

(1961) 09 CAL CK 0008
In the Calcutta High Court
Case No : A.F.O.O. No. 256 of 1958

S. Venkatesan and Another	Vs	APPELLANT
Nihalchand Agarwala and Others		RESPONDENT

Date of Decision : 20-09-1961

Acts Referred:

Constitution of India, 1950 — Article 226
Sea Customs Act, 1878 — Section 190A, 39

Citation : AIR 1962 Cal 258 : 66 CWN 501

Hon'ble Judges : H.K. Bose, C.J.; Debabrata Mookerjee, J

Bench : Division Bench

Advocate : G.P. Kar and A.K. Banerjee, for the Appellant; A.C. Bhabra, for the Respondent

Final Decision : Dismissed

Judgement

Debabrata Mookerjee, J.—This appeal is brought from an order of Sinha J. dated June 11, 1959, whereby certain proceedings commenced by a notice or a letter issued by the Additional Collector of Customs dated September 15, 1958, were quashed by a writ in the nature of certiorari and a mandamus issued directing the Customs authorities not to give effect to the notice. The Additional Collector of Customs has accordingly appealed.

2. The respondents, Nihalchand Agarwala and others, are a firm, carrying on business, under the name and style of Keshrichand Nihalchand, of importing betel nuts from eastern countries. They had an import licence valid upto the 30th of September 1957 which authorised them to import betel nuts worth about Rs. 24800/- and odd. The firm had entered into an agreement with T.N. Sharma Ltd. of Penang for supply of 80 bags of betel nuts, the total value of which was Rs. 10,322 52 nP. A consignment was booked by S.S. Noreverett and the freight was insured with the National Insurance Co. Ltd. The firm's clearing Agents were instructed to prepare the Bill of Entry and to submit the same to the Customs in time to avoid demurrage. The shipping documents were received from the Bank

concerned and the Clearing Agents paid on the firm's behalf Customs duty on the said 80 bags of betel nuts amounting to Rs. 18,296/25 nP. The payment was made on 4-6-1957. On the next day, the consignment was attempted to be cleared from the Port Commissioner's shed, but a part of it could not be traced. Only 26 bags were taken delivery of and the balance of 54 bags remained untraced. Eventually, the Port Commissioners issued a short-landing certificate, in the prescribed form. On the strength of this certificate, an application was made by the respondent firm for refund of proportionate, customs duty. Upon hearing the firm's representative, the Customs authorities issued a refund order on the 7th January 1958, which entitled the respondent firm to receive back a sum of Rs. 12,855/-. This order was quashed in due course and taken credit of by the firm on the 13th January 1958.

3. On the 15th of September 1958, the Additional Collector of Customs issued a notice to the respondent firm by which it was proposed to re-open the case for review u/s 190-A of the Sea Customs Act with a view to recover the amount which the Customs claimed had erroneously been refunded to the respondent firm. The respondents were asked to submit within ten days from the date of despatch of the letter a written representation if they wanted to make one and to inform the Customs authorities whether the firm wished to be heard in the matter.

4. The case made in the said notice dated the 15th September 1958 was that consequent upon certain scrutiny made, it appeared that after the relevant Bill of Entry had been presented to the Customs on the 23rd May, 1957, a part of the consignment, in respect of which a short landing certificate was issued, had been sunk in the river Hooghly and submerged in the river bed. The appellants' contention appearing from the notice seems to be that since the Bill of Entry had been presented to the Customs House on the 23rd May 1957 and the goods were submerged in the river sometime thereafter, the Customs were entitled to retain the full amount of duty; consequently the order of refund made in favour of the respondent firm had been irregular. The loss in the present case was described as part of the ordinary trade risks involved in every commercial venture.

5. On receipt of this notice dated the 15th September 1958, the firm wrote to the appellants on the 25th of that month, challenging the appellants' jurisdiction to re-open the proceedings and to ask for refund of the sum which had already been paid to the firm on account of the short landing of a part of the consignment. In this communication, the firm denied that liability to pay duty on account of the entire consignment even though part of it was short landed was part of the ordinary trade risks. In substance, the respondents' contention was that the Customs authorities had no jurisdiction to re-open the matter in the circumstances that had happened.

6. Presumably, the appellants were not impressed with the respondents' point of view and proposed to continue the proceedings. The respondent firm were informed that the matter would be heard on the 28th October 1958 at a stated

hour. The firm asked for postponement and eventually intimated their intention to move this Court for appropriate orders quashing the proceedings commenced against them. Accordingly, the respondent firm applied to this Court under Article 226 of the Constitution and a Rule Nisi was issued by Sinha, J. on December 12, 1958, requiring the customs authorities to show cause why they should not cancel or withdraw their notice dated the 15th day of September 1958 and the subsequent notices and forbear from giving effect to them.

7. After hearing the parties Sinha, J. made the Rule absolute and issued a writ in the nature of certiorari quashing the letter or notice in question and all proceedings based upon it and another writ in the nature of mandamus directing the Customs authorities not to give effect to the notice.

8. Being dissatisfied with the decision of the learned trial Judge, the appellants have preferred this appeal.

9. The main contention before us has been that the learned trial Judge misconstrued Sections 39 and 190A of the Sea Customs Act. It is said that the misreading of these two sections has resulted in an erroneous decision and caused failure of justice.

10. In order to be able to appreciate this contention, it would be necessary to notice the two sections. Section 39 is in these words :

"39. (1) When customs-duties or charges have not been levied or have been short-levied through inadvertence, error, collusion or misconstruction on tile part of the officers of Customs, or through mis-statement 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 such 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)

and the Customs-Collector may refuse to pass any goods belonging to such person until the said duties or charges or the said deficiency or excess be paid or repaid.

(2) For the purpose of Sub-section (1) the expression "relevant date"" means :

(a) in a case where the duty or charge has not been levied, the date on which the Customs-officer makes an order for clearance of the goods;

(b) in a case where the duty is reassessed u/s 29A, the date of reassessment;

(c) in a case where the duty is provisionally assessed u/s 29B, the date of final adjustment of duty;

(d) in a case where the duty or charge has been erroneously refunded the date of refund; and

(e) in any other case, the date of the first assessment."

11. Section 190A is as follows :

"190A. (1). The Chief Customs--authority may of its own motion or otherwise call for and examine the record of any proceeding in which an officer of Customs has passed any decision Or order under this Act for the purpose of satisfying itself as to the legality or propriety of any such decision or order and may pass such order thereon as it thinks fit:

Provided that no order prejudicial to any person shall be passed under this Section unless such person has been given a reasonable opportunity of making a representation against the proposed order.

(2) The powers conferred upon the Chief-Customs-authority under Sub-section (1) may also, in the like manner and subject to the like conditions, be exercised by the Chief Customs-officer in respect of any decision or order passed under this Act by any officer of Customs subordinate to him.

(3) No decision or order passed by an officer of Customs shall be revised under this Section by the Chief Customs-authority or a Chief Customs-officer, as the case may be, after the expiry of two years from the date of the decision or order."

12. It is to be observed that Section 39 occurs in Chapter V which deals with the levy of and exemption from Customs duties. It is one of a group of sections which speak of dutiable goods of the power to fix tariff values of the power to exempt from Customs duties, of the obligation of the owner to declare the real value of the goods in the Bill of Entry, of shipping bills, of assessment of duty and of various other matters in connection with the levy of Customs duties.

13. Section 190A occurs in Chapter XVII which prescribes the procedure relating to offences and appeals. It is one of a number of sections which regulate proceedings in connection with offences, appeals etc. under the Sea Customs Act. The power of holding search on suspicion, power to screen or X"ray bodies of persons in order to detect secreted good"s power of the officers of Customs to summon persons to give evidence and produce documents, power to issue search warrants, power to seize things liable to confiscation, power to hold adjudication proceedings for confiscation and imposition of penalties, enforcement of obligations created by the Act, and punishment for dereliction of statutory duties and for commission of offences are amongst the various matters provided for in the Chapter.

14. It seems plain that whereas Chapter V of the Act deals with rights and liabilities, Chapter XVII deals with procedure. In this sense, Chapter V may to said to contain substantive provisions whereas Chapter XVII contains procedural provisions. Broadly speaking, the various sections in Chapter XVII constitute the

machinery for the enforcement of obligations imposed by the Statute.

15. It has been argued on behalf of the appellants that Section 190A is an independent provision which must receive full effect and cannot, in any way, be subordinated to any thing contained in Section 39. The respondents' contention has clearly been that in view of the provision contained in Section 39, they cannot be asked to return any part of the duty which was refunded to them, after the expiry of three months from the date of refund. It is to be recalled that a sum of Rs. 12,855 was refunded to the respondents On the 13th January, 1958. The contention is that even if this amount was erroneously refunded to them, no proceedings can be taken for recovery of the amount unless they were commenced by a notice of demand issued in terms of Section 39 within a period of three months from the date of refund. In this case, the notice by which the respondent firm were called upon to show cause against the proposed order of repayment of the amount refunded was clearly time-barred.

16. The appellants' contention has been that Section 39 is completely out of the way. It is irrelevant in the present context since what the Customs authorities proposed to do was to revise u/s 190A of the Act the order, of refund which had been previously made; that order was, in the opinion of the authorities, an erroneous order which was fit to be revised. The proceeding commenced or intended to be commenced by the notice dated the 15th September was a proceeding in revision in terms of Section 190A which is a complete code in itself and under which any order could be revised within a period of two years. The effect of this contention is that even though Section 39 might have imposed a limit of time within which a notice of demand has to be issued, a proceeding commenced u/s 190A is not controlled by what is provided for in Section 39. The last named Section has its own period of limitation which regulates a proceeding taken under it, but the present proceeding being one u/s 190A is not governed by Section 39.

17. The learned trial Judge rejected the contention on behalf of the Customs authorities and held that Section 190A is a procedural Section and it could not be said that it is independent of Section 39. He observed that

"the bar of limitation u/s 39 must be applied to the facts of this case and the Additional Collector of Customs did not act in accordance with law in an attempt to re-open the matter u/s 190A of the Sea Customs Act."

We find ourselves in complete agreement with the view taken of the matter by the learned Judge.

18. It seems plain that Section 190A would be nearly void of content if the substantive provisions in the Act were to be read completely divorced from it. In our opinion, Section 190A is entirely procedural. It gives wide powers to the Chief Customs authority to call for and examine the records of any proceeding for the purpose of satisfying himself as to the legality or propriety of any decision or order made by a subordinate officer of the Customs. Reading the Section as it

is, it seems that it provides for correcting mistakes and errors committed by officers subordinate to the Chief Customs authority. But such correction Or revision is permitted within a period of two years. But where, however, in consequence of such revisional proceeding any order is likely to be made which may prove prejudicial to any person, the Section provides that no such order can be made adverse to that person unless reasonable opportunity has been given to the person concerned of making a representation against the proposed order. It may well be that a person aggrieved may apply to the Chief Customs authority for relief u/s 190A in a given case and if he so applies, the Chief Customs authority would be quite entitled to give him relief provided there is no bar to the grant of such relief. For example, where a person has been charged to duty, in excess of what he is required to pay under the Act, he may apply to the Chief Customs authority for redress Or the Chief Customs authority may of his own motion give him redress; but in such cases it would not be possible to give relief or to make any adverse order unless the application for such relief Or the step in aid of such adverse order is made or taken within the limit of time prescribed by the Statute. In this case, the Customs authority could certainly ask for repayment of an amount erroneously refunded provided the notice of demand was issued within the period of three months prescribed in Section 39. Similarly, u/s 40 of the Act which speaks of refund of charges overpaid to the Customs, no relief can be granted to the person concerned unless the application is made within a period of three months,

19. The power to reopen a case may reside in the Chief Customs authority in terms of Section 190A. That power can be exercised within a period of two years but in a case like the one before us which is completely covered by the specific provision contained in Section 39 of the Act, it cannot be said that the limit of time prescribed in the Section is wiped out or superseded by the period of limitation prescribed in Section 190A. There can be no question that Section 39 is a specific provision under which the respondents' case clearly falls. According to the appellants, a sum of money had been erroneously refunded to them. In order that the amount thus erroneously paid might be recovered, a notice of demand has to issue in terms of Section 39 of the Sea Customs Act. In our view, it is idle to contend that since Section 190A prescribes a period of two years within which the revisional powers of the Chief Customs authority may be exercised, that has the effect of destroying the provision of Section 39 which is a clear and specific provision in the same Statute.

20. It seems clear that when Customs duty, after having been levied, has been erroneously refunded owing to one or other of the causes mentioned in Section 39, the person to whom such refund has been erroneously made shall repay the amount on a notice of demand being issued to him within three months from the date of refund. Similarly, by Section 40, the Act provides that Customs duty which was erroneously paid for similar causes will be refunded only if the claim for refund is made within three months from the date of such payment. The point to note is that the claim for levy of duty by the Customs authorities or claim for

refund against them has to be made within the prescribed period. These provisions are unambiguous. The Courts have to construe them as they find them. The Customs' right to levy duty unpaid or short-paid or the citizen's right to refund of duty erroneously paid or overpaid have been placed on the same footing. The question then arises, whether by recourse to Section 190A, the time for levying of duty not paid or under-paid or erroneously refunded can be enlarged in favour of the Customs authorities. The direct effect of such enlargement of time will be to destroy completely the earlier provision contained in Section 39, limiting the time for the Customs to claim payment of duty not levied or short levied or erroneously refunded. If such was the result intended by the legislature, it would amount to taking away something with the left hand which was given with the right hand. There can be no extension of the Customs' rights without corresponding extension of the citizen's obligations. Interest of revenue cannot be pleaded in extension of such right in favour of the Customs authorities. Equity has no place in the law of limitation and we are to construe these provisions strictly. It can never be right to think that the legislature intended to keep alive in favour of the Customs, in this indirect manner a claim already extinguished by efflux of time. In our view, there is no real conflict between Section 39 and Section 190-A; and even if there was one, it would be the business of the Courts to harmonise the two provisions so as to provide a workable and well-reasoned basis on which each might fulfil its purpose in aid of the object of the enactment. Section 190-A, which is a new provision introduced in 1955, embodies the experience of the working of the Act. Words of wide import appear to have been deliberately chosen so as to give the Chief Customs authority power to exercise effective control over all matters, administrative or other, with the very intelligible safeguard that no one can be adversely affected in consequence of the exercise of such power without the person concerned being first heard. The very amplitude of power given by the Section would be a reason to guard against its abuse; and we consider an attempt to enlarge time for claim to payment of duty not levied or short-levied or erroneously refunded, by appealing to its provisions, would be an instance of such abuse. The Section cannot be read so as to destroy or defeat the earlier express provision contained in Section 39 of the Act.

21. The rule is well-known that where a general intention is expressed and the Act expresses also a particular intention, incompatible with the general intention, the particular intention is to be considered in the nature of an exception. The Supreme Court endorsed this view in the case of *The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others*, . In our opinion, the specific provision relating to limitation contained in Section 39 cannot possibly be destroyed or over ridden by the provision in Section 190A whereby the Chief Customs authority has been given power to revise orders previously made within, a period of two years. There can, in our view, be no question that the period of limitation prescribed in Section 39 must prevail.

22. In our opinion, the present case is completely covered by Section 39 of the

Sea Customs Act which is a specific provision. According to the notice issued by the Customs authorities, a part of the duty was erroneously refunded. Consequently if action was to be taken, it was required to be taken u/s 39 within the period of three months prescribed in the Section itself. The Section speaks of "relevant date". That expression is defined and it means, in this instance, the date of refund. We have indicated that the date of issue of notice was long after the date of refund. We cannot accept the contention that since the notice speaks of action proposed to be taken in terms of Section 190A, the period of limitation prescribed in Section 39 of the Act is wiped out, to the detriment of the person called upon to show cause against the proposed recovery of the amount said to have been erroneously refunded. There can be no question that different periods of limitation have been prescribed for different purposes. In order to enable the Chief Customs authority to exercise a general power of superintendence over decisions and orders made by subordinate officers of the Customs, a longer period of limitation, has been prescribed. This is quite understandable, but surely the period of limitation in Section 190A cannot override the express provision in Section 39 which limits the issue of notice of demand for payment of duties not levied or short-levied or erroneously refunded to a period of three months.

23. It was then argued on behalf of the appellants that the proceedings under Article 226 of the Constitution were premature. It has been said that except a notice issued u/s 190A of the Sea Customs Act, nothing further had been done and that being so, the jurisdiction, of this Court was improperly invoked by the application under Article 226 of the Constitution. We have been referred to a decision of the learned trial Judge himself reported in *East India Commercial Co. Ltd. Vs. Collector of Customs*, in which he held that where a notice had been merely issued requiring a person to show cause in connection with certain proceedings in which it was alleged that he had contravened the terms and conditions of a licence, an application under Article 226 of the Constitution directly on issue or, such notice was premature. It is true, in that case nothing further had been done except the issue of a notice by the Collector of Customs requiring the person proceeded against to show cause why certain fluorescent tubes and accessories should not be confiscated u/s 167 (8) of the Sea Customs Act. The learned Judge was however, careful to point out that in that case no question of jurisdiction had been raised. If the Customs authorities had jurisdiction to issue the notice requiring the person concerned to show cause against the proposed confiscation of the fluorescent tubes and accessories, then surely an application under Article 226 at that stage would be premature. But the learned Judge observed that if the objection to the proceedings had been founded upon want of jurisdiction, the position might have been different. In the present case, that- is precisely the point. We have noticed that the first thing that the respondents did in regard to the notice dated the 15th September 1958, was to object to the proceedings on the ground that the appellants had no jurisdiction to take them. Where, therefore, there is that initial want of jurisdiction to commence a proceeding there can, in our view, be no reason

whatever why the person proceeded against should be prevented from seeking the assistance of the Court under Article 226 of the Constitution for the purpose of preventing harassment to himself. There can be no question that the issue of notice dated September 15, 1958 is a definite step in aid of the proceeding to revise an earlier order; and where no proceeding can at all be taken for utter want of jurisdiction, there can, in our view, be no ground for shutting out relief under Article 226 to the person concerned. The respondents' contention of want of jurisdiction is founded upon the plain words of Section 39. That section, as we have indicated, prescribes a definite period of time within which the notice of demand for recovery of duty not levied, short-levied or erroneously refunded has to be issued. If, on the face of things, such notice was not issued in time, surely the person affected has a right to seek the Court's assistance for the purpose of stopping a proceeding which is bound to be infructuous and abortive. We do not think, therefore, that this objection to the application under Article 226 being premature has any substance.

24. These are the main contentions which have been put forward on behalf of the appellants In this case. We have not been able to accept them and we must hold, in agreement with the learned trial Judge, that the notice to show cause, by which the proceedings were commenced or about to be commenced, must be quashed and the appellants directed not to give effect to the same.

25. The appeal must, therefore, fail and is accordingly dismissed with costs.

Bose, C.J.

26. The main point involved in this appeal is the question of construction of Sections 39 and 190A of the Sea Customs Act. It is clear that Section 39 is a substantive provision which creates certain rights in favour of the Customs authorities to recover customs duties and charges and it clearly imposes liability to pay such duties and charges on persons liable to pay the same. But it also prescribes a period of limitation within which the payment is to be demanded. The condition precedent to the accrual of liability to pay is that the Customs authorities must issue a notice of demand to the person liable to pay within three months from the relevant date as defined or explained in Sub-section (2) of Section 39 of the Sea Customs Act. If no such notice of demand is issued within the prescribed period, the amount of claim becomes irrecoverable. The Section provides for certain contingencies under which certain customs, duties and charges which have escaped levy and certain refunds granted under certain specified circumstances can be recovered. The Customs authorities' case is that the refund had been made erroneously to the respondents. (See the letter dated the 15th September 1958). So the contingency or case is one which falls u/s 39. This being the position, can it be said that although, no notice of demand was issued within three months of the date of refund and the claim for repayment has become irrecoverable, yet, by the indirect process of revision or review as envisaged in Section 190A of the Sea Customs Act, the order of refund can be revoked and the respondents made liable to repay the amount refunded? To give

countenance to such interpretation will be to make the provisions of Section 39 nugatory. The result of such, construction will be that in every case of short levy or escapement of levy or of erroneous refund, the provisions of Section 190A may be availed of, provided it is so availed of within a period of two years as provided in Section 190A and the bar of limitation as specified" in Section 39 can be got rid of or circumvented in this manner. Such an absurd intention cannot be imputed to the legislature. In my view, Section 190A has not the effect of overriding Section 39 but it is subject to the said section. So this main point is devoid of any substance.

27. The other point raised on behalf of the appellant is that the application under Article 226 of the Constitution is not maintainable as it is a premature one. It is submitted that unless an adjudication is made or until the order is revised, the respondents have no grievance or cause of action. Mere notice to show cause does not impose any liability to repay nor does it furnish any cause of action. This contention also appears to have no force. The respondents have acquired a valuable right to retain an amount refunded by reason of lapse of time. The infraction of that right is threatened by the proceeding sought to be started by the notice dated the 15th September 1958. If the respondents do not take any steps to have the notice declared as invalid or as one tending to give rise to a useless and infructuous proceeding, they will have to suffer unnecessary harassment and expense of resisting the proceeding and defending themselves against an illegal claim. The amount being irrecoverable by reason of Section 39, by revising the order of refund or by revoking it, the Customs authorities cannot realise the amount from the respondents in any case. So it is difficult to see why the respondents cannot put an end to the proceeding at the very initial stage. There is no jurisdiction in the Customs authorities to re-open a claim barred by limitation by having recourse to Section 190A. So any step taken to initiate a proceeding to re-open a claim can be prohibited or quashed as being one taken without jurisdiction.

28. I, therefore, agree that this appeal should be dismissed with costs as proposed by my Lord.