

(1984) 07 KL CK 0023
In the High Court Of Kerala
Case No : S.A. No. 814 of 1980-G

Union of India (UOI) and Others

APPELLANT

Vs

A.Y. Yemani

RESPONDENT

Date of Decision : 31-07-1984

Acts Referred:

Central Excise Rules, 1944 — Rule 151, 200
Central Excises and Salt Act, 1944 — Section 33, 40, 40(1), 40(2)
General Sales Tax Act — Section 18
Hyderabad Abkari Act, 1316 — Section 41

Citation : (1984) 3 ECC 153 : (1984) 18 ELT 720

Hon'ble Judges : P.C. Balakrishna Menon, J

Bench : Single Bench

Advocate : M.M. Abdul Aziz, Central Government Standing, for the Appellant; N. Viswanatha Iyer, for the Respondent

Final Decision : Dismissed

Judgement

P.C. Balakrishna Menon, J.—This second appeal at the instance of the defendants is admitted on the following questions of law formulated in the memorandum of second appeal.

"(i) Whether Section 40(1) of the Central Excises and Salt Act is not a legal bar to the maintainability of the suit ?

(ii) Whether the claim is not barred by limitation prescribed by Section 40(2) of the Central Excises and Salt Act, 1944;

(iii) Whether the inferences drawn by the Courts below that the action taken by the appellants was not in good faith is supportable in law ?

(iv) Whether the award of interest by the Courts below is legally sustainable ? and

(v) Whether the plaintiff was not bound to mitigate the damages by applying for possession of the tobacco pending the proceedings and by taking delivery of the

same when called upon to do so ?"

The learned standing counsel for the Central Government has urged only questions 1 to 3; questions 4 and 5 were not argued in this case.

2. The suit is for the value of 50 bags (2305.20 Kgs.) of I.A.C. Gujarathi Pathi Biri tobacco illegally seized by the 3rd defendant from the plaintiff with interest at 12% from 31-7-1961 to 31-10-1966. The suit was filed on 5-11-1966. The plaintiff was a licensee for dealing in Biri tobacco having warehouse licence No. 29/1960 of Shertallai. The Preventive and Intelligence Inspector of the Central Excise Department, Alleppey checked the stock account of the plaintiff's warehouse between 29th and 31st of July, 1961 and seized 50 bags of Biri tobacco from the warehouse for the alleged contravention of clauses (c) and (d) of Rule 151 of the Central Excise Rules, 1944. The second defendant, the Assistant Collector of Central Excise, Trivandrum Division, passed an order u/s 33 of the Central Excises and Salt Act, 1944 confiscating the 50 bags of tobacco. The plaintiff was, however, allowed to redeem the seized tobacco on payment of a redemption fine of Rs. 1,000/- and a penalty of Rs. 250/-. The plaintiff challenged the order of confiscation in O.P. No. 2566 of 1962 before this Court. A Division Bench of this Court by Ext. P1 judgment dated 22-11-1963 quashed the order of confiscation on the ground that it was in violation of the principles of natural justice leaving the Department free to take further action in accordance with law. There were no further proceedings u/s 33 of the Act. The Excise Range Officer on 28-10-1964 ordered the release of the tobacco to the plaintiff directing him to take delivery of the same within ten days from the date of the order. There was a further order Ext. P8 by the 3rd defendant, Superintendent of Central Excise, Alleppey on 9-11-1965 directing the plaintiff to take delivery of the 50 bags of tobacco seized from him within ten days from the receipt of the order, failing which, he was informed, he will have no legal claim for the goods or its equivalent in value. He was later informed by Ext. P9 letter dated 7-5-1966 issued by the 3rd defendant that the articles seized will be destroyed. It is the plaintiff's case that he did not take delivery of the goods in pursuance to the notices issued to him for the reason that the goods seized were rendered unfit for use and had become unfit for sale. It is the case of the Department that the goods were auctioned, but there was no purchaser and had to be destroyed. The suit was filed on 8-11-1966 for the value of the goods illegally seized, or its equivalent in value with damages calculated at 12% interest from the date of seizure till the date of the suit.

3. The suit was resisted on the ground that it is not maintainable for the reason of the provisions contained in Sub-section (1) of Section 40 of the Central Excises and Salt Act, 1944. There is a further contention that the suit is barred by limitation under Sub-section (2) of Section 40 of the Act. The trial court overruled the plea based on Sub-sections (1) and (2) of Section 40 of the Act and decreed the suit for the value of the goods seized. The claim for damages by way of interest at 12% was negatived. The trial court found that the seizure of

the 50 bags of tobacco by the defendants was not justified and the defendants are bound to return the goods to the plaintiff in the same condition as were when seized. It became unfit for use for the reason of the negligence of the defendants. The plaintiff was justified in not taking delivery of the goods as it had become unfit for use and was not saleable. In appeal by the defendants, the District Court has confirmed the decision of the trial court and it is against the concurrent decision of the two courts below that the defendants have come up in second appeal.

4. Apart from question Nos. 1 to 3 referred to above, the learned counsel for the appellants has submitted that the suit is not maintainable as it amounts to a suit for damages for a tortious act against the Central Government and its employees who were discharging a statutory function under the provisions of the Central Excises and Salt Act, 1944. The learned counsel points out that Rule 200 of the Central Excise Rules empowers the officers concerned to seize and remove the goods or articles in respect of which duty should have been levied for contravention of the provisions of the Act or the Rules. If the articles or goods warehoused had been removed or replaced, the owner of the goods warehoused is liable to be proceeded against under Rule 151 and the goods seized are also liable to confiscation. Section 33 of the Act empowers the Collector of Central Excise or the Assistant Collector, as the case may be, to take proceedings by way of adjudication for the purpose of confiscation of the goods seized and for the imposition of penalty on the owner of the goods. For the reason of these various powers conferred by the officers of the Central Excise Department, counsel for the appellants submits that the seizure of goods and its retention for the purpose of adjudication by the defendants were in exercise of a sovereign function delegated to them by virtue of the provisions contained in the Statute and the rules made thereunder, and no suit for damages for a tortious act will lie against the Government or its employees. Counsel places reliance on the decision of the Supreme Court in *Kasturilal Ralia Ram Jain Vs. State of Uttar Pradesh*,) wherein it is stated thus at page 1046 :-

"(21)...If a tortious act is committed by a public servant and it gives rise to a claim for damages, the question to ask is : was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on, the delegation of the sovereign powers of the State to such public servant ? If the answer is in the affirmative, the action for damages for loss caused by such tortious act will not lie. On the other hand, if the tortious act has been committed by a public servant in discharge of duties assigned to him not by virtue of the delegation of any sovereign power, an action for damages would lie. The act of the public servant committed by him during the course of his employment is, in this category of cases, an act of a servant who might have been employed by a private individual for the same purpose. This distinction which is clear and precise in law, is sometimes not borne in mind in discussing questions of the State's liability arising from tortious acts committed by public servants. That is why the clarity and precision with which this distinction was

emphasised by Chief Justice Peacock as early as 1861 has been recognised as a classic statement on this subject." (The reference is to 5 Prom. FCR App. Al).

5. In the present case there is no suit for damages for a tortious act. The suit is only for the value of the goods illegally seized and retained by the defendants. True, there was also a claim for damages by way of interest at 12%. That claim has been negated by the courts below. What has been decreed is only the equivalent in value of the goods found to have been wrongly seized and retained by the defendants until it was so much deteriorated in quality that it could not even be sold in public auction. In substance and effect the relief that the plaintiff is asking for in the suit is for the return of the goods seized or its equivalent in value when it is found that the goods seized cannot be returned in the same condition it was at the time of its seizure. The point now as raised by the learned standing counsel for the Central Government is not seen raised in either of the courts below, nor is any such question formulated in the memorandum of second appeal on the basis of which notice of the appeal had been issued to the respondent. I, therefore, overrule the contention that the suit is not maintainable for the reason that it is in the nature of a claim for damages for a tortious act by the officers and servants of the Central Government.

6. Counsel for the appellants submits that unless the plaintiff is able to show that the action taken by the Officers of the Central Excise Department in the present case is not bonafide, he is not entitled to any relief in the suit. Counsel relies on Sub-section (1) of Section 40 of the Act as it stood at the relevant time, in support of his contention that all actions bonafide taken under the Act are immune from attack in a civil court. Sub-section (1) of Section 40 speaks of bar of suits against the Central Government or any of its officers in respect of orders passed in good faith or acts done or ordered to be done in good faith under the Act. The provision contained in Sub-section (I) does not, however, protect an act done in violation of the provisions of the Act or beyond the jurisdiction of the officer or the authority concerned. With reference to the provisions of Section 40 of the Act, a Division Bench of the Andhra Pradesh High Court in the decision in Bommidala Poornaish Vs. The Union of India, stated thus at page 343 :-

"(13) In J.S. Basappa Vs. Provincial Government of Madras (now Andhra Pradesh), Chandra Reddy, C.J., and Krishna Rao, J., held that Section 18 of the General Sales Tax Act applies only to suits for damages and compensation and cannot be extended to cases for the refund of taxes paid to the Government. This position was also conceded by the Government Pleader in that case. This case went up in appeal to the Supreme Court and that in The Provincial Government of Madras Vs. J.S. Basappa, confirmed this view. At page 1876, Hidayathullah, J., after referring to Section 18, expressed the opinion of the Court in these words :

"This section applies to suits for damages and compensation in respect of acts under the Act. It is worded in familiar language by which authorities, including Government, are protected and indemnified in respect of bona fide acts done or

purporting to be done under powers conferred by the statute. The period of limitation prescribed in the section does not apply to the kind of suits which were filed by Basappa.

It is, therefore, manifest not only from a plain reading of the section of the Act but also on a consideration of the authorities that only suits of a tortious nature, for compensation of damages are barred by Section 40. The question of collection of illegal taxes or orders imposing a tax, duty or penalty are not dealt with by the said provision."

7. In the present case the Department itself considered it unnecessary to take any action against the plaintiff or in respect of the goods seized, and that is why the plaintiff was required to take delivery of the goods kept in the custody of the Department. The plaintiff was justified in not taking delivery of the same for the reason of its deterioration in quality as to have lost its value and marketability. In Ext. P1 judgment this Court had quashed the adjudication proceedings for the reason of violation of the principles of natural justice and the Department was left free to take such action as was permissible in law. The Department has no explanation why no action was taken after Ext. PI judgment by this Court in O.P. No. 2566 of 1962. It should, therefore, be presumed that there was no case to proceed against the plaintiff and it was for that reason that the Department decided to return the goods to him. Even if it is to be held that the seizure and retention of the goods by the Department are bona fide, the plaintiff is entitled to have the goods restored to him in the same condition as it was seized or its equivalent in value. It is only the value of goods seized that has been decreed to him as the goods seized could no longer be returned in the same condition as it was seized. 1, therefore, answer question No. 1 against the appellants. I have already found that the question of bona fides of the officers of the Department is not of much consequence in a suit of this nature for the return of the goods seized or its equivalent in value and question No. 3 does not, therefore, arise for decision in this second appeal.

8. The only other question is as to whether the suit is barred by virtue of the provisions of Sub-section (2) of Section 40 of the Act as it stood at the relevant time. Sub-section (2) of Section 40 as it stood at the relevant time is extracted below :-

"No suit, prosecution or other legal proceeding shall be instituted for anything done or ordered to be done under this Act after the expiration of six months from the accrual of the cause of action or from the date of the Act or order complained of."

In the present case until the Department decided not to take proceedings in respect of the goods seized, the plaintiff had no right to demand the return of the goods or its equivalent in value. The plaintiff was for the first time told that he may take back the goods by a communication dated 28-10-1964. The passage from the judgment of Hidayatullah, J., in Baeappa's case quoted in the judgment

of the Andhra Pradesh High Court and extracted above would clearly show that the bar of limitation under Sub-section (2) of Section 40 does not apply to suits of this nature. In the decision of the Andhra Pradesh High Court referred to above it is stated thus at page 348 :-

"(25) In so far as the question of limitation is concerned, when we have held that Section 40 does not apply to this cause of action, the limitation prescribed thereunder is not applicable to this suit. There is authority for the proposition that the general law of limitation will apply in such circumstances : See (supra). Raghunadhan Reddy v. State of Hyderabad (1962) 1 Andhra WR 383:A1R 1963 AP110. The last of these cases considered the question of bar of suits in a Civil Court u/s 41 of the Hyderabad Abkari Act, analogous to Section 40 of the Act. A Bench of this Court consisting of one of us and Chandrasekhara Sastry, J., observed at p. 393 (of Andhra W.R.) (at p. 116 of AIR). "In any view, the claim for refund of earnest money deposited is not governed by Section 41 of the Abkari Act. The general law of limitation will be applicable thereto under which a suit could be brought within three years."

The present suit for the value of the goods seized is not one falling under Sub-section (2) of Section 40 of the Act.

For the aforesaid reasons I do not see any merit in the second appeal. It is accordingly dismissed with costs.