

(1987) 06 CAL CK 0015
In the Calcutta High Court
Case No : Matter No. 2032 of 1986

Neeraj Newspapers Association (P) Ltd.	APPELLANT
Vs	
Assistant Collector of Customs, Air Cargo Complex (Import) and Others	RESPONDENT

Date of Decision : 09-06-1987

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 128, 129B, 129C(6), 129E, 25
Customs Tariff Act, 1975 — Section 255(5)
Income Tax Act, 1961 — Section 220(6), 241, 254, 254(1), 255(5)

Citation : (1988) 15 ECC 343 : (1987) 13 ECR 229 : (1988) 33 ELT 89

Hon'ble Judges : A.K. Sengupta, J

Bench : Single Bench

Advocate : R.N. Bajoria, for the Appellant; Roy Chowdhury, for the Respondent

Judgement

A.K. Sengupta, J.—This application under Article 226 of the Constitution is directed against the failure on the part of the respondents to give effect to the order dated 15th May, 1985 passed by the Collector of Customs (Appeals) and consequent withholding of the refund amounting to Rs. 6,04,733.47 P. The petitioner has also claimed interest as the said sum was not refunded by the respondents.

2. The facts are in a narrow compass. The petitioner carries on business, inter alia, as Publishers and Printers. The petitioner publishes the daily news paper "The Pataliputra Times" from Patna. It owns a Press. Under the Import Policy of the Government of India for the year 1983-84, printing machinery including Photo-Composing/Type-setting Machines and Systems and ancillaries thereof such as Key Boards are importable under the Open General Licence Scheme under Appendix 2 of the said import policy.

3. Customs duty was leviable on such Photo-Composing/Type-Setting Machines and ancillaries thereof including Display Screen, Type-Setting Unit and Key Board

as and at the rates prescribed therefore, at the relevant time, under Heading No. 84.34 of the First Schedule to the Customs Tariff Act, 1975 (hereinafter referred to as "the said Act") read with Notification Nos. 114/80-Cus. and 110/84-Cus. both issued by the Central Government in exercise of powers conferred upon it by Section 25 of the Customs Act, 1962.

4. The petitioner in or about March 1984 entered into a contract with one Messrs International Incorporated, U.S.A. for import of 2 Photo-Composing Machines equipped with Display, Screens, English/Devnagri Key-Board, Type-Setting Unit, with standard equipment and 4 VDI Offline Key Boards c.i.f. Calcutta.

5. Thereupon the petitioner duly opened an irrevocable letter of credit in favour of the foreign seller, whereupon the foreign seller air freighted the aforesaid goods, c.i.f. Calcutta. Upon the arrival of the said goods at the Airport in Calcutta, the petitioner in or about August/ September, 1984 filed Bill of Entry for home consumption before respondent No. 1, Assistant Collector of Customs, Air Cargo Complex (Import). In the said Bill of Entry the petitioner classified the aforesaid goods as falling under the Heading No. 84.34 of the First Schedule to the said Act and claimed benefit of the Exemption Notification Nos. 114/80-Cus. and 110/84-Cus. in respect of payment of duty therefore.

6. However by an order dated February 8, 1985 the respondent No. 1 classified the 4 VDI Offline Key Boards in the aforesaid consignment (hereinafter referred to as "the said goods") as allegedly falling under Tariff Heading No. 84.51/55(2) of the First Schedule to the said Act and thus denied the benefit of the said Exemption Notification Nos. 114/80-Cus. and 110/84-Cus. By the said order the respondent No. 1 assessed and demanded from the petitioner an additional sum of Rs. 6,04,733.47 P. in respect of the said goods as alleged additional Customs duties thereof.

7. As the petitioner was in urgent need of the said goods and as already more than 7 months had elapsed since the said goods had arrived at the Calcutta Airport and were incurring warehouse charges, the petitioner had no option but to make payment of the said additional sum of Rs. 6,04,733.46 P along with the admitted duties of Customs payable in respect of the said goods and obtained clearance thereof.

8. Being aggrieved by the said order dated February 8, 1985 passed by the said Assistant Collector the petitioner preferred an appeal u/s 128 of the Customs Act, 1962 before the Collector of Customs (Appeals) Calcutta.

9. By an order dated May 15, 1985 the Collector of Customs (Appeals) Calcutta (hereinafter referred to as "the said Collector") accepted the contentions of the petitioners and allowed its appeal against the said purported order dated February 8, 1985 passed by the respondent No. 1. The said Collector set aside the said order dated February 8, 1985 passed by the respondent No. 1 and directed that consequential benefit, subject to verification with the original records, should be granted to the petitioner.

10. Immediately upon receipt of the said order dated May 15, 1985 passed by the said Collector the petitioner on or about July 8, 1985 filed an application before the respondent No. 1 for refund of the said extra sum of Rs. 6,04,733.47 P. realised from the petitioner and which had become refundable to the petitioner in terms of the said order dated May 15, 1985 passed by the said Collector.

11. In the meantime the petitioner came to know from the Customs, Excise and Gold Control (Appellate) Tribunal, New Delhi that an appeal being Civil Appeal No. 1482 of 1985-B-2 had been filed by the respondent No. 1 before the said Tribunal against the said order dated May 15, 1985 passed by the said Collector. In or about March 1986 the petitioner duly filed its opposition to the said appeal petition before the Tribunal.

12. Although the said appeal was filed before the Tribunal against the said order dated May 15, 1985 passed by the said Collector, no stay of the operation of the said order dated May 15, 1985 passed by the said Appellate Collector has been granted by the Tribunal.

13. Under the aforesaid circumstances the petitioner has asked for refund of the said sum of Rs. 6,04,733.47 P. with interest.

14. An affidavit has been filed on behalf of the respondents. The grounds taken are as follows :

(a) The writ lies solely for the reliefs claimed in the writ application. The Courts in India have categorically laid down that an application claiming only refund is not maintainable under the writ jurisdiction.

(b) That the proceedings relating to the purported refund is pending before the Appellate Tribunal and only that Tribunal is the proper authority to consider the question of refund. This Hon"ble Court has always refused to consider the question of refund in such circumstances as the jurisdiction as that of the Tribunal.

(c) The Customs Authorities have already preferred the Appeal before the Appellate Tribunal under the Customs Act, 1962 and the same is pending before it. The said Act does not require that the Customs authorities should refund the money in the interim period or should give any security during the said period. The same principle is also laid down under the CPC and that is the general principle of law. The petitioner's claim claiming refund as an interim relief is wholly contrary to the said law and principle.

(d) The Order of the Appellate Collector of Customs and/or the Collector of Customs (Appeal) is not final under the Customs Act, 1962, as there is an appeal therefrom to the Appellate Tribunal. Moreover, the Customs Act, 1962 has only made the order of the Appellate Tribunal as final so far as the statutory adjudication is concerned. In the circumstances, the petitioner cannot now enforce the order of the Appellate Collector, Customs and/or the Collector of Customs (Appeal) since the Appeal before the Tribunal is pending.

15. Mr. Roychowdhury Learned Counsel appearing on behalf of the respondents has submitted that it is no doubt true that under the order dated 15th May, 1985 passed by the Collector of Customs (Appeal) the petitioner is entitled to refund but in view of the fact that the matter is pending before the Tribunal, the order has not become final and accordingly at this stage no refund can be issued. Further, if refund is issued, the revenue will be prejudiced if ultimately the appeal succeeds. He has also submitted that there is no specific provision which entitles the assessee to claim refund immediately after the order of the Appellate Collector is passed allowing refund to the assessee. The main contention is that it is only after the dispose of the appeal by the Appellate Tribunal the question of grant of any refund to the petitioner would arise. He has also reiterated the grounds taken in the affidavit-in-opposition.

16. On the other hand, it is contended by Mr. R.N. Bajoria, Learned Counsel appearing for the petitioner that the petitioner is entitled to refund as the order dated 15th May, 1985 has not been stayed by the Tribunal. Mere filing of appeal cannot prevent the petitioner from getting the refund nor does the filing of the appeal operate as stay. He has submitted that there is no provision which entitles the respondents not to give effect to the order of the Appellate Collector, simply because the appeal is pending against such order. He has also submitted that the grounds taken in the affidavit have no substance at all.

17. I have considered the rival contentions. It is now well settled that if any amount is collected illegally and without authority of law, the Writ Court can direct the refund of the amount so collected. In this case the Appellate Collector held that no duty can be levied on the subject goods. Accordingly the collection of duty on the said goods was unauthorised. The petitioner was, therefore, entitled to the refund and since the refund has been withheld, without there being any order of the Competent Court or Tribunal staying the operation of the order allowing refund, the petitioner has moved this Court under Article 226 of the Constitution of India. In my view this application is maintainable.

18. The contention that the Tribunal is the proper authority to consider the question of refund and the High Court cannot consider the question of refund cannot be accepted on the facts of this case. In this case the appellants authority has already directed that consequential benefits should be granted to the petitioner i.e. to say that the petitioner would be entitled to the refund of the duty paid on the subject goods. The legality of the order of the Appellate Collector is not an issue in this writ application. The only question which calls for consideration is whether the petitioner is entitled to get the refund during the pendency of the appeal preferred by the department against the order of the Appellate Collector.

19. There is no specific provision in the Customs Act which authorises the Customs authority to withhold the refund during the pendency of appeal before Tribunal. Under the Income Tax Act, 1961 a specific provision has been made u/s 241 giving power to the authorities to withhold refund, where an order giving

rise to a refund is the subject matter of appeal or further proceeding or where any other proceeding under that Act is pending, if the grant of the refund is likely to adversely affect the revenue. Such refund can be withheld till such time as the Commissioner may determine. Since in the Customs Act there is no such specific provision, the Customs authorities cannot withhold the refund due to the assessee on the ground that a proceeding is pending before the Tribunal.

20. Although the Customs authorities cannot withhold the refund in absence of any specific provision to that effect, the question is when an appeal is pending before the Tribunal, whether the Tribunal can grant stay of the order passed by the Appellate Collector and as a consequence thereof direct withholding of the refund.

21. The Supreme Court in the case of Income Tax Officer Vs. M.K. Mohammed Kunhi, was considering the question whether the Income Tax Appellate Tribunal has the power to stay recovery or realisation of the penalty imposed by the Departmental authorities on an assessee during the pendency of appeal before it. There the Supreme Court held that there can be no manner of doubt that by the provisions of the Act or the Rules powers have not been expressly conferred upon the Appellate Tribunal to stay proceeding relating to the recovery of penalty or tax due from an assessee. The Supreme Court held as follows :

"The right of appeal is a substantive right and the questions of fact and law are at large and are open to review by the Appellate Tribunal. Indeed, the Tribunal had been given very wide powers u/s 254(1), for it may pass such orders as it thinks fit after giving full hearing to both the parties to the appeal. If the Income Tax Officer and the Appellate Assistant Commissioner have made assessments or imposed penalties raising very large demands and if the Appellate Tribunal is entirely helpless in the matter of stay of recovery, the entire purpose of the appeal can be defeated if ultimately the orders of the departmental authorities are set aside. It is difficult to conceive that the legislature should have left the entire matter to the administrative authorities to make such orders as they choose to pass in exercise of unfettered discretion. The assessee, as has been pointed out before has no right to even move an application when an appeal is pending before the Appellate Tribunal u/s 220(6) and it is only at the earlier stage of appeal before the Appellate Assistant Commissioner that the statute provides for such a matter being dealt with by the Income Tax Officer. It is a firmly established rule that an express grant of statutory power carries with it by necessary implication the authority to use all reasonable means to make such grant effective. The powers which have been conferred by Section 254 on the Appellate Tribunal with widest possible amplitude must carry with them by necessary implication all powers and duties incidental and necessary to make the exercise of those powers fully effective.

It is well-known that the Income Tax Appellate Tribunal is not a Court but it exercises judicial powers. The Tribunal's powers in dealing with appeals are of the widest amplitude and have in some cases been held similar to and identical

with the powers of an Appellate Court under the Civil Procedure Code."

22. In *Polini v. Gray* (12 Ch.D. 438) this is what Jessel M.R. said about the powers of the Court of Appeal to grant stay at page 443 :

"It appears to me on principle that the Court ought to possess that jurisdiction, because the principle which underlies all orders for the preservation of property pending litigation is thus, that the successful party in the litigation, that is, the ultimately successful party, is to reap the fruits of that litigation, and not obtain merely a bar on success. That principle, as it appears to me, applies as such to the Court of first instance before the first trial, and to the Court of Appeal before the second trial, as to the Court of last instance before the hearing of the final appeal."

"Section 255(5) of the Act does empower the Appellate Tribunal to regulate its own procedure, but it is very doubtful if the power of stay can be spelt out from that provision. In our opinion the Appellate Tribunal must be held to have the power to grant stay as incidental or ancillary to its appellate jurisdiction. This is particularly so when Section 220(6) deals expressly with a situation when an appeal is pending before the Appellate Assistant Commissioner, but the Act is silent in that behalf when an appeal is pending before the Appellate Tribunal. It could well be said that when Section 254 confers appellate jurisdiction it impliedly grants the power of doing all such acts or employing such means as are essentially necessary to its execution and that the statutory power carries with it the duty in proper cases to make such orders for staying proceeding as will prevent the appeal if successful from being rendered nugatory."

23. Sections 129B and 129C(6) of the Customs Act, 1962 are similar to Sections 254(1) and 255(5) of the Income Tax Act, 1961 which were considered by the Supreme Court in the said decision.

24. Section 129E of the Customs Act provides that where in an appeal under the Customs Act, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of the Customs authority or any penalty levied under the Customs Act, person desirous of appealing against such decision or order, shall pending the appeal, deposit with the proper officer duty demanded or penalty levied. But the Tribunal may dispense with such deposit subject to such condition as it may deem fit to impose so as to safeguard the interest of revenue. In other words, the Tribunal has been given specific power by the Customs Act only to dispense with payment of duty or penalty. Implication of this provision is that in the event the Tribunal dispenses with the deposit of the penalty or duty, this will operate as stay of the recovery of penalty or duty being the subject matter of the appeal. Similar provision has not been made where the Collector of Customs prefers an appeal against an order passed by any authority under the Customs Act.

25. Under the Income Tax Act the Tribunal has the power to stay realisation of the disputed demand or penalty till the disposal of the appeal pending before it,

without there being any specific provision to that effect. Under the Customs Act, as indicated earlier, the Appellate Tribunal can dispense with the payment of the disputed duty or penalty till the disposal of the appeal pending before it. The same principle will apply when an appeal is preferred by the department and an application is made for stay of the operation of the order appealed from. Where the department is appellant and makes an application for stay of the operation of the order appealed from, the Tribunal has to consider such application in the light of surrounding facts and circumstances. The power of the Tribunal to stay the operation of the order appealed from whether the appellant is the assessee or the Department is discretionary. But that is a judicial discretion which has to be exercised on objective facts and upon consideration of matters relevant to the exercise of such discretion. The power of stay by the Tribunal cannot be exercised in a routine way or as a matter of course in view of the "special nature of taxation" and revenue laws. The Supreme Court in *M.K. Mohammed Kunhi* (supra) held as follows :

"It will only be when a strong prima facie case is made out that the Tribunal will consider whether to stay the recovery proceedings and on what conditions, and the stay will be granted in most deserving and appropriate cases where the Tribunal is satisfied that the entire purpose of the appeal will be frustrated or rendered nugatory by allowing the recovery proceedings to continue during the pendency of the appeal."

26. In this case the appeal was filed by the Department long time ago i.e. sometimes in March- 1986. Since then no application was filed by the revenue before the Tribunal for stay of the operation of the order of the Appellate Collector allowing the refund. The contention of the revenue that because an appeal is pending the order appealed from has lost finality and therefore no refund can be issued, cannot be accepted. Mere filing of an appeal cannot operate as stay of the order appealed from. If this contention is accepted the revenue will suffer more than the assessee. If the assessee cannot claim refund during the pendency of the appeal without there being any stay from the Appellate Tribunal, the revenue cannot also on the same principle oppose any application of the assessee for stay of the realisation of the demand disputed in appeal. In my view the contention raised on behalf of the revenue has no substance. An assessee is entitled to the refund on the basis of the order of the Appellate Collector, unless such order is stayed by the Appellate Tribunal. Admittedly in this case there is no stay nor was any stay asked for by the revenue. The respondents acted illegally in withholding the refund on the sole ground that an appeal has been preferred by the department against such order and the appeal is pending. I am, therefore, of the view that the petitioner shall be allowed the refund on the basis of the order of the Appellate Collector as no stay has been obtained by the revenue.

27. The other contention which has been raised is as regards payment of interest. There is no specific provision under the Customs Act unlike the Income

Tax Act for payment of interest on the delayed refund. But where the refund is due to the petitioner which has been illegally withheld, the assessee is entitled to interest as he was deprived of the use of the money. Interest is the compensation for the loss a person suffer because of deprivation of the money which he is otherwise entitled to have. In the case of Calcutta Paper Mills Manufacturing Co. v. Customs, Excise and Gold (Control) Appellate Tribunal referred in (1987) 11 ECC 191, I held that where the collection made by the respondents is unauthorised, interest has to be paid on the refund. Interest is the return or compensation for the use or retention of another's money. Since the respondents have retained and enjoyed the benefit of such money so long, they have to pay interest.

28. I am, therefore, of the view that the petitioner shall be entitled to interest on the refund from the date of the order of the Appellate Collector till the date of payment.

29. For the reasons aforesaid this application is allowed. The petitioner shall be granted the refund as may be due on the basis of the order of the Collector of Customs (Appeal) dated 15th May, 1985 with interest @ 12% per annum from the date of that order till the date of payment. The refund shall be allowed within six weeks from the date of communication of the operative part of this judgment and order. The petitioner however shall furnish a bond incorporating an undertaking to the effect that in the event the appeal is allowed by the Tribunal, the petitioner shall refund the entire sum inclusive of interest which shall be paid to the petitioner in terms of this orders

"Let a signed copy of the operative part of this judgment be handed over to the advocate for the petitioner upon his undertaking to apply for and obtain the certified copy of the judgment and the order."