
(1989) 05 CAL CK 0014
In the Calcutta High Court
Case No : Matter No. 1554 of 1985

Indian Cable Co. Ltd. and Another

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 31-05-1989

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 27
Evidence Act, 1872 — Section 115

Citation : (1990) 1 CALLT 72 : (1990) 26 ECC 261 : (1990) 29 ECR 84

Hon'ble Judges : Monoranjan Mallick, J

Bench : Single Bench

Advocate : Jatin Ghosh, for the Appellant; Amalesh Mitra, for the Respondent

Final Decision : Dismissed

Judgement

Monoranjan Mallick, J.—The petitioners have filed this writ petition praying for a writ of Mandamus directing the Respondents to act in accordance with law and to refund the sum of Rs. 4,65,596.37 which has been collected as Customs Duty without the authority of law.

2. The. facts are briefly as follows :

The petitioner No. 1 carries on a business of manufacture of sales of electric wires and cables and the company for its said business owns and operates a factory at Jamshedpur in the State of Bihar and another factory at Pune, in the State of Maharastra. For manufacturing the aforesaid wires and cables the petitioner company requires PTFE tape as one of the raw materials (hereinafter referred to as tape for the sake of brevity). The petitioner procured the said supply either from the internal market or by importing from abroad. The petitioners state that prior to 1975 customs duty was levied at the rate prescribed under the Indian Tariff Act, 1954 under the Tariff Item No. 82(3)(b). Thereafter the Parliament passed the Indian Customs Tariff Act 1975 prescribing the rate at which the Customs duty was liable to be levied on any article

imported in India. The said Act came into force on and from 7th August 1976. The Central Government in exercise the powers conferred by Section 25 of the Customs Act 1962 issued exemption notification being. No. 228-Cus, dated August 2, 1976 as amended by Notification No. 443-Cus, dated November 29, 1976 exempting articles made of plastic excepting the articles mentioned in the table to the said notification. The said amended notification is marked with the letter "A".

3. During the years 1975, 1976 and 1977 the petitioner company imported diverse tapes from abroad through Port of Calcutta by seven consignments. The said PTFE tape imported prior to 2nd August 1976 was wrongfully and illegally levied to Customs duty under item No. 82(3) (b) and after August 2, 1976 was levied to customs duty under item No. 39.07 of the Customs Tariff Act 1975 but in fact no duty was liable to be levied on the said PTFE Tape either in the Indian Tariff Act 1954 or under the Customs Tariff Act 1975.

4. It would appear from Tariff item No. 82(3) (b) of the Indian Tariff Act 1954 that the said item is applicable to few plastic goods specifically mentioned thereto. The said item No. 82(3) (b) reads as follows :

82(3)

(a)

(b) Articles made of plastic the following namely:

Tubes, rods, sheets, foils, sticks, other rectangular or profile shapes, whether laminated or not, and whether rigid or flexible including lay flat tubings, and polyvinyl chloride sheets.

5. PTFE tape being a tape does not come under any of the items enumerated in the said item. Similarly, by virtue of the said exemption notification, the said PTFE tape is also not liable to be assessed to duty under item No. 39.07 of the Customs Tariff Act.

6. It would appear from the said Customs Tariff Act that the Custom duty was to be levied in respect of the articles specified in the said Indian Customs Tariff Act which does not include the PTFE tape. In the premises, the purported levy of duty and collection of money as duty is altogether without authority of law. The petitioners paid diverse amount as Customs duty on the mistaken brief that such money was payable in law as Customs duty. The petitioners immediately after discovery of the said mistake upon receiving legal advice made seven several applications for refund of the money so collected by the respondents as Customs duty, claiming in the said applications that the PTFE tape was exempted from payment of the duty and no customs as leviable u/s 3 of the Customs Tariff Act.

7. However, the Respondent No. 4 without affording a reasonable opportunity of showing cause and/or hearing by purported orders, dated 16.11.79 and 21.11.79 rejected the said claim for refund on the alleged" ground that the claim was

allegedly barred by limitation u/s 27 of the Customs Act. The petitioners preferred seven appeals against the said order of Assistant Collector of Customs which was also rejected by the Appellate Collector by separate composite orders, dated 19.3.1980 and 5.4.1980 without affording any opportunity of hearing which was specifically prayed for in, the said Memorandum of Appeal.

8. Against the aforesaid two composite orders, the petitioners filed two revisional applications before the Central Government and ultimately the said revisional applications were transferred to the Appellate Tribunal under the provisions of Section 131(b) of the Customs Act.

9. In the said revision applications, the Customs, Excise, Gold (Control), Appellate Tribunal gave two personal hearings on 29th August 1985 and before the Tribunal the petitioners' learned Advocate, inter alia contended that the duty collected by the Customs Authority was without the authority of law and hence the limitation in Section 27 of the Customs Act would not apply to this claim. However, the Tribunal by a purported order dated 29th August 1985 held that the quasi-judicial authorities functioning under the Customs Act as well as the Tribunal were bound to apply the time limit prescribed under the Customs Act and could not ignore it and resort to the general law of limitation and rejected the revision applications.

10. The said purported order is ex facie bad in law being ultra vires under Articles 265 and 300A of the Constitution and as such the impugned order is liable to be set aside and the respondents be directed by a writ of Mandamus to refund the sum of Rs. 4,65,596.37 p. collected as Customs duty without authority of law.

11. The writ petition has been opposed by the respondents by filing an affidavit-in-opposition. In the affidavit-in-opposition it is disputed that no duty is liable to be levied on the said PTFE under the Indian Customs Tariff Act 1934 or under the Customs Tariff Act 1975. It is contended that as the PTFE tape is in essence and in fact plastic sheets the same is covered by heading 82(3) (b) of the Indian Tariff Act 1934 and under item No. 39.07 of the Customs Tariff Act 1975 and that the said exemption notification, dated 2.8.1976 as amended on 29.11.1976 did not apply to plastic sheets which was chargeable to the customs duty and countervailing duty as alleged.

12. The Respondents have also taken the plea that the Customs authorities as well as the Tribunal were justified in rejecting the claim as it was barred by limitation u/s 27 of the Customs Act.

13. The writ petitioners have filed an affidavit-in-reply to the said affidavit-in-opposition and have challenged the contentions of the respondents that the PTFE tape is in essence and in fact plastic sheets and is covered by the heading No. 82(3) (b) of the Indian Tariff Act 1934 or under item No. 39.07 of the Customs Tariff Act, 1975.

14. Mr. Jatin Ghosh, appearing on behalf of the petitioners has urged that the PTFE tape being not a specified item under the Indian Tariff Act which was in force prior to 2.8.1976 and being a fully exempted article under the Exemption Notification as amended by the Amendment Notification annexed with the writ petition as annexure "A", the Customs authority had no jurisdiction to levy duty on the said item and the money was collected illegally and without authority and that the petitioners discovered the mistake after receiving legal advice and submitted refund claims and the State not having power to collect the duty on the tapes under Article 265 of the Constitution the money collected by the Customs is not the duty under the Act and as such the provision in regard to limitation would not arise.

15. Several decisions of the Supreme Court have been cited and it has been observed that if collection is without authority of law, it is the duty of the Government to make speedy refund as good government involves not only proper collection of taxes but also readiness to refund the levy if illegally collected, one such decision cited is reported in Aluminium Corporation of India Ltd. Vs. Union of India (UOI) and Others, . The decision reported in AIR 1984 SC 975 has also been referred to me which holds that if the collection is without authority of law special law of limitation provided in the Customs Act is not applicable and the petitioner is entitled to refund the amount paid by filing a writ petition or by filing a civil suit and there is no hard and first rule in regard to limitation which depends upon the facts and circumstances of each case. There can be no dispute to the above proposition of law as laid down by the Supreme Court. But on behalf of the Respondents, it is submitted by Mr. Amalesh Mitra the learned Advocate for the Union of India that in this particular case, the Customs does not admit that the petitioner is entitled to exemption of duty under the Exemption Notification being annexure "A" to the writ petition or that duty was not leviable under the item No. 82(3) (b) of the Indian Tariff Act 1974 and the Customs very much disputes the contention of the petitioner as regards the exemption of duty claimed. He also refers me to the decision of Collector of Central Excise, Chandigarh Vs. Doaba Co-operative Sugar Mills Ltd., Jalandhar, where the Supreme Court has held that even where the departmental authority claimed refund from the assessee it is bound by the special law of limitation provided in the Statute but this would not debar the authority to file a civil suit for recovery of the exemption amount paid to the assessee if the claim is not otherwise barred. Mr. Mitra submits that in this particular case when the claim of the petitioners that duty is not leviable is very much disputed by the department, the writ court cannot decide that disputed question of fact and the only remedy of the petitioner is to file a civil suit for recovery of the alleged payment of duty on the allegation that the same is without the authority of law and in such a case the Customs can get the proper opportunity to establish its defence by leading proper evidence that the contention of the writ petitioner is not correct or that the duty was not illegally assessed and charged.

16. He has also referred to me the decision of Salonah Tea Co. Ltd. and Others

Vs. Superintendent of Taxes, Nowgong and Others, and has urged that Sabyasachi Mukharji, J. presiding over the Division Bench of the Supreme Court has observed that a writ petition solely praying for a writ of Mandamus directing the State to refund the money alleged to have been illegally collected as tax is not, maintainable for the simple reason that a claim for such refund can always be made in a suit against the authority which had illegally collected the money as tax and in such a suit it is open to the State to take all possible defence to the claim which cannot in most cases be properly raised and considered in the exercise of the writ jurisdiction.

17. On perusing the relief sought for in this writ petition I find that in this writ petition the writ petitioners only pray for a writ of Mandamus for refund of the duty allegedly illegally collected by the Customs. It is also found that the respondents have in the affidavit-in-opposition contested the claim of the writ petitioner that the duty has been illegally collected. Therefore, that becomes a very disputed question which cannot be decided properly by the writ court. Sabyasachi Mukharji, J., in *Salonah Tea Co. Ltd. case* has observed in paragraph 14 at pages 410 and 411 reported in *Salonah Tea Co. Ltd. and Others Vs. Superintendent of Taxes, Nowgong and Others*, that the High Court under Article 226 of the Constitution can exercise to direct refund unless there has been avoidable laches on the part of the petitioner which indicate either the abandonment of his claims or which is of such nature for which there is no probable explanation or which will cause any injury either to the respondent to any third party.

18. In this particular case, when the respondents very much dispute the contention of the writ petitioners that no duty was leviable or that the entire collection is without the authority of law and has disputed the claim of the petitioner, then it would definitely cause injury to the respondent if the jurisdiction under Article 226 of the Constitution is invoked to order refund. It is necessary for the petitioner to establish in an appropriate court by filing a suit that the duty has been illegally assessed and in such suit the respondent customs shall have all the defence to make which can-not be effectively made and decided by this writ court under Article 226 of the Constitution of India.

19. Mr. Jatin Ghosh, learned Counsel appearing for the petitioner submits that when the Customs authorities as well as the Tribunal did not reject the claim of the petitioner on the ground that the duty was properly levied and rejected the claim on the ground that the same was barred by limitation then the Respondent cannot take the plea in this writ petition that the duty was properly assessed and that there was no illegal collection of duty.

20. In my view when the claim on the face of the application was barred u/s 27 of the Customs Act, the Customs Authority as well as the Tribunal rejected the claim and did not enter into the merits of the claim. Therefore, only because the Customs authority did not enter into the merits of the claim I am not of the view that the Customs authority is estopped from raising the plea in this writ petition

that the duty has been properly collected.

21. In view of the above, regard being had to the principles laid down by the Supreme Court in *Salonah Tea Co.*'s case it will not be fit and proper for this court under Article 226 of the Constitution to issue a writ of Mandamus upon the respondents to refund the amount of duty paid by the petitioner for the import of PTFE tape in the three years in question namely 1975, 1976 and 1977. The writ petitioners will be at liberty to file a proper civil suit in a competent court of law for recovery of the said amount. The writ petition is, therefore, dismissed. No order for costs is passed. All interim orders are vacated. Parties shall act upon the signed copy of the operative portion of the judgment.