

(1994) 08 CAL CK 0010
In the Calcutta High Court
Case No : C.O. No. 3730 (W) of 1994

Haryana Plywood Industries

APPELLANT

Vs

Collector of Customs

RESPONDENT

Date of Decision : 22-08-1994

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B, 11B(3), 35
Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 15, 27, 27(2), 27(3), 28

Citation : (1994) 74 ELT 224

Hon'ble Judges : Tarun Chatterjee, J

Bench : Single Bench

Advocate : Negative Ahmed, for the Appellant; N.C. Roy Chowdhury, for the Respondent

Judgement

Tarun Chatterjee, J.—The writ petitioner No. 1, M/s. Haryana Plywood Industries, is a partnership firm engaged in the manufacturing of Jawala Ply, Jawala Boards and Jawala. The writ petitioner No. 2 is its partner and writ petitioner No. 3 is the agent of the writ petitioner No. 1.

2. The writ petitioners imported 62 crates of wood (rough packed but not further prepared) falling under Central Excise Tariff Item Nos. 4408.92 read with Notification Nos. 62/85 dated 17th of March, 1985 and 311/86 dated 13th of May, 1986 attracting basic Customs Duty at 10% ad valorem. The consigned goods arrived at Calcutta Port on 3rd of October, 1986 from Singapore by a vessel. The Notification Nos. 439/87-Cus. and 440/86-Cus., which had the effect of enhancing the Customs duty and auxiliary duty to 60% of ad valorem and 40% of ad valorem respectively, were issued on 6th of October, 1986. The writ petitioners filed a Bill of Entry on 8th of October, 1986 and the assessment was made on the basis of the enhanced rates by implementing the above notifications issued on 6th of October, 1986 instead of making such assessment at 10% ad valorem on the basis of the Notification Nos. 62/85 and 311/86. The writ petitioners filed a refund application seeking refund of Rs. 3,62,398.39 being the

excess duty paid under protest. The Assistant Collector of Customs rejected the refund application of the writ petitioners and on appeal, the Collector of Customs (Appeals) set aside the said order of the Assistant Collector of Customs and remanded the case back to him for re-hearing. Again the Assistant Collector of Customs rejected the claim holding that the writ petitioner must obtain an order of assessment from the group concerned and file a claim before the Collector of Customs (Appeals). Before the Collector of Customs (Appeals) the writ petitioners produced a letter dated 18th of August, 1988 from Government of India, Department of Publication, Book Department, to show that they had received the concerned notification for publication on 29th of January, 1987 and put for sale on the same date. The Collector of Customs (Appeals) however, held that the rate of duty must be the rate which was prevailing on the date of presentation of the Bill of Entry i.e. on 8th of August, 1986, in terms of the provisions contained in Section 15(a) of the Customs Act, 1962 (hereinafter referred to as the Act).

3. Feeling aggrieved by the order of the Collector of Customs (Appeals), the writ petitioners preferred an appeal before the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi. By a judgment and order dated 28th of July, 1992, the aforesaid Appellate Tribunal allowed the appeal filed by the writ petitioners and directed that the excess duty paid in respect of the Bill of Entry in question must be refunded to the writ petitioners. A direction for expeditious refund of the said amount was also made. Although such an order of refund was made by the Appellate Tribunal, the refund was, however, not made by the authorities. For refund of the aforesaid amount in terms of the order of the Appellate Tribunal, the writ petitioners made an application before the authorities but the Customs Authorities had refused compliance of the said order of the Appellate Tribunal. Accordingly, the writ petitioners have come up to this Court for a direction upon the Customs authorities to forthwith refund the excess amount of Rs. 3,62,398.39 which was realised in excess of the import duty payable by the writ petitioners with interest at the rate of 24%.

4. Heard the learned Counsel appearing for the writ petitioners and for the Customs Authorities. Perused the materials on record. Mr. Roy Chowdhury appearing on behalf of the Customs Authorities, raised a preliminary objection as to the entertainability of this writ application at this stage. Mr. Roy Chowdhury contended that in view of the amended provision of Section 27 of the Act, the writ petitioner just approach the Assistant Collector of Customs before coming to this Court for refund of the excess duty paid by the writ petitioners by means of a writ petition. In support of this contention, a decision of the Supreme Court reported in *Union of India and others Vs. Jain Spinners Ltd. and another*, was cited. In that decision, the Supreme Court held that in a case of refund of duty deposited in High Court, in terms of an order passed by the High Court in writ jurisdiction, the assessee cannot get refund on the basis of the order of the High Court in the writ jurisdiction, the assessee cannot get refund on the basis of the order of the High Court without fulfilling the conditions as provided in the

amended provisions of Section 11B of the Central Excises & Salt Act, 1944. Mr. Roy Chowdhury, appearing for the customs authorities has submitted that since the facts stated in the writ petition are not disputed, it would not be necessary for the customs authorities to file any affidavit-in-opposition and this writ petition can be disposed of on the facts alleged in the writ petition. Accordingly this writ petition is taken up by consent of parties.

5. In order to appreciate the points raised by Mr. Roy Chowdhury, it would be necessary to consider the facts of the case in the Supreme Court because there cannot be any quarrel on the principles laid down by the Supreme Court in the aforesaid decision to the effect that the assessee is to apply before the Assistant Collector of Customs under the amended Section 11B of the Central Excises & Salt Act, 1944 (hereinafter referred to as the Salt Act) to obtain an order of refund despite such direction for refund has been made by the High Court on the writ petition. The facts, as would appear from the decision of the Supreme Court in that decision in a nutshell are as follows :

6. The writ petitioner in that writ petition moved a petition under Article 226 of the Constitution against an order dated 28th of August, 1985 passed by the Assistant Collector, Central Excise confirming the demand made on the writ petitioners of that case of Rs. 1,10,81,405.94 and imposing a penalty of Rs. 500/-. At the same time the writ petitioners preferred an appeal u/s 35 of the Salt Act before the Collector of Central Excise, Bombay and applied for stay of the order of the Assistant Collector. In the aforesaid writ application, a prayer for ad interim stay was made at the instance of the writ petitioners and the High Court passed an interim order of stay on condition that the writ petitioners shall deposit in Court an amount of Rs. 28 lakhs by 31st of January, 1986 and a further amount of Rs. 28 lakhs by 30th April, 1986 and for further clearance the writ petitioners were directed to furnish bank guarantee on the disputed duty and pay admitted duty as per 18III(i) of Central Excise Tariff. The High Court also passed another order in the said writ petition permitting the Union of India to withdraw the said amount with certain conditions specified therein. In terms of the said order passed by the High Court, the writ petitioner deposited the said amount and admittedly the Union of India had withdrawn the said amount from the High Court. At this stage, the appeal which was filed u/s 35 of the Salt Act was allowed by the Collector of Customs and it was found by the Collector that the writ petitioners were eligible for the consequential reliefs if otherwise admissible. In view of the order passed by the Collector allowing the appeal of the writ petitioners, the writ petitioners filed an application for refund before the Assistant Collector, Central Excise. While the said application for refund was pending before him, the writ petitioner approached the High Court on 25th June, 1991 with an application for disposal of the writ petition in which the order of the Assistant Collector of Customs confirming the demand made from the writ petitioners was challenged, as the said impugned order was set aside by the Collector of Customs and also for a direction upon the authorities to pay the refund amount claimed by the writ petitioners with interest thereon within two

months from that date. The said prayer was resisted by the Union of India contending that the writ petitioners had already recovered the duty in question from others and therefore, they were not entitled to any refund in view of Section 11B of the Salt Act. In spite of such resistance on behalf of the Union of India, High Court passed an order directing the Union of India to refund the amount deposited with interest within two months by an order dated 19th of September, 1991. In the facts and circumstances of that case before the Supreme Court as stated hereinabove, it was held by the Supreme Court that in view of Section 27, Sub-section (3) of the Act, as amended, the order of refund which was passed by the High Court, to give effect to its earlier order was invalid as the Supreme Court was of the view that the order for refund of excess duty paid by the writ petitioners attracted the provisions of Sub-section (3) of Section 11B of the Salt Act which came into force on 20th September, 1991. It appears also from the facts stated in the said decision of the Supreme Court that an application for refund was filed by the writ petitioners in that case before the Assistant Collector of Customs and before such application was considered, the writ petitioner approached the High Court for a direction on the Union of India to refund the excess duty paid by them. From the facts of the Supreme Court decision it also appears that the application for refund was rejected on merits by the Assistant Collector of Customs on the ground that the assessee had failed to prove that they had not passed on the duty in question to others. In the present case, the facts are otherwise. There is no dispute that before the amendment of Section 27 of the Act, an application for refund was made by the writ petitioners before the Assistant Collector of Customs. At this stage, it is necessary to refer to proviso to amended Section 27 of the Act. Proviso to amended Section 27 of the Act clearly says where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991 such an application shall be deemed to have been made under this subsection and the same shall be dealt with in accordance with the provisions of Sub-section (2). Therefore, in view of the aforesaid proviso to Section 27 of the Act, the application for refund which was admittedly filed before the Assistant Collector of Customs before the amendment was brought into force, must be dealt with in accordance with the amended provision of Sub-section (2) of Section 27 of the Act. As noted earlier in the aforesaid decision of the Supreme Court, referred to hereinabove, it was only held that for getting an order of refund even if such an order of refund was passed by the High Court in its writ jurisdiction, the assessee has to apply before the Assistant Collector of Customs under the amended provisions of Section 27 of the Act. In this case, admittedly before the amendment of the Act, the writ petitioners applied for refund before the Assistant Collector of Customs. Finally, the Customs, Excise and Gold (Control) Appellate Tribunal allowed the application for refund of the writ petitioners and directed refund of the duty paid in excess by the writ petitioners. This order was passed on 26th of July, 1992 when the amended provision of Section 27 of the Act had already come into force. No argument was made before the Appellate Tribunal on behalf of the Customs Authorities as to whether

the writ petitioners were not entitled to refund on the ground of doctrine of unjust enrichment. At the time of hearing of this writ application, it was submitted by Mr. Roy Chowdhury on behalf of the Customs Authorities, that although the writ petitioners may be entitled to refund on the basis of the order passed by the Appellate Tribunal, their claim must be considered in the light of the amended provisions of Section 27 of the Act by the Assistant Collector of Customs. As noted earlier, under the new Section 27 of the Act, it has been provided, inter alia, that an application for refund of customs duty shall be accompanied by such documentary or other evidence [including the documents referred to in Section 28(c)] as the applicant may furnish to establish that the amount of duty in relation to which such refund is claimed was collected from or paid by him and the incidence of such had not been passed on by him to any other person. It is, therefore, reiterated that if an application for refund was already made before the commencement of the amended provision of Section 27 of the Act, such application shall be deemed to have been made in view of amended Section 27(1) of the Act and the same shall be dealt with in accordance with the provisions of Sub-section (2) of Section 27.

7. In this case an application for refund was made by the writ petitioner which ultimately was in appeal before the Appellate Tribunal. On the basis of the order of the Appellate Tribunal, passed on the application for refund, the writ petitioners are seeking directions on the Customs Authorities to refund the amount in question. That being the position and in view of my discussions already made, I cannot agree with Mr. Roy Chowdhury that the writ petitioner must approach the Assistant Collector of Customs u/s 27 of the Act before moving the Writ Court nor I can be in agreement with Mr. Roy Chowdhury that in view of the aforesaid decision of the Supreme Court, approach to Assistant Collector of Customs must be made by the writ petitioner and this Court has no jurisdiction to pass an order of refund on the basis of the order passed by the Appellate Tribunal.

8. A Division Bench of the Bombay High Court in a decision reported in *Solar Pesticides Pvt. Ltd. Vs. Union of India (UOI)*, after considering the Scheme and the amended Sections 27 & 28 of the Act, observed at paragraphs 18 and 19 on page 205 as follows :-

"18. Hence the entire scheme is designed for a situation where (1) the importer of goods after clearing the goods on payment of duty sells those goods to others. In the process either he directly passed on the incidence of duty to his buyer or does not. Only in the latter case will the importer get the refund. Otherwise, the refund will go to the buyer or to the Consumer Welfare Fund as per the Sections 27(2) If the duty is passed on to the buyer, the right to recover the duty is also passed on to the buyer of the imported goods provided that the buyer has not in turn sold those goods and passed on the duty to the next buyer. (3) The converse situation contemplated is where the importer uses the goods himself. Here there is no question of passing on the incidence of duty to anyone else

since the goods imported are not sold to anyone else. Hence he can get the refund.

"19. Therefore, the question of unjust enrichment arises under the amended scheme when refund is asked for by a person who .has sold the imported goods and in the process directly passed on the burden of duty to the buyer. Clauses (a), (b) and (c) to the proviso to Section 27(2) and the presumption laid down u/s 28D made this very clear."

9. The Division Bench of the Bombay High Court in the aforesaid decision has observed that the question of unjust enrichment arises under the amended scheme when a refund is asked by a person who has sold the imported goods and in the process directly passed on the duty to the buyer. In the present case, it has not been disputed before me that the goods were imported under Open General Licence for own use and the same would also be evident from the Bill of Entry, copy of which has been annexed with the writ application as Annexure "X". It has also not been disputed before me by Mr. Roy Chowdhury that the writ petitioners imported the consigned goods for own use and the excess duty was paid by him. But Mr. Roy Chowdhury only submitted that as the writ petitioners imported the goods for use of the same in the manufacture of plywood block board and flush doors which are sold to others, doctrine of unjust enrichment would be very much applicable in the case of the writ petitioners and as such, question of refund of duty could not arise at all. In my view, this submission of Mr. Roy Chowdhury has no substance for the two fold reasons; Firstly, in the present case it has not been disputed by the Customs Authorities that the imported goods have been sold by the writ petitioners to anybody but the goods were used for the manufacture of plywood block boards and flush doors. Therefore, the writ petitioners have not passed on the duty paid by them on the imported goods to any buyer of such goods. If that was the case, the buyer of the imported goods could have claimed a refund also. As there is no dispute that the writ petitioners have admittedly consumed the imported goods in the process of manufacturing plywood block boards and flush doors, it can not be said that they have passed on the burden of duty to anybody else in the manner envisaged in the scheme as the scheme envisages a direct transfer of the burden of duty, along with the sale of the imported goods, to the buyer. When there is no sale of the goods which were imported and no direct transfer of the burden of duty to the buyer of the imported goods, then this case certainly falls under Clause (b) of the proviso to Section 27(2) of the Act. Section 27(2)(a)(b) cover all cases where the importer has not sold the imported goods in the same form in which they were imported but used or consumed the goods by themselves. This would include his using up or consuming the imported goods in the manufacture of commercial commodity. In the present case admittedly additional duty of customs was levied on the raw material which was imported. It is not an additional duty on any finished product which is going to be sold to the consumer and to whom the incidence of the additional duty of customs can be passed on directly. Since the additional duty of customs admittedly has not been directly

passed on by the writ petitioners to any third party, by selling the imported goods, in my view they are entitled to claim refund of this amount under proviso (b) to amended Section 27(2) of the Act. Secondly, the customs authorities cannot now raise the question of doctrine of unjust enrichment for the first time in this Court because when the appeal was heard by the Appellate Tribunal, this question of doctrine of unjust enrichment was never raised, i.e. it was never contended that the imported goods were sold to others, or duty has been passed on to others by the writ petitioners. Before me also Mr. Roy Chowdhury, appearing on behalf of the Customs Authorities did not raise any such contention that the writ petitioners sold the imported goods as it is to third parties.

10. In view of my discussions made hereinabove, and in view of the finding made that the additional duty of customs has not been directly passed on by the writ petitioners to any third party by selling the imported goods, they are entitled to the refund.

11. The Customs Authorities are directed to allow the application for refund of the additional duty of customs paid by the writ petitioners as per their refund application filed before the Assistant Collector of Customs and to pay the same to the writ petitioners in terms of the Order of the Customs, Excise and Gold (Control) Appellate Tribunal in Appeal No. C/118/89-D disposed of on 28th July, 1992 after giving them the benefit of proviso (b) of Section 27(2) of the amended Customs Act, within a period of three months from this date positively.

12. Although the claim for interest was made by the writ petitioners in the application for refund but it appears that such claim was not made by the writ petitioners at the time of passing the direction by the Appellate Tribunal on the Customs Authorities to pay the amount claimed by the writ petitioners in the application for refund. Before me also, the learned counsel for the writ petitioners did not press for payment of interest. Accordingly, the question of directing payment of interest in this matter shall not arise.

13. No other point was raised on behalf of the parties.

14. The writ petition is thus allowed in the manner indicated above.

15. There will be no order as to costs.

16. Let xerox copies of this order be made available to the learned Counsel, appearing for the respective parties on their usual undertaking.