

(1964) 12 CAL CK 0027
In the Calcutta High Court
Case No : Matter No. 76 of 1962

Ratanlal Singhanian and Others

APPELLANT

Vs

M.M. Sethi and Others

RESPONDENT

Date of Decision : 09-12-1964

Acts Referred:

Constitution of India, 1950 — Article 226
Sea Customs Act, 1878 — Section 189, 39

Citation : AIR 1965 Cal 428 : 69 CWN 328

Hon'ble Judges : D.N. Sinha, J

Bench : Single Bench

Final Decision : Allowed

Judgement

D.N. Sinha, J.—The facts in this case are briefly as follows : The petitioners carry on business in Calcutta under the name and style of "Mahadaya Premchandra". The said firm was granted a licence by the Government of India in 1958 for the importation of cotton fabrics etc., from the soft currency areas including Japan. Under the said licence, the petitioners imported from Japan about 6800 yards Black Cotton Umbrella cloth 888 (Synthetic waterproof fabric) to Calcutta. The goods arrived per s. s. "Eastern Muse" on or about 26th June, 1959. They had the manufacturer's certificate stating that the goods were synthetic waterproof fabrics. On or about the 26th June, 1959 the petitioners made over the shipping documents to their clearing agents M/s. Mitra Shipping Agency, for clearing the goods. On the same day, the clearing agents filed the bill of entry for consumption, together with the bill of lading, bill of exchange, invoice and other necessary shipping documents, for clearance of the said goods on behalf of the petitioners. Even before the petitioners placed their order for the importation of the said goods, they had taken the precaution of writing through their clearing agents to the Public Relation Officer of the respondents, enquiring if the total duty leviable on synthetic waterproof fabrics was only 65 per cent and no excise duty was leviable. On 15th September, 1958 the Public Relation Officer informed them that if it could be established at the time of passing the bill of entry or at

the time of import that the umbrella cloth was actually synthetic waterproof fabric, then the goods were exempt from levy of excise duty. When the clearing agents filed the said bill of entry, the Appraiser in the Appraisement Department of the Customs House, Calcutta, stated that he could not pass the goods on payment of 65 per cent duty, unless they were tested and found to be synthetic waterproof cotton fabrics. Thereupon, as the goods were required for the manufacture of umbrellas during the monsoon seasons and delay would have been fatal, the petitioners paid 100 per cent duty, pending the testing of the samples, and cleared the goods. Thus, a sum of Rs. 9,743.65 nP. was paid in place of Rs. 6,333.37 nP. payable at the rate of 65 per cent ad valorem. On the 12th September, 1959 the petitioners through their clearing agents demanded a refund of the balance sum of Rs. 3410.28 nP. In spite of repeated demands and after great delay, the Assistant Collector of Customs issued a refund order dated 26th May, 1960 in favour of the petitioners for Rs. 3410.28 nP. By notification dated 30th July, 1960 the Government of India, Ministry of Finance (Department of Revenue), in exercise of powers conferred by Sub-rule (1) of Rule 8 of the Central Excise Rules of 1944, introduced an amendment in the earlier notification dated 5th January 1957 whereby rubberised or synthetic water-proof cotton fabrics had been exempted from excise duty. In other words, the exemption was withdrawn. On the 26th August, 1960 the Assistant Collector of Customs for appraisement, purporting to act u/s 39 of the Sea Customs Act 1878 demanded from the petitioners, payment back of the said refunded sum of Rs. 3410.28 nP. The letter of demand a copy whereof is Ex. C to the petition is in the following terms :--

"Whereas it appears that Customs duty amounting to Rs. 3410.28 (Rupees Three thousand four hundred ten and twenty eight pms) which was erroneously refunded in respect of the above consignment is due from you as indicated below:--Demand issued due to wrong assessment.

I demand u/s 39 of the Sea Customs Act, 1878 (VIII of 1878) that the said amount be paid within 15 days from the date of this demand. Any representation oral or in writing against the demand with necessary documentary evidence about the correctness of your stand should be made within the period aforesaid otherwise it will be presumed that you have admitted the correctness of the demand."

2. On the 10th September, 1960 the petitioners in their said firm wrote to the Assistant Collector of Customs denying that the refund was erroneously made. They asked for the grounds for holding that it had been so made. On the 4th November, 1960 the petitioners were informed by the Public Relation Officer that according to the Finance Bill 1960, Government of India, consignment of cotton umbrella cloth and synthetic waterproof fabrics under Items 48(3) and 48(9) of I. C. T. are assessable to duty at the rate of 65 per cent + 37nP. per sq. yd. + 13 nP. per sq. yd. + 3 pies per sq. yd. It has been admitted before me that the reference was to the Finance Act 1960 and that it has no application to the facts

of this case, not being retrospective in operation. The same statement was repeated on the 11th November 1960 by the Assistant Collector of Customs, although no reference was made to the Finance Act 1960. On the 23rd December, 1960 the petitioners asked for a copy of the test results. On the 19th April, 1961 the Assistant Collector of Customs sent the petitioners the following letter of demand :--

"A demand letter u/s 39 of the Sea Customs Act for duty amounting to Rs. 3410.28 nP. was issued in respect of the above consignment. The demand is now confirmed and will be enforced in due course if you fail to fulfil the obligations in terms of the Less Charge.

An appeal against this decision lies to the Collector within three months hereof."

3. On the 3rd July, 1961 the petitioners preferred an appeal to the Collector of Customs. On the 7th September 1961 the petitioners were informed by the Assistant Collector of Customs that unless extra duty of Rs. 3410.28 nP. was paid, the appeal could not be entertained. On the 27th December 1961 steps were taken against the petitioners u/s 39; notifying that all goods belonging to them and passing through the Calcutta Customs House should be detained, until the sum demanded had been paid. Thereafter, the petitioners applied to this court and this rule was issued on the 23rd March, 1962. Since, then, the appeal preferred to the Collector of Customs had been withdrawn.

4. The first point agitated before me is the point of limitation. This arises u/s 39 of the Sea Customs Act, 1878, the relevant provision whereof runs as follows:

"39 (1) When customs-duties or charges have not been levied or have been short-levied through inadvertence, error, collusion or misconstruction on the part of the officers of Customs, or through misstatement as to real value, quantity or description on the part of the owner,

or when any such duty or charge, after having been levied, has been, owing to any such cause, erroneously refunded,

the person chargeable with the duty or charge which has not been levied or which has been so short-levied, or to whom lunch refund has erroneously been made, shall pay the duty or charge or the deficiency or repay the amount paid to him in excess, on a notice of demand being issued to him within three months from the relevant date as defined in Sub-section (2),

(2) (d) in a case where the duty or charge has been erroneously refunded, the date of refund;...."

5. It is argued that the refund order is dated 26th May, 1960 and the date of demand is 19th April, 1961, which is beyond three months mentioned in Section 39. In my opinion, there is no substance in this argument. The order of refund was made on the 26th May, 1960 but the actual payment was made on the 1st July, 1960 and the letter of demand for repayment of the sum is dated 26th

August, 1960 and is well within the period of limitation. It is argued that the letter of the Assistant Collector of Customs, dated 26th August, 1960 cannot be treated as a demand in terms of Section 39 because it called for a representation against the demand and the final order, dated 19th April, 1961 when after hearing such representation the demand was confirmed, should be treated as the demand. It is pointed out that in the letter, dated 19th April, 1961 containing the said order of confirmation, it is stated that an appeal against the said decision lay to the Collector of Customs within "three months hereof. I am unable to accept this argument. Section 39 requires a notice of demand to be issued, it does not contain any provision for representation being made. The opportunity for preferring representation was obviously given to comply with the rules of natural justice. That, however, did not make the demand, dated 26th August 1960 any the less a demand u/s 39. The said letter specifically contains the expression--"I demand u/s 39 of the Sea Customs Act, 1878..." This is a sufficient compliance with Section 39. Coming now to the merits of the case, Mr. Kar has abandoned the case made out in the letter of the Public Relation Officer that the amount demanded is payable by virtue of the Finance Act, 1960. The Finance Act, 1960 is not retrospective and cannot be applied to the facts of this case. The question is as to what is the amount of the customs duty payable under L. C. T. If we take the Indian Customs Tariff (47th issue) as in operation on the 31st December 1959, we find as follows: Item No. 48 (3) at page 88 of the First Schedule (Import Tariff) is the item which is relevant. The relevant part runs as follows :--

Item No. Name of article Standard rate of duty

48(8) Cotton fabrics not otherwise specified containing more than 90 per cent of cotton

... ..

(a) Cotton piece goods and fabrics not otherwise specified

(i)

(ii) not of British manufacture. 100 per cent ad valorem.

6. If the matter stood there, then the customs duty would be 100 per cent ad valorem. There is, however, a note appended to Item 48 (3), which appears at page 89 of the I. C. T. The note is as follows:

"(1) Under Government of India, Ministry of Finance (Department of Revenue), Notification No. 305-Customs, dated the 14th December, 1957, articles specified in column 1 of the Schedule noted below are exempt from the payment of so much of the Customs duty leviable thereon as is in excess of the total amount specified in column 2 against each of the articles.

" The relevant part of the Schedule is as follows :--

SCHEDULE

Name of Article. Amount of duty.

Name of Article. Cotton fabrics, not otherwise specified, containing more than 90 per cent. of cotton

(a)

Cotton piece goods and fabrics not otherwise Specified

(i)

(ii) not of British manufacture

The excise duty for the time being leviable on cotton fabrics if produced or manufactured in India, and where such duty is leviable at different rates, the highest duty, plus 65 per cent ad valorem

7. In the present case, the excise duty is leviable at different rates. Therefore, the exemption would be of any amount payable as excise duty plus 65 per cent ad valorem, considering the goods as if it were cotton fabrics manufactured in India. This leads us to the consideration of what the excise duty was on the goods in question, if it was cotton fabrics manufactured in India. For that we have to go to a chart set out at pages 212 and 213 of the I. C. T. This chart shows the excise duty leviable under the Central Excises and Salt Act, 1944, on certain articles produced or manufactured in India. The highest excise duty leviable on cotton fabrics superfine synthetic waterproof, is 6 annas plus an additional duty of 13 nP. per sq. yd. and in addition thereto an additional duty of excise under the "Khadi ami other Handloom Industries Development (Additional Excise Duty on Cloth) Act, 1953" read with Section 28 of the Finance Act of 1955, at the rate of 3 pies per sq. yd. There is, however, a note at the bottom of the said chart at page 213 which runs as follows :--

"Under Government of India, Ministry of Finance (Department of Revenue), Notification No. CER-8 (28)/56--Central Excises, dated the 5th January, 1957, as subsequently amended by Notifications No. 46/57--Central Excises, dated the 25th May, 1957, No. 79/58--Central Excises, dated the 12th July, 1958, and No. 2/59--Central Excises, dated the 17th January, 1959, cotton fabrics described below are exempt from the payment of the excise duty leviable thereon under the Central Excises and Salt Act, 1944, namely :--

1.....

2.....

3.....

4. Rubberised or synthetic waterproof fabrics, whether single textured or doable-textureal."

8. This exemption is granted by virtue of Rule 8 of the Central Excise Rules. 1944 which runs as follows :--

"8. Power to authorise exemption from duty in special case.--(1) The Central Government may from time to time, by notification in the official Gazette, exempt subject to such conditions as may be specified in the notification any excisable goods from the whole or any part of the duty leviable on such goods.

2. The Central Board (sic) may by special order in each case exemption the payment of duty, under circumstances of an exceptional nature, any excisable goods ".

9. Reading all these provisions in the I. C. T. together, the position is as follows; Cotton fabrics not of British manufacture would be normally charged to duty at the rate of 100 per cent ad valorem. As a result of the notification No. 305--Customs, dated 14-12-1957 the amount of duty would be the highest excise duty plus 65 per cent ad valorem. The highest excise duty would be 6 annas plus an additional duty of 13 nP, per sq. yd. plus 3 pies per sq. yd. The whole of this is exempted under Notification No. CER-(12)-56--Central Excises, dated 5-1-57 as amended by Notification No. 46-57--Central Excises, dated 25-5-57, No. 79/58--Central Excises, dated 12-7-58 and No. 2/59--Central Excises, dated 17-1-59. Actually, the only relevant notification is the first one of 5-1-57. This notification completely exempts rubberised or synthetic waterproof fabrics, whether single-textured or double-textured from all excise duties provided they are manufactured in India. I have already stated that the amount of excise duty is to be calculated as if the goods were cotton fabric produced in India. Upon a plain reading of these items, together with the notes, it is absolutely clear that the amount of duty is 65 per cent ad valorem. Mr. Kar has not argued that these provisions are not there in the I. C. T. Schedule. He, however, has advanced the following arguments: The first argument is that the exemption is from the "levy" of excise duty and not payment. I am unable to appreciate this argument. The note at page 213 clearly says that the cotton fabrics described therein "are exempt from payment of excise duty leviable thereon, under the Central Excise and Salt Act, 1944" Therefore, it is a distinction without a difference. First of all, we have to find out what is the duty leviable and the exemption is from the payment of duty so leviable. Mr. Kar points out that at page 89 the exemption is stated to be "from the payment of so much of the customs duty leviable thereon." Whereas at page 213 it says--"exempt from the payment of excise duty leviable thereon." Mr. Kar seeks to argue that they are not the same thing. In other words, at page 212 we find that the exemption is not from the levy but from payment and at page 89 under the heading "amount of duty", reference is made to "excise duty for the time being leviable," Mr. Kar argues that inasmuch as at page 213, the exemption is not from the levy, but from the payment, it does not help the petitioners. In order to answer this point, Mr. Roy has referred me to the original Notification No. CER-8 (28)/58, Central Excises, dated 5-1-57. The relevant part thereof is as follows :--

"S. R. O. 21-CER-8 (28)/56, dated 5th January, 1957. In exercise of the powers conferred by Sub-rule (i) of Rule 8 of the Central Excise Rules, 1944,the

Central Government hereby exempts the cotton fabrics described below from the whole of the duty leviable thereon under the Central Excises and Salt Act 1944 (I of 1944):--

(4) rubberised or synthetic waterproof fabrics, whether single-textured or double-textured:"

10. It is, therefore, clear that the note at page 213 is not strictly accurate, and the exemption is from the "levy" of duty. As I have stated above, it was not inappropriate to refer to the "payment" of the excise duty leviable. However, this is a complete answer to this particular objection put forward by Mr. Kar. The next point argued by him is that, even if the customs authorities have interpreted the Tariff Schedule erroneously, the Court cannot interfere. He has referred me to two decisions of the Supreme Court which I shall now consider. The first decision is *A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhwani and Another*, . In that case, the facts were as follows. The appellant imported certain fountain pens from Australia. These pens had nibs which were gold plated and also caps and clips of similar composition. Under item 45 (3) of the I. T. C., 1934 under the heading "Fountain pens complete" the rate of duty was 30 per cent ad valorem. The customs authorities, however, considered that the consignment fell within the description "articles plated with gold or silver" being item 61 (8), on which duty was leviable at 78 3/4 per cent. The Assistant Collector of Customs adjudicated the duty accordingly and upon appeal the Collector of Customs confirmed it. There was a further revision to the Central Government but no revision was filed. The aggrieved person made an application to the High Court of Bombay under Article 226 of the Constitution. Tcndolkar J. held that the matter came under item 45 (3) and the decision of the customs authority was unreasonable or perverse. The Collector of Customs filed an appeal which was dismissed. In the Supreme Court, Ayyangar, J., said as follows :--

"The question that we have now to consider is, has the discretion which undoubtedly vested in the Court been so improperly exercised as to call for our interference with that order. We might premise this discussion by expressing our opinion on two matters merely to prevent any misunderstanding. First we entirely agree with Chagla, C. J., that the order of the Assistant Collector of Customs in assessing duty at 78 3/4 per cent or of the Collector of Customs in confirming the same, was not void for lack of jurisdiction. The interpretation they put on the relevant items in the Tariff Schedule might be erroneous, even grossly erroneous, but this error was one committed in the exercise of their jurisdiction and had not the effect of placing the resulting order beyond their jurisdiction....."

11. The learned Judge then proceeded to consider whether he should interfere with the decision of the High Court. He decided not to do so, and one of the main reasons for coming to this conclusion was that the Court cannot lose sight of the fact that the levy of the duty at 78 3/4 per cent was "manifestly erroneous and cannot be supported on any reasonable construction of the items in the Tariff Schedule." I do not see how this case helps Mr. Kar. It lays down the principle

that the customs authorities have the right and jurisdiction to make an assessment and find out under what item a particular article should be charged. But if the finding is manifestly erroneous and is not a reasonable interpretation, then the Court can interfere. This, in fact, is what the Supreme Court did. The next case cited is *The Collector of Customs, Madras Vs. K. Ganga Setty*, . In that case, the facts were as follows: The respondent imported from Australia a quantity of oats which was described as "standard feed-oats". The commodity imported consisted of oats in whole grain. The question raised related to the proper classification of the goods imported under the Import Trade Control Schedules current during the period--July to December, 1952. The controversy centred round tin; point, whether "feed-oats" fell within item 42 or within item 32 of the Schedule.

Item 42 ran as follows:--

"Fodder, bran and pollards--O. G. L.--Soft."

Item 32 ran as follows :--

""Grain, not otherwise specified including broken grain but excluding flour-

(a) oats

(b) others."

12. The Assistant Controller held that the goods imported fell under item 32. The importer contended that the goods fell under item 42. An application was made to the Madras High Court and the learned single Judge dismissed it on the ground that the order of the customs authorises classifying uncrushed feed-oats as grain and not as fodder could not be said to be either perverse or mala fide and that consequently the Court could not interfere with the decision of the authorities. An appeal was preferred to a Division Bench which allowed the appeal. It was the correctness of this order that was challenged before the Supreme Court. The Division Bench held that as regards the entry in the Tariff classification within which an imported commodity fell, the decision of the Customs authorities was not final, but open to judicial review, and had ultimately to be decided by the Court. It was held that the proper item of classification was item 42. Ayyangar. J., said as follows :--

"With very great respect to the learned Judges we are unable to agree with them both as regards the function and jurisdiction of the Court in matters of this type, as well as in their actual construction of the relevant entries in the Import Trade Circular. As regards the limits of the jurisdiction of the Court it is sufficient to refer to the decision in *A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhwani and Another*, . That was a case where a party moved the High Court under Article 226 of the Constitution, and not as here u/s 45 of the Specific Relief Act under which the power of the Court to interfere is certainly narrower and not wider. This Court proceeded on the basis that it is primarily for the Import Control authorities to determine the head or entry under

which any particular commodity fell; but that if in doing so, these authorities adopted a construction which no reasonable person could adopt, i.e., if the construction was perverse then it was a case in which the Court was competent to interfere. In other words, if there were two constructions which an entry could reasonably bear, and one of them which was in favour of Revenue was adopted, the Court has no jurisdiction to interfere merely because the other interpretation favourable to the subject appeals to the Court as the (sic)

13. The learned Judge also passed out that even on the facts, the High Court had gone wrong, because in the judgment it was mentioned that in item 32 the word "oats" was not mentioned, overlooking the fact that it was expressly mentioned under that item. The appeal was allowed. In my opinion, this also does not help Mr. Kar. The principle enunciated is by now well-established. If two constructions are reasonably possible, then the Court will not interfere simply because the customs authorities have adopted the one which is most beneficial to the Revenue. In the facts of the present case, I do not see how two interpretations are possible. I have already referred to the items and the exemption contained therein. It is not disputed that the items apply. The customs authorities could not come to the conclusion that the petitioners are not entitled to exemption upon a reasonable interpretation of the said items. The ground put forward by Mr. Kar namely, that the exemption is as to the "levy" and not to the "payment", is not borne out by the original notification itself which does grant exemption from the levy. Therefore, refusal by the customs authorities to grant exemption from excise duty is against all reasonable interpretation and must be held to be perverse. On the merits, therefore, the application should succeed. Mr. Kar, however, has taken certain (sic) points which I shall now deal with

14. The first point is that the writ Court will not entertain an application where there is an alternative legal remedy. In this case, the petitioners actually preferred an appeal. By his letter, dated 7th September, 1961 the Assistant Collector of Customs wrote to the petitioners stating that unless the extra duty of Rs. 3,410.28 nP. was paid by the petitioners the appeal could not be entertained. Thereafter, the petitioners have made this application. Mr. Kar relies on a Bench decision of this Court *Kamal Lal Sethi v. Collector of Land Customs, Calcutta* 60 Cal WN 1042 . In that case, there were certain observations made by Chakravarti, C. J., which indicate that if a person has in fact preferred an appeal, thereby choosing to exercise his alternative legal remedy, then the fact that he has not made the necessary deposit to make the appeal effective, cannot be taken advantage of. The general principles applicable to the fees of this case are enunciated in a Supreme Court decision *Himmatlal Harilal Mehta Vs. The State of Madhya Pradesh and Others*, . It has been held there, that if the remedy provided by the statute is of so onerous and burdensome character, for example, if in order to prefer an appeal a person has to deposit the whole amount of the tax, then such a provision could hardly be described as an adequate alternative remedy. In the present case, the law requires that the full amount of the tax claimed should be deposited. Therefore, the alternative

remedy" is not adequate." As regards the principle laid down by Chakravarthi, C.J., if it was intended to hold differently from the Supreme Court decision mentioned above, then, of course, it cannot be followed. In my opinion, however, the observation depended on the facts of the particular case and is not of general application. In the present case, the petitioners have withdrawn the appeal even before the hearing was completed. In my opinion, this point cannot prevail. The next point taken by Mr. Kar is the point of delay. In this case, the demand for payments of the refunded sum was made as long ago as 26th August, 1960 and this application was made only in March 1962. Delay and laches are certainly a bar to the maintainability of an application in the writ jurisdiction. But in order to consider whether there has been delay, it is necessary to consider the dates. Although the original demand was made in August 1960, it was only confirmed in April 1961. On the 1st July, 1961 the petitioners expressed their intention to prefer an appeal and asked for a certified copy of the test memo, and the certified copy of the demand order. Mr. Roy says that there was an inordinate delay in supplying the same. Then, on the 3rd July, 1961 an appeal was preferred. It was in September 1961 that the petitioners were told that unless the whole duty claimed was deposited the appeal cannot be entertained. Thereafter, proceedings were taken against the petitioners u/s 39 of the Sea Customs Act and in January 1962 demand for justice (sic) was given and in March 1962 the application was made. In my opinion, taking into consideration all these facts, it cannot be said that there has been such delay as to disentitle the petitioners from making an application in the writ jurisdiction. Mr. Roy has drawn my attention to a recent decision of the Supreme Court--*State of Madhya Pradesh v. Bhailal Bhai* AIR 1964 SC 100? (sic) Gupta (sic) follows :--

It may, however, be sealed as a general rule that if there has been unreasonable delay the Court ought not ordinarily to lend its aid to a party by this extraordinary remedy of mandamus. Again, where even if there is no such delay the Government or the statutory authority against whom the consequential relief is prayed for raises a prima facie triable issue as regards the availability of such relief on the merits on the grounds like limitation the Court should ordinarily refuse to issue the writ of mandamus for such payment. ... the provisions of the Limitation Act do not as such apply to the granting of relief under Article 226. It appears to us, however, that the maximum period fixed by the legislature as to the time within which the relief by a suit in a civil Court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Article 226 can be measured. This Court may consider the delay unreasonable even if it is less than the period of limitation prescribed for a civil action for the remedy but where the delay is more than this period, it will almost always be proper for the Court to hold that it is unreasonable."

15. In this case, of course, the petitioners made an application long before the period of limitation had elapsed. In any event, even under this decision it is clear that the matter depends on the facts of each case. I have already held that there has not been such delay on the part of the petitioners as to disentitle them from

getting relief.

16. For the reasons aforesaid, in my opinion, this application should succeed. The rule is accordingly made absolute and there will be a writ in the nature of mandamus restraining the respondents from claiming a refund of Rs. 3,10.28 nP. as mentioned in the petition or from enforcing the demand contained in the letters mentioned in prayer (a) (i) of the petition. There will be no order as to costs.