

(1981) 09 BOM CK 0018

In the Bombay High Court

Case No : Miscellaneous Petition No. 431 of 1978

Indian Dairy Corporation

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 15-09-1981

Acts Referred:

Central Excise Rules, 1944 — Rule 11
Customs Act, 1962 — Section 18, 27, 27(1)

Citation : (1989) 24 ECR 476 : (1981) 8 ELT 926

Hon'ble Judges : M.L. Pendse, J

Bench : Single Bench

Judgement

1. The petitioners are a Company incorporated under the Companies Act for the purpose of development of Dairy Industry.

2. In the year 1975, the United Nations World Food Programme Action offered to the petitioners as gift 40,000 cartons of butter oil .On March 31, 1975, the goods arrived at the Port of Bombay from Belgium by Ship s.s. "Amsterdam". The petitioners" Clearing Agents lodged the Bill of Entry on March 25, 1975. The goods were assessed to Customs Duty under Item No. 21(2) of the Indian Customs Tariff. The Customs authorities assessed duty amounting to Rs. 44,79,374.40 on the goods, and the petitioners paid the duty on April 2, 1975.

3. While clearing the goods, the petitioners noticed that 161 cartons were missing. The petitioners enquired with the Bombay Port Trust and the Bombay Port Trust issued a short-landing certificate on September 6, 1975. The petitioners thereafter filed a refund application for refund of Rs. 18,030/- being the Customs duty paid on the missing 161 cartons which were short-landed.

4. On October 20, 1976, the Assistant Collector of Customs, Manifest Clearance Department, rejected the refund application as time-barred on the ground that the claim was not received within six months from the date of payment of duty i.e. April 2, 1975 and, therefore, it is barred under the provisions of Section 27 of the Customs Act, 1962 (hereinafter referred to as the "Act"). The appeal

preferred by the petitioners before the Appellate Collector of Customs ended in dismissal by order dated January 18, 1977 and the revision carried before the Government of India met with the same fate by an order dated June 21/77/September 1, 1977. All these three orders are under challenge in this petition filed under Article 226 of the Constitution of India.

5. Shri Hidaytullah, the learned counsel appearing in support in the petition, made two-fold submissions to challenge the legality of the orders holding that the refund application was barred by time in view of the provisions of Section 27 of the Act. The learned counsel submitted that the provisions of Section 27 of the Act are not attracted to the facts of the case because the recovery of duty was without jurisdiction and totally illegal. The submission is that limitation of six months has no application in cases where the recovery of duty is without jurisdiction. In my judgment, the submission is sound and deserves acceptance. Section 27(1) of the Act which is relevant for the purpose of present case reads as under :

"27. Claim for refund of duty. - (1) 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 before the expiry of six months from the date of payment of duty :

Provided that the limitation of six months shall not apply where any duty has been paid under protest.

Explanation. - Where any duty is paid provisionally u/s 18, the period of six months shall be computed from the date of adjustment of duty after the final assessment thereof."

It is obvious from the mere reading of the Section that the applications for refund contemplated by this Section are those where the recovery of duty is not without jurisdiction. It has been repeatedly held by this Court while considering the ambit of Rule 11 of the Central Excise Rules that the period of limitation mentioned in Rule 11 has no application where recovery of duty is illegal and without jurisdiction. The same principle must apply while considering the application of Section 27(1) of the Act to the claim for refund made where duty is recovered by the Department without jurisdiction or authority of law. It would be suffice to make a reference to the decision in the case of Wipro Product Ltd. and another v. Union of India and another reported in 1981 Excise and Customs Reporter 380 = 1981 E.L.T. 531 where the Division Bench of this Court had taken the view while considering the application of Rule 11 of the Central Excise Rules.

6. Turning to the facts of the present case, it is crystal clear that the recovery of duty by the Department in respect of 161 cartons which were found missing and in respect of which the Bombay Port Trust issued a short-landing certificate was totally without authority. No duty could have been levied in respect of goods which were not in existence and as such the recovery was without jurisdiction. As

the recovery was without jurisdiction it was not open for the Department to fall back upon the period of limitation prescribed by Section 27 of the Act and refuse to entertain the refund claim on that count. In my judgment, the orders passed by the authorities below cannot be sustained.

7. Shri Hidaytullah also urged that even assuming that Section 27 of the Act has application to the facts of the case, still this Court should issue a writ of mandamus directing the Department to grant the amount of refund claimed. The learned counsel place reliance upon the provisions of Article 256 of the Constitution of India and submitted that the recovery of taxes was without any authority and jurisdiction and in such cases, the Department cannot be take shield behind the provisions of limitation prescribed by Section 27 of the Act. The submission is that in cases where the provision is that in cases where the provision of Article 256 of the Constitution of India are violated, the High Court can issue a writ of mandamus irrespective of the provisions of the limitation prescribed u/s 27 of the Act. In support of the submission, the learned counsel placed reliance upon the two decisions of the Madras High Court in the case of Assistant Collector of Customs, Madras and others v. Premraj and Ganapatraaj and Company (P) Limited reported in 1978 ELT 630 and in the case of Durga Shankar Industries, Vijyawada v. Government of India and another reported in 1979 ELT227. In my judgment, it is not necessary to investigate the submission of the learned counsel in the present case as the provisions of Section 27 of the Act are not attracted to the facts of the present case.

8. Shri Lokur, the learned counsel appearing on behalf of the Department, very strenuously urges that the assessment of levy was according to law because such assessment was made on the strength of Bill of Entry filed by the petitioners which showed the entire consignment of 40,000 cartons. The submission has no merit, whatsoever. The petitioners were not conscious at the time of filing the Bill of Entry that 161 cartons would be short-landed. It is not open for the Department to claim that the assessment was made according to the Bill of Entry and even though the short-landing certificate was issued, the Department would close their eyes to the reality and proceed on the assumption that what was stated in the Bill of Entry was justification for the assessment of duty. The submission of Shri Lokur that assessment was in accordance with law deserves to be repelled.

9. Accordingly, the petition succeeds and the rule is made absolute and the orders passed by the Assistant Collector of Customs on October 20, 1976, by Appellate Collector of Customs on January 18, 1977 and by the Government of India on June 21, 1977/September 1, 1977 are set aside and the refund application filed by the petitioners is remitted back to the Assistant Collector of Customs, Bombay, for disposal on merits. The Assistant Collector must pass the requisite order within a period of two months from today. In the circumstances of the case, there will be no order as to costs.