to be

done under the Act alter the expiration of six months from the accrual of the cause of action or from the date of the act or order complained of.

The two sub-section operate in different fields. The first sub-S. contemplates bar of suits against the Central Government or against the officers by

protecting them in respect of orders passed in good faith or acts done in good faith, It is manifest that the second sub-Section does not have any

words or restrictions or limitation of class of persons unlike sub-S. (1). Sub-Sec. (2) does not have any words of qualification as to persons

Therefore, sub-S.(2) is applicable to any individual or person.

After making reference to certain corresponding proviso in other enactments, the Supreme Court proceeded to observeï¿½

The provisions contained in S.40 of the Act in the present case show that the first sub-Section speaks of bar of suits against the Central

Government or any officer of the Government in respect of orders passed in good faith or act in good faith done or ordered to be done, The

second Subsection of S.40 provides bar of limitation of time in respect of suits prosecutions or other legal proceedings without any qualifying

words as to person against whom suit, proceeding and prosecution shall be instituted. The contention of the appellant that Sub-Sec. (2) is confined

only against the Government officers is not warranted by the words of the statute and is repelled by reference to other comparable statutes Which

have indicated in clear words when the statute contemplates bar of suits, proceedings or prosecutions against Government servants only. The

words in S.40(2) of the Act in the present case are of wide amplitude to apply to the prosecution which was commenced against the respondents in the present appeals.

Proceeding further, the court observedï¿½

Sub-Sec.(2) of S 40 does not introduce the test of good faith in relation to act done. Good faith is one of the aspects in S.40(1) The present

appeals do not turn on Sub-sec. (1) of S.4.

7. The above decision was rendered in the context of the contention that S.40(2) was restricted to action taken against the Government servants

only and the Supreme Court held that no such restriction was to be found in S.40(1) and that S.40(2) would be applicable to any individual,

provided the action against such individual was competent and maintainable, if that individual bad done anything under the Act. While construing

the expression, ""anything done or ordered to be done under the Act"", the Supreme Court pointed out the definition of the word, ''act'' in the

General Clauses Act and after referring to certain decisions observedï¿½

These decisions in the light of the definition of the word act in the General Clauses Act establish that non-compliance with the provisions of the

statute by omitting to do what the Act enjoins will be anything done or ordered to be done under the Act.

The relevancy of the observation of the Supreme Court, as far as the present case is concerned is that the test of good faith has to be found only in

S.40(1) and that is not applicable to S.40(2), and that Sub-sec. (1) gives complete protection to the Government or the officers of the Government

so long as they act in good faith and Sub-Sec.(2) merely provides for the bar of limitation of time in I respect of suits, prosecutions or other legal

proceedings.

8. Therefore, I am of the opinion that S. 40(2) of the Act is attracted to the present case, even assuming that the third respondent had not acted in

good faith. Hence, the suit instituted by the appellant was barred by limitation under S.40(2) of the Act and liable to be dismissed and was rightly

dismissed.

9. In view of this conclusion of mine, it is unnecessary to consider the ether aspects dealt with by the trial Judge in his judgment. Accordingly the

appeal fails and is dismissed. The parties will bear their respective costs in the appeal.

