

(1983) 04 BOM CK 0008

In the Bombay High Court

Case No : Writ Petition No. 1149 of 1980

Mahindra and Mahindra Ltd.

APPELLANT

Vs

Union of India and another

RESPONDENT

Date of Decision : 29-04-1983

Acts Referred:

Customs Act, 1962 — Section 27(1)

Citation : (1983) ECR 786 : (1983) 13 ELT 904

Hon'ble Judges : B. Lentin, J

Bench : Single Bench

Judgement

1. On 6th August 1960, Government of India issued Notification No. 82/60 (referred to hereafter as "the 1960 Notification") exempting from customs duty, (subject to certain conditions, one of them being the execution of a bond), component parts of any machinery imported into India and proved to the Collector's satisfaction to be required for the purpose of the initial setting up of that machinery or its assembly or manufacture. On 5th January 1963, Government of India issued Notification No. 2/63 (referred to hereafter as "the 1963 Notification"), exempting from customs duty, subject to the execution of a bond, "parts of all tractors when imported into India solely for agricultural purposes."

2. The petitioner is the successor in title of one International Tractor Company of India Ltd.", and for convenience is referred to hereafter as "the Company". Since 1964 the Company manufactured agricultural tractors, (declared to be an essential commodity by Government of India, which from time to time fixed the selling price inclusive of manufacturer's profits), for which purpose the Company imported inter alia hydraulic lifts and 3-point linkages. Between December 1964 and July 1968 the Company imported 55 consignments comprising inter alia of hydraulic lifts and 3-point linkages. On the first two consignments of hydraulic lifts which arrived in Bombay in December 1964, the Company filed the requisite Bills of Entry claiming benefit of the exemption under the 1960 Notification.

Exemption was declined by the Department on the ground that hydraulic lifts were not parts of agricultural tractors. The Company paid the duty demanded under protest. The Company thereafter sent an undated note to the Department explaining why hydraulic lifts and 3-point linkages should be regarded as components of agricultural tractors attracting exemption under the 1960 Notification. The Company also furnished a statement giving details of an aggregate amount of Rs. 12,17,537.17 being the excess duty recovered by the Department during the period 1964-68.

3. On 30th May 1968, the Collector of Customs, Bombay, issued a Public Notice that hydraulic lifts and 3-point linkage should be treated as component parts of agricultural tractors, hence these equipments when imported with tractors should be assessed free of duty under the 1963 Notification. It was further stated that these equipments when imported for initial assembly or manufacture in terms of the 1960 Notification would be entitled to the exemption benefit under that Notification. However when imported as spares separately, they would be assessable to duty on merits.

4. On 4th December 1968, the Company wrote to the Central Board of Excise and Customs, claiming refund of Rs. 12,73,980.47 being the excess duty received between 1964 and 1968. On 23rd December 1968, the Under Secretary advised the Company to have recourse to appellate remedies under the Customs Act and to move Government in revision should the Company's appeal be rejected as time-barred. Thereupon on 18th January 1969 the Company applied to the Assistant Collector for refund. On 27th February 1969 the Assistant Collector rejected the Company's application as time-barred u/s 27(1) of the Act. On the same ground, the Company's appeal and revision application were rejected on 30th May 1969 and 15th May 1972, respectively.

5. Thereupon the Company filed Miscellaneous Petition No. 288 of 1973 in this Court for setting aside those orders and claiming on the strength of the 1960 and 1963 Notifications, refund of the duty paid. That petition was opposed solely on the ground that the Company's claim for refund was time-barred. During the pendency of that petition, certain directions were given, which are not germane for the purpose of this judgment. On 24th August 1979 the impugned orders were set aside and the matter was remanded to Government of India for disposal of the claim afresh on merits within 6 months.

6. On 27th March 1980 Government of India set aside the appellate order and remanded the matter to the Assistant Collector. On 21st August 1980, the Assistant Collector passed an order dismissing the Company's claim for refund inter alia on the ground that the Company's reliance on the 1963 Notification was barred by limitation. Hence the present petition for setting aside the orders dated 27th March 1980 and 21st August 1980 and for refund of Rs. 12,17,537.17 with interest thereon at the rate of 18% per annum from 5th April 1973.

7. The impugned orders are challenged by Mr. Chagla, the learned Counsel

appearing on behalf of the Company, on four grounds, namely, (1) on certain conditions being satisfied, both the 1960 and 1963 Notifications exempted hydraulic lifts and 3-point linkages from duty, with the result that assessment and recovery of duty on these goods were illegal and without authority of law; (2) the clearances effected by the Company between 1964 and 1968 enjoyed the benefit of the exemption given by the 1960 Notification or in any event of the exemption given by the 1963 Notification, with the result that looked at either way, the Company was entitled to the refund of duty recovered without authority of law; (3) the note submitted by the Company to the Department was and must be deemed to be a general protest in respect of all consignments, which exonerated the Company from having to lodge a specific protest in respect of each consignment and (4) in respect of certain Bills of Entry admittedly destroyed by the Department, an inference should be drawn that the duty had been paid under protest.

8. If Mr. Chagla succeeds on the ground that regardless of the 1960 Notification, the exemption given by the 1963 Notification is attracted, the other grounds of challenge urged by him must indisputably become academic. It may be recalled that the 1963 Notification exempted from Customs duty "parts of all tractors when imported into India solely for agricultural purposes." The importer was however required to execute a bond binding himself to pay, in respect of such parts not proved to have been used for the aforesaid purposes, an amount equal to the duty leviable on such parts but for the exemption. Indisputably agricultural tractors were declared to be an essential commodity and the selling price (inclusive inter alia of manufacturers' profits) was, from time to time fixed by Government of India. The categorical assertion in the petition that the component parts, namely hydraulic lifts and 3-point linkages are used exclusively in agricultural tractors and cannot be used in any other type of tractors, is not denied in the affidavit-in-reply nor is the Company assertion in the petition that these components of agricultural tractors were to be used only for agricultural purposes. So also in the affidavit-in-reply is there no denial to the Company's assertion that these components were imported for use in agricultural tractors and in fact were used for the purpose of manufacturing agricultural tractors and that the Company never sold these components as spares at any time. Even the Public Notice dated 30th May 1968 issued by the Collector of Customs, in no uncertain terms states that hydraulic lifts and 3-point linkages should be treated as component parts of agricultural tractors attracting exemption from duty in terms of the 1963 Notification. That is not all. What could be clearer than Government's own letter dated 2nd March 1967 to the Company wherein Government itself has in unmistakable terms state -

"....you have paid customs duty of Rs. 278.00 on c.k.d. packs per tractor on demand by the Customs authorities. As tractors and tractor components which go into the tractors, used for agricultural purposes, enjoy exemption from payment of customs duty, this element of cost has not been taken into account in fixing the selling price... You may like to take up the matter with the Customs

authorities and claim refund of the customs duty paid by you on the c.k.d. components...."

In these circumstances, Mr. Chagla is right when he says that even assuming for the sake of argument, that the Company's case does not fall within the exemption Notification of 1960, it squarely falls within the exemption Notification of 1963. The result is that the duty recovered by the Department from the Company is without authority of law.

9. But then Mr. Pochkhanawalla, the learned Counsel appearing on behalf of the respondents, says that the Company is barred from claiming exemption under the 1963 Notification because it did so for the first time in 1973 when the earlier writ petition was filed. This contention suffers from an inherent fallacy. Surely there can be no limitation for raising a contention. In the instant case the stand of the Department was that the Company was not entitled to the benefit of the 1960 Notification for certain reasons, to which the retort of the Company in the earlier petition was, and in the present petition is, that if such be the Department's stand, the Company is in any event entitled to the benefit of the 1963 Notification. This is an alternative plea-taken by the Company which it certainly was entitled to do.

10. Mr. Pochkhanawalla urged that the 1963 Notification does not apply to the Company because, (a) the Notification applies only to importers of tractors for agricultural use, (b) the Notification applies only to importers who themselves are agriculturist because provision is made for execution of a bond, and (c) the Notification was introduced to help agriculturist who themselves imported tractors for their own use. Limb (a) of Mr. Pochkhanawalla's contention proceeds from a misconstruction of the 1963 Notification which pertains to the importation of parts of tractors used solely for agricultural purposes. Coming to limbs (b) and (c), ingenuity of learned Counsel (refreshing thought it be) cannot be a substitute for the plain reading of the Notification or for facts within the peculiar knowledge of the respondents themselves and which they have wisely refrained from stating on affidavit either in the present or the earlier petition. This reticence cannot be attributed either to innocence or error, for to countenance either of the ipse dixits assailed across the Bar, would be to do injury to the tone, tenor and language of the 1963 Notification itself. Mr. Pochkhanawalla's reliance on the observations of the Gujarat High Court in *Suhrid Geigy Ltd. v. Union of India* (1980) E.L.T. 759 is equally misplaced. In that case it was observed that it is open to the Court to discern the object of the Notification from the pleadings or from the Notification itself, even if such object discernible from the Notification was not pleaded. Nothing of the kind suggested by Mr. Pochkhanawalla is discernible either from the pleadings or from the plain and natural reading of the 1963 Notification. It is true that in the 1963 Notification there is a provision for execution of a bond. But then, so is it even in the 1960 Notification. There was also no question of the Company executing any bond, for duty has been paid and it is that very duty which the Company seeks to recover as having been collected

contrary to the 1963 Notification and without authority of law. For that matter even the Assistant Collector has in his impugned order, stated that an end-use affidavit would serve the purpose. Such affidavits have admittedly been filed by the Company with the Department.

11. Mr. Pochkhanawalla next urged that under the Public Notice dated 30th May 1968 issued by the Collector, exemption would be attracted only if component parts were imported with the tractors and as the company did not import the lifts and 3-point linkages with the tractors, it would not be entitled to the benefit of the exemption. Apart from the fact that this too is a contention now assailed for the first time in arguments across the Bar, it is a total misreading of the Public Notice which brings to the forefront that it is only if the component parts are imported as spares that duty would be attracted. It has never been the Department's case that the company imported the component parts, viz. hydraulic lifts and 3-point linkages as spares. The association of the component parts with tractors in the Public Notice, is on its plain reading intended to make a distinction from the components being imported as spares and hence assessable to duty. Assuming Mr. Pochkhanawalla is correct in his submission, what is important is that the Public Notice issued by the Collector cannot override or add conditions not stated in the 1963 Notification issued by Government of India and which unlike the Public Notice, has the force and authority of law. There is nothing in the 1963 Notification to suggest that the components had to be imported with the tractors, in order to attract exemption of customs duty. I agree with Mr. Pochkhanawalla when he says that the 1963 Notification must be read in the language in which it has been framed, without meanings or omissions being imputed to it. It is this very principle I invoke in repelling Mr. Pochkhanawalla's contentions with regard to the 1963 Notification.

12. These were the only grounds urged by the respondent's learned Counsel.

13. In these circumstances, the duty that was recovered by the Department was without authority of law. To recall the observations of the Supreme Court in Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others, ,

"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 wrongly recovered to whom it belongs."

Restitution must be made.

14. Not satisfied, Mr. Chagla like Oliver Twist asks for more. He asks for interest. Painting a picture of the Company driven from pillar to post in search of redress, he relied on two decisions of the Gujarat High Court in Vijay Textile v. Union of India (1979) E.L.T. (J181) and Jyoti Ltd. v. Union of India (1979) E.L.T. (J546) where interest at 12% was awarded against the department. However, with typical fairness, he also brought to my notice a decision of the Division Bench of this court in Oudh Sugar Mills Ltd. v. Union of India (1980) E.L.T. 327, where it

was held that awarding interest must depend on the facts and circumstances of the case. In the facts and circumstances of the present case, I think the ends of justice would be met if the Department is ordered to simply refund the amount of duty collected from the Company without authority of law.

15. In the result, the impugned orders are set aside. The respondents shall refund the amount of Rs. 12,17,537.17 within 12 weeks from today. There will be no order as to costs.

Finally I acknowledge the ability with which Mr. Pochkhanawalla conducted the case on behalf of the respondents and the lucidity with which he advanced his arguments.