

(1986) 01 CAL CK 0042

In the Calcutta High Court

Case No : Letters Patent Appeal against S.B. Order No. 1267 of 1978

Incheck Tyres Ltd.

APPELLANT

Vs

Assistant Collector of Customs for Refund Section and Others

RESPONDENT

Date of Decision : 09-01-1986

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 18, 26, 27, 27(1), 27(4)
Sea Customs Act, 1878 — Section 40

Citation : 90 CWN 648 : (1986) 9 ECC 381 : (1986) 9 ECR 141 : (1987) 27 ELT 614

Hon'ble Judges : N.K. Mitra, J;C. Mukherjee, J

Bench : Division Bench

Advocate : S.S. Ray, for the Appellant;S.N. Banerjee, for the Respondent

Final Decision : Dismissed

Judgement

C. Mukherjee, J.—Being aggrieved by the judgment of G.N. Roy, J., discharging the rule obtained by them, the appellant-company has preferred the instant appeal under Clause 5 of the Letters Patent. The appellant-company between November, 1969 and April, 1971 had imported about seven consignments of "Crys-tex Insoluble Sulphur". The customs authorities had purported to impose duty upon the said consignments under Item 28 under the Indian Customs Tariff and after paying assessed duties the said consignments had been cleared by the appellant-company.

2. The appellant-company had filed appeals in respect of the duties assessed upon two consignments dated November 20 and 21, 1969 inter alia contending the goods in question came under Item No. 28(3) and not Item 28 of Indian Customs Tariff. The Assistant Collector of Customs for refund had rejected the said contention of the appellant. On appeal the Appellate Collector of Customs by his order allowed the said appeal, upheld the contention of the appellant-company that the said goods were classifiable under Item 28(3) and, therefore,

had ordered consequential refund of duty be granted to the appellant-company. Although the Government of India had issued a show cause why the said order of the Appellate Collector shall not be annulled, by a letter dated July 27, 1972, the said notice was withdrawn.

3. Thereupon the appellant-Company had applied for refund of duty paid in respect of the remaining consignments mentioned in paragraph 5 of their writ application filed in this court. The Assistant Collector had refused to pass order for refund in 5 (five) of the cases on the ground that the claims for refund having been made after expiry of six months from the date of payment of duty the appellant was not entitled to obtain refund. Thereupon the appellant-company unsuccessfully filed appeals and thereafter revisional applications. Ultimately, it moved this court under Article 226 of the Constitution challenging the orders passed by the said authorities in the proceedings u/s 27 of the Customs Act, 1962. As already stated the learned trial Judge has been pleased to discharge the rule.

4. Before us the respondents have not disputed that duty was wrongly assessed under Item 28 in respect of the consignments in question. But the respondents have submitted that the claim for refund having been made after expiry of six months the appellant was not entitled to any order in that behalf. The learned trial Judge in our view, rightly declined to apply the proviso to Sub-section (1) of Section 27 of the Customs Act on the ground that in the instant case the appellant-company did not pay duty under protest. In case duty had been paid under protest, the limitation prescribed by Section 27 of the Act would have been inapplicable. The learned trial Judge correctly made a distinction between involuntary payment and payment under protest and only in the latter case proviso to Sub-section (1) of Section 27 of the Act would be attracted. No doubt, when duty upon the five consignments in question were paid by the appellant-company, proceeding initiated by it for refund of the duty in respect of the two earlier consignments dated 20 and 21st November, 1969 had been pending. But the appellant did not take the precaution of recording its protest at the time of payment of duty for clearing the consignments which are now subject matter of the writ application. In the above view, the proviso to Section 27 of the Customs Act was clearly inapplicable.

5. Mr. Roy has alternatively suggested that in view of the adjudication of the Appellate Collector of Customs in respect of two earlier consignments, recovery of duty under Item 28 of Indian Customs Tariff was illegal and without authority. Therefore, even if the claims for refund by way of making an application u/s 27 of the Customs Act might have become barred by limitation this court in exercise of its powers under Article 226 of the Constitution ought to issue a mandate upon the respondents to refund the sum illegally recovered from the appellant-company. In support of his submission Mr. Roy relied upon the decision of the Supreme Court in the case of *Patel India Private Limited Vs. Union of India and Others*, .

6. Having given our anxious consideration we find that the ratio of the decision in Patel India (Private) Limited's case (supra) is inapplicable in the facts of the present case. First, the said proceeding before the Supreme Court arose out of an application made u/s 40 of the Sea Customs Act, 1878 provisions of which were not identical with those of Section 27 of the Customs Act, 1962. While Section 40 of the earlier Act applied to cases where duties had been paid through inadvertence, error or misconstruction, applicability of Section 27 of the Customs Act, 1962 has not been limited only to cases of payment of duties through inadvertence, error or misconstruction. Further Sub-section (4) of Section 27 of the Customs Act, 1962 has provided that save as provided in Section 26, on claim for refund of any duty shall be entertained except in accordance with the provisions of the Section 27 of the Act. Secondly, in Patel India (Private) Limited's case (supra) payment had been made under protest notwithstanding that there was no provision in Section 40 of the Sea Customs Act comparable to the proviso to Section 27(1) of the Customs Act, 1962.

7. Mr. Banerjee appearing on behalf of the respondents has on the other hand placed reliance upon the decision of the Supreme Court in the case of Madras Rubber Factory Ltd. Vs. The Union of India (UOI) and Others, . In the said case the Supreme Court had refused to interfere with the orders of the Customs Authorities made u/s 27 of the Customs Act, 1962 rejecting applications for refund which were filed out of time. In the said case the alleged protest in paying duties was not proved. Payment was also not made provisionally u/s 18 of the Act. There is considerable force in the submission of Mr. Roy, the learned Advocate for the appellant, that in the case of Madras Rubber Factory Limited's (supra), the Supreme Court had no occasion to consider the wider question as to the power of the court under Article 226 of the Constitution to order refund of tax or duty illegally or without lawful authority recovered by the State. A Division Bench of the Madras High Court in the case of the Assistant Collector of Customs, Madras and Ors. v. Premraj and Ganpatraj & Company (Pvt.) Ltd., reported in Census 1978-77D - 1978 ELT 6330 had rightly pointed out that the case of Madras Rubber Factory Ltd. (supra) before the Supreme Court arose out of a proceeding, u/s 27 of the Customs Act and the only question before the Supreme Court was whether the authorities functioning under the Act had acted in accordance with law by rejecting the prayer for refund on the ground of limitation. Undoubtedly, the bar of limitation of six months laid down by Section 27 of the Customs Act would not apply in case the High Court in its discretion makes an order for refund under Article 226 of the Constitution. But in exercising its power under Article 226 of the Constitution the court is always guided by well settled principles of law. When a party has chosen to avail of the ordinary remedy provided in the Customs Act for obtaining refund of duty paid by him but the said claim is rejected on the ground of limitation, the court by invoking its power under Article 226 of the Constitution may choose not to lift the said bar of limitation and order refund of the duty. The obligation to pay duty and obligation on the part of the revenue to refund duty wrongly recovered both arise under the

statute. When by his own conduct a party has already lost its right to obtain refund under a particular law, the court may not relieve the party of the said statutory bar and grant refund. In other words, by lapse of time a party's right to refund might have been extinguished and it may no longer have any subsisting right to maintain a writ application for enforcement of the same. Similarly, the bar of limitation has taken place and the respondents have no enforceable duty to refund of tax or duty illegally recovered. In ordering or refusing the prayer for refund in exercise of its writ jurisdiction, the court may decline to make an order for payment of money for which there may be other appropriate and adequate remedies and by the party's own laches the remedy had become time barred.

8. For the foregoing reasons, we hold that in the instant case when the appellant company's right to obtain refund had been already extinguished it would be sound exercise of discretion to refuse its prayer for issue of mandate upon the respondents to refund duty in question.

9. We accordingly dismiss this appeal. There will be no order as to costs.