**(1987) 02 BOM CK 0022**

**In the Bombay High Court**

**Case No :** Writ Petition No. 3075 of 1986

Sudhir Chimanlal APPELLANT

Vs

Union of India RESPONDENT

**Date of Decision :** 05-02-1987

**Acts Referred:**

Customs Act, 1962 — Section 27
Drugs and Cosmetics Rules, 1945 — Rule 38, 40, 41

**Citation :** (1988) 19 ECR 26 : (1988) 36 ELT 406

**Hon'ble Judges :** S.M. Daud, J

**Bench :** Single Bench

## Judgement

1. This petition under Article 226 of the Constitution of India takes exception to the rejection of an application made by the petitioner for refund of Additional Duty alleged to have been illegally recovered from him and, so recovered upon an import of a consignment of Sorbitol 70% Liquid USP covered by the Bill of Entry at Ex. ''E'' to the petition.

2. Petitioner''s case is that the consignment imported was a "drug" and exempt from Additional Duty vide Notification No. 104/82-C.E., dated 28th February 1982, as amended from time to time. Because of a mistake law mutually entertained by petitioner and the Assistant Collector of Customs, Additional Duty was illegally recovered. Petitioner realised the error pursuant to the judgment of Pendse, J. in Writ Petition No. 1808 of 1982. This judgment was delivered on 12th August 1986. Petitioner got knowledge of the judgment on or about 25th August 1986. On 6th October 1986, petitioner applied for refund. This application was rejected by responded No. 3 on the ground that the claim was barred by time vis-a-vis Section 27(i) of the Customs Act, 1962. The erroneous order was contrary to the judgment of Pendse, J. aforementioned. Hence the petition for refund of the amount paid together with interest thereon at the rate of 18 per cent per annum from the date of recovery until the refund was made unto the petitioner.

 

3. Respondents oppose the petition through an affidavit-in-reply submitted by Jagdish Chander, who is an Assistant Collector of Customs (Legal) at Bombay. First, it is contended that the imported goods were not a "drug" but some other substance. Had the substance been a "drug", there would have been compliance with the Drugs and Cosmetics Act, 1940 ("Drug Act") and the Rules framed thereunder ("Drug Rules"). Admittedly, there was no compliance with the Drug Act and the Drug Rules. The goods were, in fact, imported under Tariff Heading No. 29.01/45(i) of the Customs Tariff Act, 1975 ("C.T.A."). The reliance placed on the judgment delivered in W.P. No. 1808 of 1982, was without substance. In fact, the claim for refund in that case was made in the very year of import, that is, 1982. In the instant case, imports had been made in May and June 1983 and the petitioner had come up for a refund as late as October 1986. Therefore, the rejection of the refund application on the ground of limitation was correct. The claim for refund was also barred on the principle of unjust enrichment. Without prejudice to the defences aforementioned, the claim was barred on the principle set out in Khandelwal Metal and Engineering Works and Another Vs. Union of India (UOI) and Others, . The plea raised on the basis of this decision is that the goods were not exempt from Additional Duty. Lastly, even if petitioner was to get a direction for a refund, it should be subject to verification of the claim on the bias of production of relevant documents, as it was not uncommon for the Customs Authorities to come across spurious claims. In this case itself, petitioner had made some double claims.

4. Excepting for two issues which I will consider below, the other defences raised by respondents have to be negatived as being covered by Pendse, J.''s decision in Writ Petition No. 1808 of 1982 and my decision in Writ Petition No. 2228 of 1986, decided on 15th January 1987, along with a number of other petitions. The two points which require consideration are :-

(i) Whether the goods imported could not be said to be a "drug" in view of the alleged failure to company with Sections 8 and 16 of the Drug Act ? and

(ii) Whether the goods imported were not exempt from Additional Duty as held in the Supreme Court''s decision in Khandelwal''s case (supra) ?

5. Counsel for respondents submits that there was failure to comply with various provisions of the Drug Act and the Drug Rules, which failure led to the conclusion that the goods imported were not a "drug". In particular, reliance was placed upon Sections 8 and 16, read with the Second Schedule to the Drug Act, and Rules 38 to 41 of the Drug Rules. Section 8 and 16 deal with the expression "standard quality" in relation to drugs imported and indigenously manufacture. The Second Schedule sets out the standard to be complied with by such drugs. It is contended that unless a commodity complies with the standard specified in the Second Schedule, it cannot be classified as a "drug". I see no substance in this contention. It is true that Section 8, read with the Second Schedule, lays down what is the standard quality in relation to a "drug". It may also be taken for granted that where permission is given to import a "drug", the imported

 

commodity has to conform to the standard quality laid down in the Second Schedule. But all that the importer of a "drug" has to do, is, to comply with the requirement of Rule 38. This Rule lays it down that all consignments of drugs sought to be imported be accompanied by "an invoice or other statement showing the name and address of the manufacturer and the names and quantities of the drugs". Now, so far as this requirement of the Rule is concerned, the Bill of Entry at Ex. ''E'' enumerates in Column 2 the commodity being imported and the name and address of the manufacturer. The commodity is described as ''Sorbitol 70 PC Liquid USP''. The country of manufacture is given out to be France. The name of the manufacturer is Roquette Freres. The batch number, date of manufacture, etc., etc. are all set out in Column 2. The contention is that those particulars are not sufficient, for the importer had further to establish compliance with the prescribed standard - such standard being that set out in the Second Schedule to the Drug Act. There is no merit in this contention, for the initials "USP" themselves indicate that the consignment of Sorbitol conformed to the requirements of the United States Pharmacopoeia. This would bring the commodity within the classification "other drugs" in Item No. 5(b) of the Second Schedule to the Drug Act. The reference to Rules 39, 40 and 41 is totally misplaced. Rule 39 deals with documents to be supplied to the Customs Collector in respect of which a licence is not required. Rule 40 mentions the procedure to be followed by the Customs Collector, where he has reason to doubt whether any drugs comply with certain provisions. Rule 41 refers to testing of samples. In the instant case, the Bill of Entry at Ex. ''E'' as also the invoice both show that the consignment was ''Sorbitol 70% Liquid USP''. This was a sufficient indication to the authorities of petitioner importing a "drug". If any doubts were entertained by the authorities, they should have taken recourse to the provisions of Rules 40 and 41. At this late hour, it is not open to respondents to contend that what was imported was not a "drug". Compliance with Rule 38 having been proved, the burden has shifted to respondents, to establish that despite such compliance, it was, in fact, a substance other than "drug" that had been imported.

6. The reliance placed upon the judgment of the Supreme Court in Khandelwal''s case is based on the argument that even though drugs may have been exempted from duty under the Central Excises and Salt Act, 1944 (CESTA), it did not mean an automatic exemption from Additional Duty recoverable u/s 3 of the C.T.A. This point was considered by Pendse, J. in Writ Petition No. 2840 of 1986, decided on 18th December 1986, and, negatived in these words :-

"Finally Shri Sethna submitted that even if Central Excise duty is not payable, still additional duty of customs can be levied, and in support of the submission reference was made to the decision of the Supreme Court in Khandelwal Metal & Engineering Works and Another v. Union of India and Others. In my judgment, it is not necessary to examine this question, because even assuming that additional duty of customs can be levied, the question which arises in the present case is whether such duty has been prescribed under Tariff Item 68(a). Once it is a found that such duty is not prescribed under Tariff Item 68(a) ... ... ... then the question as to whether such duty can be levied or not does not survive for consideration."

In the instant case, the exemption notification excluded "drugs" from the whole of duty leviable under Item No. 68. Therefore, Pendse J.''s view reproduced above will be attracted and, the contention urged is to be negatived on that very view.

7. The result of the above discussion is that the petition will have to be allowed. But before I can come to the concluding portion, I will have to address myself to two features. The first, is respondents'' submission that an order for refund should be subject to verification of documents, inasmuch as there is every possibility of an untenable claim being put forth, whether designedly or because of a genuine mistake. I agree that the refund should be subject to verification, for it is quite possible that petitioner may be making a mistake in regard to the documents, numbers and dates on which he paid Additional Duty. Next is the petitioner''s claim for interest from the date of collection of the same, and, that at the rate of 18 per cent per annum. It is well-settled that interest is not to be permitted merely because the amount due has been withheld without just cause, unless there be a statute or custom or agreement to sanction the grant of the same. Here nothing of that nature can be said to exist. Dr. Kantawala pleads that the relief to be granted, require respondents to deposit the amount of refund in Court, as otherwise suitors succeeding against the Customs, find it virtually impossible to get relief. There may be some substance in the grievance of the petitioner. Nonetheless, there are measures available to suitors to execute orders passed in their favour. Therefore, no special directions, as solicited by the petitioner are called for. Hence the order.

ORDER

Respondents to pay unto petitioner the Additional Duty wrongly recovered from him in respect of the consignment figuring in this case, subject to verification. This payment shall be made within eight weeks from today. Failure to pay the amount within the specified time will subject respondents to the liability to pay the same along with interest at the rate of 12 per cent per annum to be computed as from the expiry of the aforementioned period of eight weeks Petitioner shall get his costs from respondents, who shall, in addition, bear their own. Rule, in the above terms, made absolute.

 