
(1980) 10 CAL CK 0001
In the Calcutta High Court
Case No : Civil Rule No. 24OW of 1967

Khardah Company Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 01-10-1980

Acts Referred:

Central Excise Rules, 1944 — Rule 11, 9
Central Excises and Salt Act, 1944 — Section 36
Constitution of India, 1950 — Article 133(1), 226, 227
Customs Act, 1962 — Section 27(1)
Sea Customs Act, 1878 — Section 40

Citation : 85 CWN 192 : (1983) 14 ELT 2159

Hon'ble Judges : Bhabes Chandra Chakrabarti, J; Anil Kumar Sen, J

Bench : Division Bench

Advocate : Biswarup Gupta, Jatin Ghosh and M.M. Guha, for the Appellant; Samarendra Nath Banerjee, for the Respondent

Final Decision : Allowed

Judgement

Anil Kumar Sen, J.—This is an old Rule which came up for hearing before us on a specific assignment by the learned Chief Justice. Khardah Company Limited, the petitioner before us obtained the above Rule seeking relief alternatively under Article 226 of the Constitution and Article 227 thereof. Their prayer is that the orders dated November 24, 1965 passed by the Assistant Collector, Central Excise, Calcutta Division, April 16, 1966 passed by the Collector of Central Excise, Calcutta and Orissa and being set aside the respondents should be directed February 28, 1967 passed by the Central Government to refund the excess excise duty realised from them in respect of their products between the period May 1962 to February 1964. The point involved is a short one, namely, though the respondents do not dispute that there had been such excess realisation whether their liability to refund is barred by limitation prescribed by Rule 11 of the Central Excise Rules, 1944. To appreciate and decide the point at issue it would be necessary to refer to certain facts which are set out briefly as

follows.

2. The petitioner company manufactures D.W. Tarpaulin and D.W. Jute canvas in their jute mills. On and from the midnight of April 23, 1962, Central Excise duty was imposed on the jute manufactures when item 22A of the First Schedule to the Central Excises and Salt Act, 1944 came into effect. The said item reads as follows :

"22A. Jute Manufactures (including the manufactures of Bimlipatam jute) or mesta (fibre), all sorts, not elsewhere specified in which jute (including Bimlipatam jute or mesta fibre) pre-dominates in weight-

(1) Hessians.... Rs. 250 per M.T.

(2) All other descriptions of jute manufactures not otherwise specified (including cloth bags, twist, yarn, rope and twine) Rs. 125 per M.T."

3. The petitioner before us who was manufacturing D.W. Tarpaulin and D.W. Jute canvas thereupon submitted applications in Form A.R. I for passing their products, namely D.W. Tarpaulin on payment of excise duty at the rate of Rs. 125 classifying the product as one coming under entry 22A(2) as aforesaid. The excise authorities passed the said goods accordingly on realisation of excise duty at the said rate.

4. On May 29, 1962, the authorities, however, demanded of the petitioner a total amount of Rs. 10,914.50 by way of short excise levy realised from them. The claim so made was based upon the view that the petitioner's products, namely D.W. Tarpaulin and D.W. Jute canvas really answers the category specified in entry 22A(1) and not (2) thereof so that the excise duty payable would be Rs. 250 per M.T. and not Rs. 125 per M.T.

5. The petitioner thereupon not only paid the excise duty so demanded but thenceforward got their products of the said category passed on payment of excise duty at the rate of Rs. 250 per M.T. classifying such products in their application in Form A.R. I as falling within the category of item 22a(1). Obviously it was so done as otherwise the goods would not have been passed by the excise authorities but since the petitioner was a member of the India Jute Mills Association they lodged a protest with the Central Government that D.W. Tarpaulin and D.W. Jute canvas are not really a product which can be said to be hessian. The Jute Mills Association in their representation to the Central Government pointed out :

"There is now some difficulty in the jute goods market since some excise inspectors are charging the lower rate while others are charging the higher rate and the buyers are seeking re-imbursement of the duty, paid over and above the lower rates from the mills. The Association would accordingly be grateful for your written confirmation that the lower rate of duty applies to D.W. Tarpaulin and canvas and that any money paid in excess of the amount should be reimbursed to the mills."

6. The Government in its turn informed the Association "that the matter of classification of (1) Jute canvas and (2) D.W. Tarpaulin is under examination and a further communication regarding the correct classification of (1) jute canvas and (2) D.W. Tarpaulin will follow as early as possible." Ultimately, however, the Government decided in favour of the claim put forward by the Association and the Government decision was communicated to the Association by a letter dated April 29, 1964, which reads as follows :-

"I am directed to invite a reference to paragraph 4 of this office letter of even number 7312B dated 15-4-69 and to say that the matter of classification of (1) jute canvas and (2) D.W. Tarpaulin has been examined and it has been decided to classify the said products as "all other descriptions of jute manufactures not otherwise specified" under sub-item (2) of item 22A of the Central Excise Tariff. Necessary instructions have been issued to the Assistant Collector of Central Excise, Calcutta III Division in the matter."

7. The Association in its turn having informed the petitioner of the aforesaid decision of the Central Government with regard to the disputed classification of their products, the petitioner on June 4, 1965, and on July 25, 1965, lodged their claim of refund of excise duty paid in excess by them between the period May 1962 and February 1964 of their products D.W. Tarpaulin and D.W. Jute canvas. Such claims being lodged the petitioner was called upon to show cause why the claim should not be rejected under Rule 11 of the Rules framed under the said Act as time-barred. In showing cause the petitioner pointed out that they originally classified their products as falling within the category specified in entry 22A(2) but due to confusion in the mind of assessing authorities in regard to the appropriate classification of their products they were made to pay excise duty at the higher rate until the Government finalised its decision as to the classification so that the refund could not have been claimed earlier. Incidentally in this representation they further prayed that Rule may be waived as a special case.

8. The claim of the petitioner, however, was rejected by the Assistant Collector by his order dated November 24, 1965, solely on the ground that such a claim was not lodged within 3 months from the date of payment of the duty. It cannot now be disputed nor was it ever disputed by the authorities that after the finalisation of the classification by the Central Government by their order communicated on April 29, 1964, the excise duty levied at the rate of Rs. 250 per M.T. was unauthorised so that a sum of Rs. 125 per M.T. was otherwise liable to be refunded. Obviously, the Assistant Collector in refusing the refund treated the claim of refund as a claim under Rule 11 of the Rules and rejected the same solely on the ground of limitation.

9. The petitioner preferred an appeal to the Collector of Central Excise being Central Excise Appeal No. 45 M.P. of 1966 but the appeal was dismissed by the Collector by his order dated April 16, 1966. All the relevant facts not being disputed the Collector took the view that the established practice of Assessment of D.W. Tarpaulin and Jute canvas was changed with effect from 29-4-64 but

since the appellant did not lodge any protest regarding the previous assessment obviously on account of mis-construction on their part, nor they having claimed provisional assessment under Rule 9(b) of the Rules their present claim for refund after the expiry of 3 months from the date of payment of the duty is not sustainable in law. Obviously the Collector in his turn proceeded on the view that the claim of refund as made is one under Rule 11 and that the petitioner is not entitled to any such refund as claimed on the provision of the said Rule.

10. The petitioner then preferred a revisional application u/s 36 of the Act which, however, was dismissed by the Central Government by an order dated February 28, 1967, which reads as follows :

"The Government of India have carefully considered the points made by the applicants but see no justification for interfering with the order in appeal. The revisional application is accordingly rejected."

11. Feeling aggrieved by the aforesaid orders dated November 24, 1965, April 16, 1966 and February 28, 1967, the petitioner has moved the present application on the alternative prayers referred to hereinbefore for setting aside the said orders and for an order directing refund of the excess excise duty paid by them on their products between May 1962 and February 1964.

12. The present application is being contested by the respondents who have filed an affidavit in opposition. According to the respondents, the petitioner having paid the excise duty on an assessment which was not disputed in accordance with law and on the other hand they themselves having classified their products as those coming under entry 22A(1) in their application in Form A.R. I filed by them, later cannot claim any refund except in terms of Rule 11 of the Rules. It is further claimed that had the petitioner disputed the classification at the material time they could have asked for provisional assessment under Rule 9(b) or could have paid the assessed duty under protest but they did not do anything of the kind. On the other hand, they themselves paid the duty believing their products to be answering the category as in entry 22A(1) so that their claim of refund, if at all, could be entertained under Rule 11 of the Rules. Such being the nature of claim, according to the respondents, it was rightly over-ruled being barred by limitation of prescribed therefore.

13. Mr. Gupta appearing in support of this application has contended that the orders impugned have proceeded upon an erroneous assumption that the claim for refund could be made only in terms of Rule 11 of the Rules and it was so made. According to Mr. Gupta Rule 11 can have no application in the present case since the excess excise duty was not paid through any inadvertence, error or mis-construction. On the other hand according to Mr. Gupta it was so paid under compulsion after the assessing authorities demanded the higher rate under entry 22A(1) pending finalisation of the classification by the Government itself. According to Mr. Gupta on the ultimate decision of the Government, the excess realisation being unauthorised in law, the respondents are liable to refund

all amounts so realised and Rule 11 having no application, the special limitation thereunder could not have been a ground for rejecting the prayer for refund. Strong reliance was placed by Mr. Gupta on certain decisions including some decisions of the Supreme Court to which we shall refer hereinafter.

14. Mr. Banerjee appearing on behalf of the respondents has contested the points thus raised by Mr. Gupta. According to Mr. Banerjee whatever duty that might have been paid by the petitioner had been paid on assessment thereof. In the first place according to Mr. Banerjee such assessment not having been challenged in accordance with law, the petitioner cannot now claim refund of the amounts paid under such assessment only because the basis for the assessment has since been revised in view of later decision of the Central Government. Secondly it has been contended by Mr. Banerjee that in any event had the petitioner disputed the classification at the material time they could have either paid the duty under protest or could have asked for provisional assessment under Rule 9(b). They not having done either, it must be held that they themselves paid the duty erroneously believing their products to answer the description of the goods specified in entry 22A(1) so that their claim for refund would squarely come under Rule 11. It has been pointed out by Mr. Banerjee that they themselves were quite aware of the said position when they prayed for waiver of the limitation prescribed by the said Rule. Such being the position, according to Mr. Banerjee it had been rightly held in the orders under challenge that the claim for refund is barred by the provision of Rule 11 of the Rules.

15. We have carefully considered the rival contentions put forward before us. On the undisputed facts it is now well-established that the petitioner initially got their products passed by the excise authorities on the basis that such products answer the description of the goods specified in entry 22A(1). This was at the time when the said entry was brought into effect for the first time. Later, however, the assessing authorities changed their views as to the classification. The thought that such products must be considered to "be hessian coming under entry "2A(1) and not entry (2) thereof. The petitioner did accept for the time being such a claim on the part of the assessing authorities when they paid the balance demanded for the goods already passed and when they sought for clearance of the subsequent products on the said basis. But it is established at the same time that the assessing authorities themselves were not sure of their position when some of them were classifying such products as hessian under entry 22A(1) while others were classifying such products as under entry 22A(2). The producers, therefore, moved through their Association the Central Government for determining finally the correct classification of such products. Such a dispute as we have indicated hereinbefore was entertained by the Central Government and after due examination the Central Government decided in favour of the Association on April 29, 1964, when it was directed that D.W. Tarpaulin and D.W. Jute canvas should correctly be classified as falling under entry 22A(2) and not sub-item (1) thereof. The excise duty that was paid in between cannot be said to have been paid under circumstances contemplated by

Rule 11 as it stood at the relevant time. Rule 11 as it then stood provides as follows :

"No duties or charges which have been paid or have been adjusted in an account-current maintained with the Collector under Rule 9 and of which repayment wholly or in part is claimed in consequence of the same having been paid through inadvertence, error or mis-construction, shall be refunded unless the claimant makes an application for such refund under his signature and lodges it with the proper officer within three months from the date of such payment or adjustment, as the case may be."

16. In our view, in the facts and circumstances of the present case it cannot be said that the petitioner had paid the excess duty through inadvertence, error or mis-construction. On their part they claimed and as it now appears claimed very rightly that their products, namely, D.W. Tarpaulin and D.W. Jute canvas are not products which could be said to be hessian so that such products really come under entry 22A(2) and not sub-item (1). The assessing authorities of the petitioner though initially accepted the said classification later thought it otherwise. Therefore, when the petitioner paid the balance demanded of them and went on paying the excise duty on the subsequent clearances, they really paid under compulsion as otherwise the goods would not have been cleared. Such being the position, we are unable to accept the contention of Mr. Banerjee that the claim of refund as made in the present case really comes within Rule 11 of the Rules and consequently we are unable to support any of the impugned orders all of which are based on the said view. As we have indicated hereinbefore the respondents are not in a position to dispute their liability on merits to refund because on the Government decision dated April 29, 1964, they had realised an excess excise duty to the extent of Rs. 125 per M.T. from the petitioner for the goods cleared between May 1962 and April 1964. Notwithstanding the said position such a claim had been refused only on the application of the special limitation prescribed by Rule 11 of the Rules which in our view, however, can have no application. It is also a settled principle now that if the claim of refund of any amount realised without any authority of law is not barred by any specific statutory provision, is enforceable in law.

17. Mr. Gupta in our view rightly relied on the decision of the Supreme Court in the case of Patel India Private Limited Vs. Union of India and Others, . In this case, the appellant who was an importer of certain goods claimed that the import duty should be assessed on the invoice price in respect of some of the items so imported. That claim being over-ruled and the duty being assessed on the aggregate sum the appellant preferred a revision application before the Central Government. Pending disposal of the revision application other items were also imported by the appellant. The appellant had to pay excess amount of import duty assessed on the aggregate sum in respect of such goods later imported and not on the invoice price. When the revision application ultimately succeeded before the Government and the Government directed refund of the excess

amount of import duty upholding the appellant's plea that such duty is payable only on the invoice price, the appellant claimed refund or similar excesses realised from them on the subsequent imports. Such claim was refused and reliance being placed on Section 40 of the Sea Customs Act, 1878, which is a provision parallel to Rule 11 of the Rule now under consideration by us, the Supreme Court held that Section 40 can have no application. It was so held because excise duty was paid not under any inadvertence, error or misconstruction but because it was so demanded on the ground that the invoice price was not the real value of the imported goods. Section 40 being ruled out, it was observed by the Supreme Court :

"If the customs authorities were not entitled to levy the excise duty and retain it they were bound to return it to the appellant company who had paid it under protest and only with a view not to incur demurrage charges unless there was some provision of the Act which debarred the appellant company from recovering it."

That was also the view of the Division Bench of the Madras High Court in the case of Assistant Collector of Customs v. Prem Raj and Ganapat Raj & Company, 1978 Census 77D.

18. Mr. Banerjee on the other hand strongly relied on a decision of the Supreme Court in the case of Madras Rubber Factory Ltd. Vs. The Union of India (UOI) and Others, . This decision relied on by Mr. Banerji, however, is distinguishable both on facts and on the law thereunder consideration. In this case, the appellant was being assessed to duty on V.P. Later under the residuary item 87 of the Indian Tariff" Act instead of I.C.T. 39 an item meant for charging duty on raw rubber. Undisputedly the customs duty on raw rubber charged under item 87 is higher than the one chargeable under the aforesaid item No. 39. Having paid such excess duty, the appellant claimed refund u/s 27(1) of the Customs Act, 1962. Unlike Rule 11 now under consideration, Section 27(1) thereunder consideration is wide in its terms as it refers to all claims for refund of any duty paid in excess under whatever account. Such a claim u/s 27(1) was rejected on the ground of limitation prescribed by Section 27(1) and that was upheld by the Supreme Court notwithstanding a decision of the Supreme Court in the meantime deciding V.P. Latex to be chargeable under item 39 and not item 87 of the Indian Tariff Act. As we have indicated here the claim of refund was made u/s 27(1) and Section 27(1) itself was wide enough to cover such a case. Secondly in this case unlike the one now before us the assessing authorities were not in doubt as to proper classification and the assessment was not being made pending classification being determined by the Government itself. The classification itself was impugned in making the application for refund and a decision of the Supreme Court intervened to support the claim for classification as made in the application. But in the case now before us the assessing authorities themselves were not sure as to what would be the correct classification and when the Government itself was examining the classification the assessment made by the

assessing authorities must be deemed necessarily to be provisional in the sense that the same would be subject to the finalisation of the classification by the Government itself. In such a case, in our view, it would be no defence now to plead that the petitioner should have challenged the assessment in accordance with law or should have claimed a provisional assessment under Rule 9(b) of the Rules. The assessing authorities must be deemed to be aware of the position that the assessment made cannot be final but must be subject to the final determination of the classification then under consideration by the Government. That must be the legal position irrespective of whether the assessment itself is individually challenged or any claim is lodged for a provisional assessment under Rule 9(b). In the case of Patel India Private Ltd. (Supra) the excess duty claimed and directed to be refunded was the duty paid on assessment which were never challenged by preferring any appeal or revision therefrom. Order for refund was made only because the assessment of duty and realisation thereof was made at a time when the dispute as to the correct basis for such assessment was under adjudication by the Central Government in a revision against an earlier assessment.

19. The claim of the petitioner now before us may be considered from another aspect. As we have indicated hereinbefore, the respondents are not in a position to dispute their liability to refund the excess of the duty assessed during the period May 1962 to April 1964, when the assessing authorities proceeded to make the assessment under entry 22A(1) instead of 22A(2) as finally decided by the Central Government on April 29, 1964. On the Government decision, therefore, the excess so realised was without any authority of law. In the case of Aluminium Corporation of India Ltd. Vs. Union of India (UOI) and Others, , the Supreme Court observed :

"To return what has been taken wrongly is as much a duty and grace of the Government as to levy relentlessly and fully what is due. Default in either, not altogether unfamiliar brings down the confidence of the community in the administration."

20. Again in a very recent decision in the case of Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others, , the Supreme Court was considering a similar question where it was observed :

"Where public bodies, under colour of public laws, recover people's moneys, 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 wrongfully recovered to whom it belongs. 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 to justice is ubi jus ibi remedium."

This decision, in our view gives complete answer to the first point raised before us by Mr. Banerjee appearing on behalf of the respondents in support of orders

impugned before us.

21. Before we conclude we have to dispose of an incidental objection to the claim of refund realised by Mr. Banerjee. According to Mr. Banerjee the petitioners having passed on the incidence of enhanced assessment of the excise duty to their customers the refund, if ordered, would only result in unjust enrichment of the petitioners and hence such an order should not be made. Reliance is placed by Mr. Banerjee on a Bench decision of the Bombay High Court in the case of *Ogale Glass Works Ltd. v. Union of India and Ors.* 1979 E.L.T. (468) (BOM) and a single bench decision of this court in the case of *Hindusthan Pilkington Glass Works v. Central Excise* 1977 (2) C.L.J. 408. It, however, appears that the Bombay High Court in a later Bench decision in the case of *Associated Bearing Co. v. Union of India* 1980 E.L.T. 415 (Bom.) did not share the earlier view when it was expressly held that a claim of refund cannot be rejected on the ground that the company may already have recovered the amount from its customers.

22. In considering the issue raised by Mr. Banerjee, one must refer to the nature of the liability resulting from the levy and see on whom the liability is fixed. In the case of *Tata Iron & Steel Company Ltd. v. State of Bihar* AIR 1958 S.C. 452, Supreme Court was considering the validity of imposition of a sales tax with retrospective effect. In meeting an argument that such retrospective imposition would deny an opportunity to the assessee to pass on the liability to its purchasers and as such would be inconsistent with the very nature of the levy, it being an indirect tax, the Supreme Court observed : "From the point of view of the economist and as an economic theory sales tax may be an indirect tax on the consumers but legally it need not be so....This also makes it clear that the sales tax need not be passed on to purchasers and this fact does not alter the real nature of the tax which by express provision of law is cast Upon the sellers." In the case of *Chhotabhai Jethabhai Patel and Co. Vs. The Union of India and Another*, the position in law in the case of excise levy was held to be the same. If the liability imposed is of the assessee alone and if the assessee is liable to pay irrespective of whether he can pass on the liability to his customers, for the very same reason he can demand refund of all unauthorised levy irrespective of whether he had actually borne the burden himself or not, unless the statute provides it otherwise. The answer to the objection raised by Mr. Banerjee is to be found in the observations of the Supreme Court in the case of *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, relied on by the Bombay High Court in its later decision, which though obiter appear to enunciate the true legal principle which follows from their earlier decisions referred to hereinbefore.

23. However, it appears to be the consistent view of all courts that all realisations made by the Government without authority of law must be reimbursed. Supreme Court has recognised the position that High Courts exercising their writ jurisdiction have power for the purpose of enforcement of fundamental as well as statutory rights to give consequential relief by ordering repayment of money so realised without any authority of law; though at the same time it has been made

clear that the special remedy under Article 226 is not intended to supersede completely the other normal remedies or to deny defences legitimately open in such an action. In the present case it should be noted that the petitioners had moved the authorities under the statute for the refund and the order refusing such a prayer as made by those authorities have been challenged under Article 227 and alternatively under Article 226 of the Constitution. No order for refund having been sought for from this Court in exercise of its writ jurisdiction, there is also no scope for an objection as raised by Mr. Banerjee. Hence the objection raised by Mr. Banerjee is overruled.

24. In the result, the application succeeds. The impugned orders being set aside, we direct the respondents to refund all excess duty realised from the petitioner between the period May 14, 1962 to February 29, 1964, in respect of the claims made in their applications for refund dated June 4, 1965 and July 25, 1965.

25. Let operation of this order remain stayed for a period of three months from this date.

26. Certificate prayed for under Article 133(1) of the Constitution is refused because in deciding the case we have proceeded entirely upon principles laid down by the Supreme Court.