(1988) 12 KL CK 0018

In the High Court Of Kerala

Case No : O.P. No. 8231 of 1988-E

Kiran Overseas APPELLANT

Vs

Assistant Collector of Customs RESPONDENT

Date of Decision : 05-12-1988

Acts Referred:

- Constitution of India, 1950 — Article 265
- Contract Act, 1872 — Section 72
- Customs Act, 1962 — Section 124, 130E

Citation : (1989) 22 ECR 190 : (1992) 61 ELT 361

Hon'ble Judges : T.L. Viswanatha Iyer, J

Bench : Single Bench

Advocate : P.C. Chacko, for the Appellant; P.V. Madhavan Nambiar, Central Govt. Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

T.L. Viswanatha Iyer, J.—Pursuant to proceedings initiated u/s 124 of the Customs Act, 1962, the Collector of Customs, Cochin called upon the petitioner, an exporter, to make payment of Rs. 7,32,477.44 as duty, besides imposing a penalty of Rs. 3 lakhs. The petitioner challenged the order in appeal before the Customs, Central Excise and Gold (Control) Appellate Tribunal, South Regional Bench at Madras. The Tribunal allowed the appeal by order dated 20-6-1988, a copy of which is Ext. P 1. The demand for payment of duty, as also the imposition of penalty were both set aside.

2. Pending appeal, and in compliance with an interim order of the Tribunal on an application for stay made before it, the petitioner made deposit of an amount of Rs. 3.5. lakhs towards the demand, and furnished security by way of bank guarantee for Rs. 8 lakhs. But virtue of the order Ext. PI of the Tribunal, the petitioner became entitled to refund of the amount of Rs. 3.5 lakhs, as also for revocation of the bank guarantee. The Tribunal had specifically stated in its order that the bank guarantee will stand discharged. The petitioner applied to the

respondents for refund of the amount deposited and for revocation of the bank guarantee consequent on the order Ext. PI. Copies of the applications made by the petitioner are Exts. P2 and P3, dated 29-6-1988 and 8-7-1988 respectively. The request has not been complied with despite the lapse of over three months. The petitioner has therefore filed this original petition for direction to the respondents to return the amount of Rs. 3.5 lakhs as also to discharge the bank guarantee for Rs. 8 lakhs.

3. Sri P.V. Madhavan Nambiar, Senior Standing Counsel for the Central Government appears on behalf of the respondents. He has filed a statement objecting to the prayer made by the petitioner. It is stated that the Tribunal has allowed the appeal on purely "technical grounds without going into the merits of the case". The amount of customs duty involved is "over Rs. 8.4 lakhs, and since the possibility of unscrupulous elements taking advantage of the situation in future cannot be ruled out", the department has taken this to be a fit case for appeal to the Supreme Court u/s 130E(b) of the Customs Act, 1962. Necessary steps for filing the appeal have been taken and the appeal will be filed without delay. The statement then goes on to dissect the order Ext. P1 on merits inter alia contending that the South Regional Bench of the Tribunal at Madras had no jurisdiction at all to hear and decide the appeal, and that the order is in conflict with the decision of the High Court of Calcutta (by) Sudhir Ranjan Roy, J. in Webta Private Limited and Others Vs. Collector of Customs and Others, . The respondents therefore pray for a dismissal of the writ petition.

4. The deposit of Rs. 3.5 lakhs was made by the petitioner pursuant to the interim order of the Tribunal on an application for stay made before it. The bank guarantee was also furnished in compliance with that order. The amount was paid towards the levy made by the Collector in his order on adjudication. When the appeal was allowed by the Tribunal, and the demand and imposition of penalty set aside, the petitioner became entitled forthwith to restitution of the amount, and for discharge of the bank guarantee. The right of the respondents to retain the amount paid being referable only to the order of adjudication of the Collector, when once the order is set aside, the very foundation of the demand goes and the amount becomes eo instant refundable to the petitioner. Section 72 of the Indian Contract Act, 1872 recognises that a person to whom money has been paid or anything delivered by mistake or under coercion must repay or return it. Article 265 of the Constitution directs that no tax shall be levied or collected except by authority of law. This entails a further or concomitant duty on the State to refund what has been collected contrary to constitutional or statutory provision". (vide Aluminium Industries Ltd. v. Agricultural Income Tax & Rural Sales Tax Officer, 1961 KLJ 1336 Rajagiri Rubber and Produce Co. Ltd. Vs. Addl. Sales Tax Officer and Others, and Salonah Tea Co. Ltd. and Others Vs. Superintendent of Taxes, Nowgong and Others, . As stated by the Supreme Court in Commissioner of Sales Tax v. Auraiya Chamber of Commerce (1981) 167 ITR 458, in such cases, the right of refund is embedded in the very fact of payment. The duty to make refund or restitution is not postponed by any contemplated

appeal or other proceeding in challenge of the order Ext. P1. In the absence of any order of stay from the Supreme Court, the respondents are bound to comply with the order Ext. P1 and grant refund.

5. In the circumstances, as soon as the order Ext. PI was passed on 20-6-1988, a duty was cast on the respondents to refund the amount paid by the petitioner, as also to discharge the bank guarantee. This is all the more so in this case as the amount was paid and the bank guarantee was furnished consequent on an interim order passed by the Tribunal. The petitioner has made demand for restitution and for discharge of the bank guarantee, but the respondents have not acceded to his request in view of the projected appeal to the Supreme Court. More than five months have elapsed since the order Ext. P1, without the refund being granted or the bank guarantee being cancelled. The respondents are therefore liable to be compelled by the issue of a writ of mandamus to perform their constitutional duty and to make restitution of the amount paid and to discharge the bank guarantee. The respondents are no doubt contending that the order of the Tribunal is unsustainable in law. That is a matter for them to urge before the Supreme Court in the appeal which they are filing.

6. I allow the original petition. The respondents are directed to refund to the petitioner the amount of Rs. 3.5 lakhs, and to discharge the bank guarantee, within a period of two months from today. There will be no order as to costs.