(1963) 07 BOM CK 0005

In the Bombay High Court

Case No : Misc. Petition No. 407 of 1962

Shree Warana Sahakari Sakhar Karkhana Ltd. APPELLANT

Vs

M.S. Pai RESPONDENT

Date of Decision : 06-07-1963

Acts Referred:

Constitution of India, 1950 — Article 226
Sea Customs Act, 1878 — Section 29, 39, 40

Citation : (1963) 07 BOM CK 0005

Hon'ble Judges : K.K. Desai, J

Bench : Single Bench

Judgement

1. This petition under Article 226 of the Constitution raises a question of some importance relating to the true interpretation and effect of the provisions in Section 39 of the Sea Customs Act. The petition came to be filed under the following circumstances :-

The Petitioners imported "Precision brass tubes for evaporators" as component parts of sugar manufacturing plant machinery in March 1958. In respect of the goods of import the petitioners submitted Bill of Entry dated March 17, 1958, to the Customs authorities, in accordance with the provisions of Section 29 of the Act. The Petitioners were duly assessed in respect of the goods of import to customs duty at 10 per cent of the value under Item 72(23)/72(25) of the Indian Customs Tariff. The Petitioners paid the duty and cleared the goods sometime in March, 1958.

2. The Petitioners had imported other diverse goods in June/July 1958 and one consignment in May 1959. These goods were also duly assessed to customs duty and the Petitioners paid the duty assessed and cleared these goods. The Petitioners made refund applications in respect of the duty paid by them in connection with these last diverse goods of import within the time prescribed u/s 40 of the Act. The particulars about the dates of arrival of the goods and the Bills of Entry in respect of these goods as well as the dates of refund applications

made by the Petitioners and the amounts sanctioned for repayment in respect of the above refund applications are all contained in the statement enclosed with the letter of the Assistant Collector of Customs dated July 28, 1962. A copy of the letter of the Assistant Collector of Customs dated July 28, 1962, along with the enclosed statement is annexed as Ex. C to the petition. Though the aggregate amount claimed by the Petitioners in their refund applications was very large, the refund was sanctioned for the aggregate sum of Rs. 28,388.21 nP as appears from the above letter of the Assistant Collector of Customs dated July 28, 1962. In connection with the consignment of the precision brass tubes or evaporators which the Petitioners had imported for the first time in March 1958, by his letter dated December 31, 1958, the Assistant Collector of Customs wrote to the Petitioners to state that customs duty in respect of that consignment had been short levied by Rs. 40,000.75 nP. It appears that the view of the Assistant Collector of Customs was that in respect of the precision brass tubes for evaporators the Petitioners ought to have been assessed to duty at 35 per cent under Item 70(A) I.C.T. and not under Item 72(23)/72(25) I.C.T. at 10 percent as had been in fact done in the previous assessment that had been made in respect of that consignment. Between January 1959 and July 28, 1962, correspondence was exchanged between the Petitioners and the Customs authorities wherein the Petitioners repeatedly contended that they had been duly assessed to customs duty in respect of the above consignment and the demand of the Customs authorities that duty had been short levied by Rs. 40,000.75 nP was altogether untenable. In the absence of production of any other writing, it appears that all the refund applications that the Petitioners had made and which I have referred to above were passed by the letter dated July 28, 1962, addressed by the Assistant Collector of Customs to the Petitioners. By that letter the Petitioners were informed as regards the precision brass tubes for evaporators that had been imported in March 1958 that the Petitioners had failed to make any response to the demand for payment of the less charges due to an erroneous assessment of the consignment of the brass tubes. It is necessary to quote here the further statements made by the Assistant Collector of Customs in that letter :

"It may be stated that though the demand is time barred u/s 39 of the Sea Customs Act, the amount is legally due to Government. It is now ascertained that refund claims to the tune of Rs. 28,388.21 nP (as per enclosed statement) have been passed in your favour. This office has therefore decided to set off the refund amounts against the pending Less Charge claims."

3. The Assistant Collector of Customs purported to adjust the refund amount of Rs. 28,388.21 nP against what, according to him, had been less charged and short levied in respect of the consignment of brass tubes.

4. The short contention of the petitioners in this petition is having regard to the scheme of Section 39 and the other relevant sections of the Sea Customs Act, the Customs authorities had no power to reopen the final adjustment to customs

duty that had been already made in respect of the consignment of brass tubes except as provided in Section 39 of the Act. The true effect of that section is that no short levy assessment can ever be made beyond the period of 3 months from the relevant date mentioned in the section. The contention is that the final assessment having been made in respect of the consignment of brass tubes in March 1958, it was not permissible for the Customs authorities, having regard to the scheme of Section 39, to make re-assessment of the Petitioners'' goods for assessing them to less charges or short levy in December 1958 as the Respondents had purported to do. This is so, because the period of 3 months from the relevant date mentioned in the section had expired sometime before the end of June 1958.

5. In connection with this contention, it is necessary to refer to Section 39 of the Act, which 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 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 persons 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 re-assessed u/s 29A, the date of re-assessment;

(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."

6. Before discussion the true effect of Section 39, it is necessary to state that Chapter V of the Act beginning with Section 20 relates, inter alia, to levy and collection of customs duty. The scheme of levy and collection as provided in this

Chapter is the only scheme available for recovery of customs duties. It is not permissible, therefore, for the Customs authorities to collect customs duty otherwise than as provided in Chapter V. The scheme for collection of the customs duty as provided in Section 29 in this Chapter provides that on the importation of the goods or the exportation thereof, the owner must declare the real value etc. of the goods in the bills of entries or the shipping bills. Provision is made in that section entitling the Customs Collector to call upon the owner or other person to produce diverse documents for satisfaction of the Customs authorities in connection with the real value of the goods. He is also empowered to open cases, packages and parcels, if necessary. Section 29B provides for provisional assessment of goods in accordance with the scheme of that section. It is necessary to note that this is the only section which contains scheme as regards provisional assessment of duty in respect of goods of import permitting the Customs authorities to make final assessment of duty subsequently. The Scheme of the Act is that in respect of the goods which are not provisionally assessed the Customs authorities make final assessment as regards the customs duty payable by importers and exporters and upon payment the goods are cleared from the Customs limits. Section 39 is the only section which provides for remedies of the Customs authorities in connection with claims for customs duties or charges short levied through inadvertence, error, collusion or misconstruction on the part of the officers of the customs or even through mis-statement as to the real value, quantity or description on the part of the owner.

7. It is clear on a reading of the scheme of Section 39 and the general scheme of the Act that the final assessments made by the Customs authorities are binding on importers and exporters on the one hand and the Customs authorities on the other and that these final assessments can only be revised in accordance with the provisions in the Act itself. Upon such final assessments, a right of appeal arises in favour of the importer or the exporter, as the case may be. It is not permissible for the Customs authorities to revise their own final assessments except by the appellate authorities mentioned in the Act. The Customs duty even if short levied, cannot become a debt payable except in accordance with the scheme of Section 39. The scheme of Section 39 patently is that the short levy assessment and notice of demand cannot be issued unless the same is done within 3 months from the relevant date as defined in sub-section (2) of the section. The necessary consequence of the scheme of Section 39 is that the Customs authority is not entitled to change its own opinion as regards the duty finally assessed after the period of 3 months mentioned in the section. After that period expires, it is not permissible for the Customs authority to consider that the duty had been short levied through inadvertence, error, collusion or misconstruction on the part of the officers of the Customs or through mis-statements as to the real value, quantity or description on the part of the owner.

8. In the view which I have taken as above, support is derived from the observations in the case of S. Venkatesan and Another Vs. Nihalchand Agarwala and Others, . In that case, the Customs authorities desired to revise the final

assessment orders passed in respect of consignments of the Petitioners in the first Court (and Respondents in the Court of Appeal) after the 3 months'' period mentioned in Section 39 of the Act had expired. For that purpose, the Customs authorities resorted to the power of revision as contained in Section 190A of the Act. Section 190A provides :

"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) ....

(3) ....".

9. Though the period of 3 months as mentioned in section 39 had expired, relying upon the provisions of section 190A, the customs authorities served notice on the Respondents in the Court of appeal that their consignments had been short levied to duty and refunds had been wrongly made in the amount mentioned at the foot of the notice. They were called upon to show cause as to why the amount refunded should not be recovered from them.

10. The Respondents-Appellants challenged the notice as being contrary to the scheme of Section 39. Sinha J. in the first Court (Nihal Chand Agarwalla and Others Vs. S. Venkatesan and Another,) and Bose C.J. in the Court of appeal in the case which I am referring to (S. Venkatesan and Another Vs. Nihalchand Agarwala and Others,), inter alia, observed as follows :

"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 ......

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 citizens'' 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."

11. The Court thereafter discussed that there was in fact no real conflict between the provisions in section 190A and section 39 of the Act and held that the proceedings commenced by the notice making demand for repayment of the refund given were initiated without any jurisdiction at all. Similar are the observations in connection with the true construction of section 39 in the case of Ramnath Agarwal Vs. G.S. Iyer, Collector of Customs, Kandla and Another, . In that case also the Court struck down the attempt made by the Customs authorities to collect the duty short levied in respect whereof demand was not made within the period of 3 months mentioned in the section.

12. It is necessary to record that the contention of Mr. Modi for the Respondents is that the customs duty payable in respect of the consignment of brass tubes and all other consignments is fixed and recoverable by reason of the provisions of section 20 of the Act read with section 2 of the Indian Tariff Act along with other relevant provisions of that Act. According to him, it was under a mistake that the Customs assessed the brass tubes'' consignment of the Petitioners at 10 percent under item 72(23)/72(25) of the Indian Customs Tariff. According to him, in fact, these goods were assessable to pay Customs duty on the basis of item 70(a) of the Indian Customs Tariff at 35% of the value. His further argument is that as subsequent to the final assessment made the customs authorities discovered the mistake, the short levied duty becomes a debt payable by the Petitioners to the Customs authorities. This argument, in my view, completely overlooks the scheme of all fiscal statutes. The nominated authorities under these statutes are the only individuals, who, for the first time, by assessment proceedings, find out the debt payable by way of tax. The scheme of the Sea Customs Act is that once such final assessment is made by appropriate authorities, it cannot be revised in any manner except in accordance with the scheme of the Act. There can be no debt by way of short levied duty in respect of the goods once finally assessed except in accordance with the provisions of Section 39 of the Act. In other words, once the 3 months'' period mentioned in the section expires, nothing can become payable by way of short levied customs duty under that section and as and by way of customs duty. The result of the above finding is that the Asstt. Collector of Customs was not justified by his decision dated December 31, 1958, to hold and make a finding that the customs duty in respect of the Petitioner''s consignment of brass tubes imported in March, 1958 had been short levied by Rs. 40,000.75 nP. or by any other amount whatsoever. The Customs authorities were not justified in making demands in the correspondence that took place from January 1959 to July 1962 calling upon the

petitioners to pay up the above amount of Rs. 40,000.75 nP. The 1st Respondent was not entitled to decide, as he in fact did by his letter dated July 28, 1962, adjust the amount of refund claim of Rs. 28,388.21 nP against the amount alleged to be due for short levied customs duty in respect of the petitioner''s ''brass tubes'' consignments. The 1st Respondent has unjustifiably failed to refund to the petitioners the above sum of Rs. 28,388.21 nPs ascertained to be due to the petitioners. The decision of the Assistant Collector of Customs to adjust the amount due to the Petitioners in the above manner must be struck down as illegal. It was under the circumstances, incumbent on the 1st Respondent to make refund of and pay to the Petitioners the above sum of Rs. 28,388.21 nP.

13. Mr. Modi has argued that the Union of India is outside the ambit of writ jurisdiction of this Court and no order can be made in this petition against the Union of India. As, in my view, the respondents 1 and 2 are in Bombay and complete redress can be given to the petitioners without making any orders against the Union of India, it is unnecessary to consider this point in greater details. I propose not to make any order against the Union of India.

14. Mr. Modi has argued that in petitions under writ jurisdiction orders for payment of moneys should not be made. Now, it is true that in writ jurisdiction the Court is not really concerned with matters of money claims. It is, however, well established that where as a result of its findings in writ jurisdiction the Court finds it necessary to make incidental orders for payment of moneys, the Court does not prevent itself from making such incidental orders. The order that I am making for refund to the petitioners is incidental on my finding that the decision that was made by the Asstt. Collector of Customs was illegal and without jurisdiction. I see no reason why in such circumstances it is not permissible for me to make incidental order for payment of money.

15. Mr. Modi has also argued that the claim of the Petitioners for payment of refund was in fact barred by the law of limitation before this petition was filed and for that reason the order for payment should not be made in favour of the Petitioners. He has, in that connection, pointed out from the statement enclosed with the letter of the Asst. Collector of Customs dated July, 28, 1962, copy whereof is annexed as Ex. C to the petition, that the 8 refund applications (out of 9) for repayment were all made on September 29, 1958, and that the remaining one refund application was made on July 29, 1959. The refund, therefore, had become due prior to the above dates. According to him, therefore, the claim made in Court for granting refund is beyond a period of 3 years and must be held to be barred by the law of limitation. This contention appears to me to be untenable. Now, it is well established that the Sea Customs Act is a complete code providing complete scheme for all matters arising under the Act. When excess amounts are recovered as and by way of Customs duty, the only remedy available for refund of such excess payments is the remedy mentioned in section 40 of the Act. Under that section, applications for refunds have to be made to the

Customs authorities. All questions of facts or law that arise in connection with such applications must be decided and disposed of by the appropriate Customs authorities mentioned in the Act. The period of limitation for such applications is mentioned in the section as 3 months from the date of excess payment. It is not contended by Mr. Modi that the above applications for refund were made beyond 3 months from the date of excess payments. In fact, the applications were made in time and for the first time they were disposed of by the Asstt. Collector of Customs by his letter dated July, 28, 1962, whereby in connection with these refund applications, the petitioners were informed as follows :

"It is now ascertained that refund claims to the tune of Rs. 28,388.21 nP. (as per enclosed statement) have been passed in your favour."

16. In the result, the Customs authorities have ascertained and found that the above amount is due and payable to the petitioners for the first time by the decision dated July 28, 1962. As the Customs authorities attempted to adjust that liability wrongfully, the Petitioners filed this petition for redress of that wrong on October, 9, 1962. The contention of the Respondents that the claim was barred by the Law of limitation must be negatived.

17. In the result, there will be an order in favour of the Petitioners against Respondents 1 and 2 in terms of prayer (b) of the Petition. There will be no order as against Respondent No. 3. Respondents 1 and 2 will pay the costs of the Petitioners. Respondent 3 will bear and pay its own costs.