

(1957) 09 BOM CK 0019

In the Bombay High Court

Case No : Misc. Application No. 97 of 1957

Kantilal Lalubhai and Co.

APPELLANT

Vs

G.S. Vaswani

RESPONDENT

Date of Decision : 04-09-1957

Acts Referred:

Sea Customs Act, 1878 — Section 191, 3, 39

Citation : (1957) 09 BOM CK 0019

Hon'ble Judges : Coyajee, J

Bench : Single Bench

Advocate : Khambata, for the Appellant;

Judgement

1. In connection with this case a preliminary point has been raised namely that the petition should not be entertained on account of gross delay. There is a further preliminary point which I shall refer to hereafter.

2. The facts in this case are simple. On the 1st of October 1955 the steamer s.s. "DARA" brought in certain chests of tea. The petitioner was one of the parties who was a consignee and they were to export these goods in September, 1955. Therefore in September, 1955 they prepared the necessary shipping bills for assessment of export duty and they paid the same which was for that month 6 annas per lb. s. s. Dara which was expected to arrive on the 30th of September 1955 arrived, as I stated above, on the 1st October, 1955 and the duty leviable as from the 1st October for export of tea was eight annas per pound. Thereupon on the 25th of October the respondents issued a notice, which is annexed as Ex. A. to the petition, calling upon the petitioners to pay a sum of Rs. 1,875 within 15 days such demand was made. According to the petitioners they contended that they were not liable to pay the deficiency and appealed to the Assistant Collector of Customs and the Assistant Collector of Customs rejected their appeal on the 30th January 1956. On the 13th February 1956 the Collector of Customs was approached, but on the 18th of April 1956 the Collector of Customs rejected the petitioners' request. The petitioners appealed to the Central Board of

Revenue against this order which was rejected on the 21st May 1956 the revision and appeal being dated 8th of May 1956. It is at this stage that certain correspondence follows which is of some importance and they are collected as Ex. D and Ex. E. This is the correspondence with the Central Government. On the 18th of January the petitioners wrote to the Finance Ministry and on the 28th of January 1957 they got a reply that the orders could not be interfered with. In these circumstances the first point is taken that there is a gross delay of at least 12 months if not fourteen months and therefore the petition should not be allowed.

3. This appears to be a small amount of Rs. 1,875/- but evidently from the correspondence it appears that the petitioners firm is a member of the Tea Traders' Association who took up the matter on their behalf with the Central Government. It must be remembered, that the order of the Collector rejecting the application was followed by the final order of the Central Board of Revenue dated the 21st May 1956 and this petition was not filed until the 21st of March 1957, in any event; so that there was a delay at least of nine months. This gross delay would obviously put the petitioners out of Court. But this petition has been argued with a certain amount of tenacity, because it is admittedly a test petition on behalf of one of the members of the Tea Traders' Association.

4. When the Advocate General indicated to me the nature of the appeal, Mr. Khambata on behalf of the petitioners submitted that as a matter of fact the petitioners were complaining against an order enforcing the original order of the Collector, because on the 22nd February 1957 a letter was addressed to the petitioners by the Assistant Collector of Customs stating that they had failed to pay duty amounting to Rs. 1,875/- and further goods imported or exported on their behalf and passing through the Customs House should be detained under the provisions of section 39 of the Sea Customs Act. It is contended that they have come within a month of this order and therefore there is no delay at all on the part of petitioners. It was also contended that they had gone in appeal u/s 191 to the Central Government and their appeal had been filed on the 18th of January 1957 and that was disposed of by the Central Government on the 28th of January 1957; so that under both these circumstances there is no delay.

5. Now the scheme of the Act is very clear. From the judgment of assessment passed by the Assistant Collector an appeal lies to the Collector. From the decision of the Collector an appeal lies on the Central Board of Revenue and powers of revision reserved to the Central Government u/s 191 of the Sea Customs Act which says that the Central Government may on application of any person aggrieved by any decision of order passed under this Act by any officer of customs and the Chief Customs Authority and from which no appeal lies, reverse or modify such decision or order. The Chief Customs Authority is defined u/s 3 and the Chief Customs Authority under that definition means the Central Board of Revenue constituted under the Central Board of Revenue Act and includes such officer as the Govt. under notification may name. The petitioners appealed

against the assessment and demand made on them to the Collector and the Central Board of Revenue. The decision of the Central Board of Revenue was arrived at on the 25th May 1956. Nothing was done thereafter by the petitioner until the 18th of January 1957 when they wrote the letter which is annexed as Ex. E. to the petition. To my mind it is entirely fallacious to say that this is an appeal u/s 191 challenging the decision of the Central Board and of the Collector. There is no challenge to the order made. All that the letter says is that on account of a certain misfortune and no default of the importers who were exporting tea these goods arrived by s.s. DARA one day the late and these merchants had been called upon to pay excess duty amounting to Rs. 50,000. Thereafter it is pointed out that the tea trade of Ceylon was competing hard with the tea trade of India and that tea trade of India was losing ground in the Asiatic countries to the West of India. But the most important is the last but one paragraph which says that under the law perhaps the Government is justified in enforcing this payment, but in view of what is pointed out otherwise in that letter. Their application should be sympathetically considered. It cannot be said that this amounts to an appeal against the order either of the Collector or of the Central Board of Revenue. It is a petition in misericordiam and nothing more and no decision of the Collector or of the Central Board of Revenue is referred to and it is not alleged that such a decision is in error on any point at all either in fact or in law. In these circumstances it would be a very far-fetched thing to say that this was an appeal u/s 191 against the order and decision of the Collector and the Central Board of Revenue and therefore the time should begin to run or be calculated after the 28th of January 1957 when the reply to this petition was received.

6. Another point taken up by Mr. Khambata is as follows :-

It is said that circumstances came into being after the order of the Central Board and which entitle the petitioners to come to this Court and they are that an order was passed on the 22nd February 1957 to the effect that if this amount were not paid, further goods imported or exported on behalf of the petitioners passing through the Customs would be detained. That this was one of the grievance of the petitioners which came into being on the 22nd February 1957 and therefore I was referred to paragraph 13 of the petition in which a submission is made that the action of the respondents in imposing and demanding and attempting to recover from the petitioners the additional export duty of Rs. 1,875/- is void, illegal without jurisdiction and authority and not warranted by provisions of section 39 of the Sea Customs Act and that the respondents have no jurisdiction of competence to detain these goods. I was also referred to the prayer where it says that the respondents be restrained from recovering the additional export duty of Rs. 1,875/- or from detaining the petitioners goods as per their order dated the 22nd February 1957. Now, this argument would appear on the face of it to be fallacious, because their grievance is the imposition of the assessment and what is being done u/s 39 is to seize the goods in pursuance of enforcing recovery of the dues that are owing to the Customs by the petitioners under the

orders which stand unchallenged as far as appeals go. It can never be said that such a consequential order made is a ground or a starting point from which the time should be calculated for relief by way of a writ. This question would have had some persuasive effect on me, but for the fact that it is not true that the petitioners came to realise in February 1957 that coercive measures were to be taken against them in default in this particular manner u/s 39, because in Ex. B. to the petition there is a letter dated 30th January, 1956 from the Assistant Collector of Customs in the second paragraph of which it is stated that the petitioners are requested to pay up the less charge amount of Rs. 1,875 within ten days from the date of this letter failing which action would be taken as provided in the last clause of section 39, with the result that as far back as 30th January 1956, a year and a half before the date of the petition the petitioners were put on their guard that in default of payment of this assessment coercive measures u/s 39 would be adopted against them, within ten days. In these circumstances, it hardly lies in the mouth of the petitioners to say that fresh circumstances have arisen after February 1957 which enabled them to come to Court. It is true that in prayer (a) a relief is asked both against imposition of duty and against the order of enforcement in a rolled up plea. But that does not in my opinion make any difference to the position.

7. A further point has been taken by Mr. Seervai relying upon the decision in *Gandhinagar Motor Transport Society v. State of Bombay* reported in 55 B.L.R. at page 922 where at page 923 the learned Chief Justice observed : "The main ground on which the order of the Government is challenged is that Government had no jurisdiction to sit in appeal over the decision of the State Transport Authority and that the decision given by the State Transport Authority was the final order which became conclusive and no appeal lay from that order. The petitioners never raised the point as to the jurisdiction of Government when Government heard the matter. The petitioners were quite content to permit Government to hear the appeal preferred by respondent No. 4. If Government had decided in favour of the petitioners we would not have heard anything further about the jurisdiction of Government to hear appeals from the decision of the State Transport Authority, but it is because Government have decided against the petitioners that the petitioners have thought of coming to us in order to exercise our jurisdiction under the Constitution". It has been argued on this basis that the petitioners are now not entitled to challenge the orders of the Collector and of the Central Board of Revenue which were not challenged by them in their representation to the Central Government u/s 191 of the Sea Customs Act on the board principle that a party must not be allowed to approbate and reprobate at the same time and that not having challenged these decision in their Revision Petition they should not be allowed to raise that point before me. Mr. Khambata tried to distinguish this case by limiting it to the particular facts and circumstances of the case where the party itself had approached the Government and asked for a decision and Mr. Khambata said that therefore that party was precluded from challenging the jurisdiction of Government. This decision has

been referred to in a decision by Mr. Justice Dixit and Mr. Justice Shelat in Special Civil appeal No. 1305 of 1957. The learned Judges quoted this portion of the judgment of the High Court and observed that that was a principle which had to be applied broadly and not limited in the manner asked for by Mr. Khambata and they quoted from the judgment of Rex v. Williams (1914) I.K.D. 608 where Mr. Justice Channel pointed out as follows :-

"A party may by his conduct preclude himself from claiming the writ ex debito justice, no matter whether the proceedings which he seeks to quash are void or voidable. If they are void, it is true no conduct of his will validate them; but such considerations do not affect the principles on which the court acts in granting or refusing the writ of certiorari. This special remedy will not be granted ex debito justice to a person who fails to state in his evidence on moving for the rule nisi that at the time of the proceedings impugned he was unaware of the facts on which he relies to impugn them".

8. Similarly as in the other cases if the Central Government had decided in favour of petitioners there would have been no question of his coming here. It is only on failure to get any relief that they have approached this Court. I may observe however, in connection with the appeal u/s 191 a copy of which is annexed as Ex. E. to the petition that I have still to come across a statutory appeal where, as in this case, it is in terms stated that the lower court's judgments are probably right in law, but that the superior court should grant some relief. I am only indicating the emptiness of the contention that this could be a challenge to the decision of the lower court u/s 191 of the Sea Customs Act. In these circumstances I uphold the preliminary objection and I hold that the latest the petitioners could have come for relief under a writ would have been within two weeks or so of the order of the Central Board of Revenue. It must be remembered that although the petitioners rely upon their representation to the Central Government dated, the 18th January 1957 even though that was preferred six months after the decision of the Central Board. It is not for a party to choose to delay a matter by preferring an appeal six months later and then come to the court and say that I have come to the Court within three months of the final decision. It cannot lie in the mouth of such a party to say that his own default in not prosecution the statutory appeal in time should be construed in his favour.

9. In these circumstances I am definitely of the opinion that there has been gross delay and on the preliminary point. I hold on account of this gross delay that the petition should not be entertained. The Rule is therefore discharged. The petition stands dismissed with costs.