
(1995) 05 GAU CK 0014
In the Gauhati High Court
Case No : First Appeal No. 10 of 1991

Union of India (UOI)

APPELLANT

Vs

Assam Hard Board Ltd.

RESPONDENT

Date of Decision : 05-05-1995

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B, 11B(4), 11B(5), 15A, 35
Civil Procedure Code, 1908 (CPC) — Section 80
Constitution of India, 1950 — Article 226
Contract Act, 1872 — Section 72

Citation : (1995) 80 ELT 41

Hon'ble Judges : J.N. Sharma, J;B.N. Singh Neelam, J

Bench : Division Bench

Advocate : K.N. Choudhury, C.G.S.C, for the Appellant; J. Singh, for the Respondent

Final Decision : Allowed

Judgement

J.N. Sarma, J.—This appeal has been filed against the judgment and decree dated 7-9-1990 passed by the Assistant District Judge No. I, Kamrup, Gauhati in Title Suit No. 45 of 1983 decreeing the suit of the plaintiffs.

2. The brief facts are as follows :

The plaintiff is a company under Companies Act, 1956. The plaintiff is a manufacturer and dealer of all kinds and classes of boards, hardboard, insulated board, clipboard and all kinds of articles, in the process of manufacture of wood, bamboo and its allied products are used. The company manufactured hardboard from the year 1965 to 1977 and during this period a total amount of Rs. 8,17,430.86 was realised by the Central Excise Department as duty on an aqueous solution held by the Department as aqueous solution of resin which was used in the process of manufacture of hardboard. During the period mentioned above, the department demanded duty and the same was paid by the Company under mistake of fact. The law regarding the validity of duty on aqueous solution

of resin was clarified by a judgment of the Delhi High Court wherein it was held that the department was not entitled to levy duty on water solution of resin and as such solution does not fall within the definition of resin. The plaintiff claims that in view of this decision of Delhi High Court the realisation of duty from the plaintiff was illegal and as such the plaintiff filed an application before the Assistant Collector of Customs and Central Excise, Guwahati, for refund of the amount. The Assistant Collector by order dated 31-7-1981 rejected the claim for refund. It is stated in the plaint that this rejection by the Asstt. Collector is without authority of law and it is further stated that the realisation of the duty is unconstitutional and illegal and the Government is liable to refund the amount to the Company. A notice u/s 80 of the CPC was issued and thereafter the suit was filed for realisation of the aforesaid amount.

3. The defendants filed a written statement wherein it was stated inter alia as follows:

(i) that the plaintiff cannot seek redress in Civil Court as there is specific provisions for relief under Central Excises and Salt Act, 1944. It was further stated that the defendants under T.I. 15-A declared their products as Synthetic Resin and accordingly the duty was realised and now this cannot be claimed to be mistake of fact. Other defences were also raised in the suit.

4. As many as 6 issues were framed in the suit. For decision of this appeal we are concerned only with Issues Nos. 3, 4 and 5.

Issue No. 3. - Whether this court has jurisdiction to decide the suit in its present form where there is a provision u/s 11B of the Central Excises and Salt Act, 1944 for refund of duty? Issue No. 4 - Whether the suit will be bad under the provisions of Section 11B(4) and (5) of the Central Excises and Salt Act, 1944 read with Section 40 of the said Act. Issue No. 5 - Whether the plaintiff has taken recourse to the provisions of the Central Excises and Salt Act and rules made thereunder before instituting the present suit? If not, whether this court will entertain the present suit in its present form?

5. Before we go to the other things, let us have look at Section 11B(4)(5) as well as Section 35 of the aforesaid Act. Let us also have a look at T.I. 15-A of the Act.

Section 11B of the Act reads as follows:

It consists of five sub-sections, with an explanation to Sub-section (5). They are quoted below:

11B. Claim for refund of duty. - (1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months:

Provided that the limitation of six months shall not apply where any duty has been paid under protest.

(2) If on receipt of any such application, the Assistant Collector of Central Excise

is satisfied that the whole or any part of the duty of excise paid by the applicant should be refunded to him, he may make an order accordingly.

(3) Where as a result of any order passed in appeal or revision under this Act refund of any duty of excise becomes due to any person, the Assistant Collector of Central Excise may refund the amount to such person without his having to make any claim in that behalf.

(4) Save as otherwise provided by or under this Act, no claim for refund of any duty of excise shall be entertained.

(5) Notwithstanding anything contained in any other law, the provisions of this Section shall also apply to a claim for refund of any amount collected as duty of excise made on the ground that the goods in respect of which such amount was collected were not excisable or were entitled to exemption from duty and no court shall have any jurisdiction in respect of such claim.

6. Section 35 provides for Appeal to Collector against an order passed by a Central Excise Officer, lower in rank than a Collector of Central Excise. Section 35A provides for procedure in such an appeal. Section 35B provides for appeal to the Appellate Tribunal against an order of Collector of Central Excise and against an order passed by the Collector (Appeals) u/s 35A of the Act. Section 15A (sic Tariff Item?) of the Act provides for duty on Artificial or Synthetic Resins and Plastic materials and Articles thereof.

7. The learned Judge in deciding issues Nos. 3, 4 & 5 relied on certain decisions and came to the following findings - In deciding Issue No. 3 the learned Judge referred to Section 11B of the Act and found that the plaintiff brought the suit stating that the duty was paid by mistake of law and fact, but as we have pointed out earlier the mistake of law was nowhere mentioned/stated in the plaint. It was stated to be under mistake of fact and the payment was stated to be under mistake of law and fact. The learned Judge held that the benefit of Section 72 of the Contract Act shall be available to the plaintiff and in deciding this issue the learned Judge relied on the following decisions.

(i) State of Madhya Pradesh Vs. Bhailal Bhai and Others, . That case arose out of an application under Article 226 of the Constitution of India and the case arose out of a liability to pay tax under the Madhya Bharat Sales Tax Act and the Supreme Court in that case considered what is the power of a writ court to give consequential relief having found that the levy of the tax is illegal. That will be clear from paragraph 16 of the judgment where the Supreme Court inter alia pointed out as follows :

"For the reasons given above, we are clearly of opinion that the High Courts have power for the purpose of enforcement of fundamental rights and statutory rights to give consequential relief by ordering repayment of money realised by the Government without the authority of law".

The Supreme Court further pointed out that -

"Special remedy provided in Article 226 is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defences legitimately open in such actions".

The Supreme Court pointed out that the relief under Article 226 is a discretionary power. So, this case does not help in deciding the controversy between the parties. The next case which has been relied on by the learned Judge is *Munna Lal Vs. State of Punjab*, This is a judgment by a single Judge of the Punjab and Haryana High Court. In paragraph 5 of the judgment, the court held as follows :

"It is well settled that if the Government realises any amount from a citizen which it is not entitled to charge, he can file a suit for recovery of that amount in the Civil Court."

In that case the court was considering the royalty being levied under the Mines and Minerals (Regulation and Development) Act and in that particular case the court found that there was no special remedy provided for refund of the amount illegally realised from a person. So, this case also does not help in deciding the present controversy, inasmuch as in our present case, the remedy have been provided for refund of the amount. The third case which has been considered is 1990 (2) GLJ 86 (*Assam Industrial Corporation v. Union of India*). That was a case under the Central Excise Act and Rules and that matter arose out of a writ, further that case did not consider Section 11B nor Section 35A or 35. In that case the writ court considered whether the writ court was competent to give relief in exercise of power under Article 226 of the Constitution of India. So, this case is no authority to decide as to whether the civil court has jurisdiction for the suit as in the present case.

The fourth case is *Salonah Tea Co. Ltd. and Others Vs. Superintendent of Taxes, Nowgong and Others*, . The point which arose for decision can be found from paragraph 6 of the judgment.

The Supreme Court pointed out as follows :

"The only question that falls for consideration here is whether in an application under Article 226 of the Constitution the Court should have directed refund."

In this connection, the Supreme Court inter alia pointed out as follows :

"Normally speaking in a society governed by rule of law taxes should be paid by citizens as soon as they are due in accordance with law. Equally, as a corollary of the said statement of law, it follows that taxes collected without the authority of law as in this case from a citizen should be refunded because no State has the right to receive or to retain taxes or monies realised from citizens without authority of law."

So, this is not the authority to decide the present controversy. The learned Judge in deciding the Issue No. 3 held that the civil court has the jurisdiction to decide the suit. As we have pointed out earlier the cases which have been relied on to

decide the issue are absolutely not relevant to the facts and circumstances of the present case. Whether the Civil Court has the jurisdiction to try the suit or not. We shall discuss in the later part of the judgment. But we are only discussing the cases relied on by the learned Judge which are not relevant to decide the particular point. The learned Judge took up the Issues Nos. 4 and 5 and decided together. The learned Judge considered that as the earlier issue has been decided by him in favour of the plaintiff, so the learned Judge also decided those two issues in favour of the plaintiff and accordingly the suit was held to be within the jurisdiction of the Civil Court and the suit was decreed.

8. We have heard Sri K.N. Choudhury, learned Standing Counsel for the appellants and Sri J. Singh, learned Counsel for the respondent. To decide this appeal as we have already quoted that we are concerned only with Issues No. 3, 4 and 5 because if we hold that the Civil Court has no jurisdiction to entertain the suit, there is absolutely no necessity to decide the case on merit. Sri Choudhury appearing for the appellants has relied on the following decisions regarding the jurisdiction of the Civil Court.

(i) The Premier Automobiles Ltd. Vs. Kamlekar Shantaram Wadke of Bombay and Others,

(ii) Dhulabhai and Others Vs. The State of Madhya Pradesh and Another,

(iii) Union of India v. A.V. Narasimhalu - 1969 (2) SCC 658

In the two cases, i.e. The Premier Automobiles Ltd. Vs. Kamlekar Shantaram Wadke of Bombay and Others, the law laid down in these cases is that the ouster of jurisdiction of the civil court should not be readily inferred. It must be done extremely (sic expressly) or by implication. In these two decisions the Supreme Court pointed out that all the citizens have the right to approach the civil court to ventilate their grievances. But the legislature makes law and may provide special remedy for ventilation of those particular grievances and if a special remedy is provided, that special remedy must be availed of and the jurisdiction of the civil court may be deemed to be ousted. These two decisions further decided that if a particular order or decision or procedure adopted to arrive at the decision are absolutely without jurisdiction or mala fide in nature, then also the civil court would have the right to declare that particular decision to be null and void. For the decision of this particular case, the last decision i.e. Union of India (UOI) Vs. A.V. Narasimhalu, is the most relevant case. This was a case under Sea Customs Act, 1878 and certain customs duty were imposed under Sections 188 and 191. A suit was filed challenging the legality and validity of the imposition of that duty and the trial court decreed the suit holding that the claim was not barred. On appeal, the Special Judge of the Civil Court held that the civil court had no jurisdiction to entertain the suit and reliance was placed on Secretary of State for India v. Mask & Co. (LR 67 LA 222). In Second Appeal, the High Court of Madras reversed the judgment of the Special Judge of the Civil Court and restored the decree passed by the trial court. The Union of India filed appeal before the

Supreme Court with special leave and the Supreme Court after considering the matter and relying on *Dhulabhai and Others Vs. The State of Madhya Pradesh and Another*, in paragraphs 8,9 and 10 of the judgment pointed out as follows :

"But an erroneous decision of the Customs Authority cannot be said to be reached without jurisdiction merely because it may be shown in some collateral proceeding to be wrong. Normally an action of an administrative authority interfering with the right to property may be challenged by resort to a civil court. Yet in the case of a right which depends upon a statute, the jurisdiction of the Civil Court to grant relief may by express provision or by clear implication of the statute be excluded. Where a statute re-enacts a right or liability existing at common law, and the statute provides a special form of remedy, exclusion of the jurisdiction of the civil court to grant relief in the absence of an express provision, will not be readily inferred. Where however, a statute creates a new right or liability and it provides complete machinery for obtaining redress, against erroneous exercise of authority, jurisdiction of the civil court to grant relief is barred. Liability to pay a duty of customs is not a common law liability. It arises by virtue of the Sea Customs Act: in respect of any grievance arising in consequence of enforcement of that liability, machinery has been provided by the Act. Having regard to the complicated nature of the questions which arise in the determination of liability to pay duty of customs the Legislature has invested the power of determining liability and the manner of enforcement thereof upon a specially authorised hierarchy of tribunals. An appeal lies against the order of the Assistant Collector of Customs against an order imposing duty as well as an order refusing to refund duty, and the grievance may be carried to the Central Board of Revenue. In our judgment, the jurisdiction of the Civil Court is by clear implication of the statute excluded."

9. We, however, deem, it necessary to observe that the civil courts have jurisdiction to examine cases in which the Customs Authority has not complied with the provisions of the statute or the officer of Customs has not acted in conformity with the fundamental principles of judicial procedure or the authority has acted in violation of the fundamental principles of judicial procedure or he has made an order which is not within his competence or the statute which imposes liability is unconstitutional, or where the order is alleged to be mala fide. A civil suit will lie for obtaining appropriate relief in these cases.

10. But the exclusion of the jurisdiction of the civil court to entertain a suit does not exclude the jurisdiction of the High Court to issue high prerogative writs against illegal exercise of authority by administrative or quasi-judicial tribunals. The finality which may be declared by the statute qua certain liability either by express exclusion of the jurisdiction of the civil court or by clear implication does not affect the jurisdiction of the High Court to issue high prerogative writs."

11. So, relying on that decisions, we hold that Civil court has no jurisdiction to entertain the suit and the jurisdiction is ousted by Section 11B(4) and (5). In that view of the matter, the suit of the plaintiffs is liable to be dismissed which

we hereby do. Sri Choudhury submits that when this appeal was admitted an amount of 50% was paid to the plaintiff-decree holder in view of the order of the court and as this appeal has been allowed and suit has been dismissed, he is entitled to refund of the amount. This prayer is a reasonable one. But we allow this appeal subject to the following conditions :

(i) The claim of the plaintiff for refund of the amount was rejected by the Assistant Collector of the Customs and Central Excise u/s 35 (sic) of the Central Excises and Salt Act, 1944, and appeal lies to the Collector, Central Excise (Appeals). But the period of limitation for filing such application is 90 days, but the proviso to that section before the Collector to condone the delay for another period of 3 months. In the instant case, more than 6 months have elapsed from the date of the order. But in the particular facts and circumstances of this case, we allow the plaintiff a month from today to file appeal before the Assistant Collector of Central Excise (Appeals) and on receipt of such appeal, without considering the question of delay shall consider the same as maintainable and decide the appeal on merit and refund of the amount paid by the Department to the plaintiff shall be subject to the result of this appeal. The appeal is accordingly allowed. We make no order as to costs.