
(1991) 11 KL CK 0001
In the High Court Of Kerala
Case No : O.P.No. 4435 of 1988

Hindustan Insecticides Ltd.

APPELLANT

Vs

Assistant Collector of Customs

RESPONDENT

Date of Decision : 13-11-1991

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 18, 27, 27(1)

Citation : (1993) 44 ECC 255 : (1992) 58 ELT 458 : (1992) 2 ILR (Ker) 91

Hon'ble Judges : Sreedharan, J

Bench : Single Bench

Advocate : S.S. Krishnan, for the Appellant; K.A. Cherian, for the Respondent

Judgement

Sreedharan, J.—The short question that arises for consideration in this original petition is whether the petitioner is entitled to refund of a sum of Rs. 44,766.07 wrongly paid as customs duty, on an application filed after expiry of a period of six months from the date of its payment.

2. Petitioner imported HEXACHLOROCYCLOPENTADIENE for the manufacture of their produce ENDOSULPHAN. The raw material imported is an organic substance. But the customs authorities assessed the goods for the purpose of customs duty under Tariff Item No. 28.01/58(1) as an inorganic chemical compound not elsewhere specified as per the provision contained in the Customs Act, 1962 read with Customs Tariff Act, 1975, petitioner paid the duty as assessed. When a second consignment of the same substance was received by the petitioner, the customs authorities assessed duty under Tariff Item 29.01/45(1) and collected the dues correctly. On such assessment, the petitioner realised the mistake in paying the excess duty in relation to the earlier consignment. Immediately thereafter i.e. within two weeks from Ext. P2 the second of assessment Ext. P3 application was filed claiming refund of Rs. 44,766.07. That application has been rejected on the sole ground that it was filed after the expiry of the statutory period of limitation of six months u/s 27(1)

(b) of the Customs Act, 1962 (hereinafter referred to as the Act). Hence the Original Petition.

3. A detailed counter-affidavit has been filed by the Assistant Collector of Customs, Cochin. It is admitted therein that the first consignment was classified as an inorganic chemical under Tariff Item 28.01/58(1) and assessed to customs duty at the rate of 70% plus 40% and 10% towards C.V. duty and that the subsequent consignment was classified under Tariff Head 29.01/45(1) and was assessed to duty at the rate of 60% plus 40% and 12% towards C.V. duty. In paragraph 7 of the counter-affidavit, it is specifically averred.

"It is not contested that the duty leviable under Customs Tariff Head 29.01/45(1) on HEXACHLOROCYCLOPENTADIENE is 60% plus 40% and 12% towards C.V. duty. The basic question is not the rate of duty chargeable under Heading 29.01/45(1) but the question whether the rejection of refund application is time barred in accordance with law or not".

Accordingly it is contended that since the application for refund was filed beyond six months from the date of payment, the petitioner is not entitled to get the amount claimed in Ext. P3 application.

4. From the pleadings it is crystal clear that respondents collected excess customs duty on first consignment of HEXACHLOROCYCLOPENTADIENE under Tariff Item No. 28.01/58(1). As a consequence of this wrong assessment, it is conceded that particular had to pay an additional sum of Rs. 44,766.07. According to the respondents the amount thus paid should have been claimed within six months from the date of payment of duty as provided by Section 27(1) of the Act. For a proper understanding of that provision, I read the same.

"Any person claiming refund of any duty paid by him in pursuance of an order of assessment made by an officer of customs lower in rank than an Assistant Collector of Customs may make an application for refund of such duty to the Assistant Collector of Customs -

(a) in the case of any import made by any individual for his personal use or by Government or by any educational research or charitable institution or hospital before the expiry of one year;

(b) in any other case before the expiry of six months from the date of payment of duty.

Provided that the limitation of one year or six months as the case may be shall not apply where any duty has been paid under protest.

Explanation. - Where any duty is paid provisionally under S, 18 the period of one year or six months as the case may be shall be computed from the date of adjustment of duty after the final assessment thereof.

As per the Section, a claim of refund of duty should be made within six months from the date of its payment. If the duty was paid without the sanction of law,

can this period of limitation be put forward for denying the claim? In Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others, Their Lordships observed.

"Where public bodies, under colour of public laws, recover people's money, later discovered to be erroneous levies, the dharma of the situation admits of no equivocation. There is no law of limitation especially for public bodies on the virtue of returning what was wrongly recovered to whom it belongs".

In view of the statement, it is not open to the respondents to contend that the petitioner is not entitled to have the money refunded on account of the expiry of the period of limitation fixed by Section 27(1) of the Act.

5. In the counter-affidavit, it is admitted by the respondents that duty was levied wrongly in respect of the consignment evidenced by Ext. P1 under Customs Tariff Head 29.01/45(1). In such a situation it has to be held that duty paid under mistake of law was duty recovered without authority of law and jurisdiction. The claim for refund in such cases cannot be governed by the law of Limitation Act out in the Customs Act. The refund application in the instant case was rejected on the sole ground that it was filed beyond six months from the date of payment of the duty and therefore could not be entertained u/s 27(1) of the Act. In the case of duty paid by the petitioner under mistake of law, the period of limitation set out in Section 27(1) cannot be attached. The refund of the money under mistake of law is not regulated by the provisions of the Customs Act.

6. In so far as the question whether refund can be granted in a proceeding under Article 226 of the Constitution, reference may be made to The Newabganj Sugar Mills Co. Ltd. and Others Vs. The Union of India (UOI) and Others,]; Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others,] and Shri Vallabh Glass Works Ltd. and Another Vs. Union of India (UOI) and Others, . In the light of these decisions, I have no hesitation in holding that this court has power to direct refund of the amount paid by the petitioner under mistake of law. No avoidable laches on the part of the petitioner has been put forth as a ground for declining the prayer for refund. In Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others, referred to earlier, dealing with the claim for refund Their Lordships stated:-

"Nor is it palatable to our jurisprudence to turn down the prayer for high prerogative writs, on the negative plea of alternative remedy since the root principle of law married So justice, is ubi jus ibi, remedium".

7. Learned counsel representing the respondents raised a contention that this court in an identical situation in Bakul Cashew Company v. Officer of Customs, Quilon [1977 KLT 562] held that an assessee cannot claim refund of the customs duty paid after the expiry of six months fixed in Section 27(1) of the Act. The facts in that case are as follows:- Petitioner an importer of cashewnuts paid regulatory duty of customs without knowing the exemption granted to raw cashewnuts from the regulatory duty of customs under the notification of the

Government of India in the Ministry of Finance (Department of Revenue and Insurance) No. 38-Customs, dated 17-3-1972. He made the application for refund beyond the period of six months fixed u/s 27. That application was rejected as belated. When that order was challenged before this Court, a learned Single Judge dismissed the petition observing :-

"The notification granting the exemption shows that in the event of the conditions not being satisfied, regulatory duty is payable for cashewnuts. The question whether these conditions are satisfied or not is therefore a question for determination by the fact finding authority. Until such questions are answered in favour of the importer, he remains liable for payment of duty. In the present case there was no occasion for consideration of any such question as no claim for exemption was made by the petitioner and as the amount otherwise due had been paid in full".

That decision, according to me, cannot be of any help to the respondents herein because respondents admit that they wrongly levied the duty and that it was not having any legal sanction. So as in the Bakul Cashew Company case the claim for refund in the instant case is not depending on the finding of any disputed question of fact. From the pleadings it is evident that petitioner made the payment on a mistake be refunded and the Department cannot deny the refund on the ground that the importer did not file the application within six months from the date of its payment. Further this decision cannot be taken to have stated the correct law that duty paid cannot be claimed after the expiry of six months from the date of payment. If the payment was on a mistake of law the claim for refund cannot be turned down relying on Section 27 of the Customs Act in the light of the subsequent pronouncement of the Supreme Court.

8. Lastly it contended on behalf of the respondents that the petitioner is not entitled to any relief in this matter on account of his having not availed of alternate remedies by way of appeal to the authorities under the Act. I do not find any force in this contention. The appellate authority under the Act cannot take a decision ignoring the provision contained in Section 27(1) of the Act. The approach to those authorities, if made by the petitioner would have been futile. So I do not think it proper to non-suit the petitioner on the ground that alternate remedies have not been exhausted. In exercising the powers under Article 226 of the Constitution it is open to this court to pass such orders as public interest dictates and equity projects. On the facts and circumstances of the case, I hold that petitioner is entitled to get refund of Rs. 44,766.07 claimed in Ext. P3 application. Respondents are directed to issue orders refunding this amount to the petitioner within one month from the date of receipt of a copy of the judgment. In case the amount is not refunded within that period it will carry interest at the rate of 12% per annum from the expiry of that period of one month till the date of payment.

Original Petition is disposed of in the above terms.

Issue carbon copy of the judgment to the parties on usual terms.