SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Chemistar Vs. Union of India (Uoi),

Chemistar Vs. Union of India (Uoi),

SooperKanoon Citation : sooperkanoon.com/361448

Court : Mumbai

Decided On : Feb-06-1987

Reported in : 1988(15)LC158(Bombay)

Judge : S.M. Daud, J.

Appeal No. : Writ Petition No. 2751 of 1986

Appellant : Chemistar

Respondent : Union of India (Uoi), ;The Collector of Customs and ;The Assistant Collector of Customs

Judgement :

S.M. Daud, J.

1. These petitions under Article 226 of the Constitution are aimed at recovery of Additional Duty collected from the petitioners who had imported 'Phenol' and from whom Additional Duty was collected in 1985 and 1982 respectively.

2. The contention is that Phenol was a 'drug' entitled to exemption from Notification No. 234/82-C.E. dated 1.11.1982 as amended from time to time ending with No. 80/85-C.E. dated 17.3.1985. Pursuant to a mistake of law entertained by both the parties, the Additional Duty was recovered. That such a recovery was illegal was so held by Pendse J. in the case of Raman Kantilal

Shandari v. Union of India and Ors. reported in (1987) 11 E.C.C. 181 : 1987 (11) ECR 84. However, when the petitioners applied for a refund of the same, the applications were rejected, and therefore, the instant petitions. It is submitted that imposts collected without the sanction of law can be recovered at any time within three years of the discovery of the mistake. Petitioners had applied to the Customs Authorities for a refund within three years of the realisation of the mistake. Their applications were rejected on the plea that the applications should have come within six months of the collection of the duty as required by Section 27(1) of the Customs Act, 1962. This view entertained by the Customs Authorities was erroneous. A legitimate request having been rejected, petitioners had to move this Court under Article 226 of the Constitution.

3. No affidavitin reply has been filed in Writ Petition No. 2748 of 1986. However a request is made that time be granted for that purpose. This request cannot be entertained, seeing that the matter was admitted on 21.10.1986. If the respondents really wanted to file a return they could have done so within a reasonable time of their waiving service, which waiver was effected on 21.10.1986 itself. More than three months having passed without their availing of the opportunity of filing an affidavit in reply, the matter cannot be indefinitely adjourned to suit the convenience of the respondents. In so far as Writ Petition No. 2751 of 1985 is concerned, the affidavit in reply raises defences summarised below.

It is contended that the imported article was not a 'drug', and thererfore, not entitled to the exemption pursuant to the notification afore-mentioned. In fact, the article was imported as a 'chemical' and was assessed as such for basic duty under the Customs Act. Petitioners' could not now turn back upon the label under which the import had been made and seek exemption from Additional Duty under a notification which in any case did not apply. This was because the imported substance was not recognised as a 'drug' by any pharmacopoeial system, which fact was evident from the absence of an indicative lettering or letter 'P'. The allegation that Additional Duty was paid under a mistake of law was not true, and, therefore, denied. The refund applications had been rightly rejected. Petitioners could not take advantage of the decision in R.K. Bhandari's case (supra) 1987 (11) ECR 84. For all the aforesaid reasons, the petitions deserved to be dismissed with

costs.

4. In regard to Phenol without the suffixes 'USP', 'BP', 'USSRP' or 'IP', I have in my judgement to Writ Petition No. 2228 of 1986 with others held that the presence or absence of such letters is not determinative of whether the article being imported is a, 'drug' or not. Briefly stated, I have gone by the inclusive definition of 'drugs' given in Section 3(b) of the Drugs and Cosmetics Act, 1940. It is contended that the exemption notification itself requires that a 'drug' if exemption is sought in respect thereof, has to 'conform to pharmacopoeial standard'. In the instant case, the Bill of Entry showed the imported article to be a 'chemical' or 'inorganic compound'. Therefore, there was no question of it being deemed 'a drug conforming to any pharmacopoeial standard'. The Explanation itself shows that even a 'chemical' can be a 'drug' when it conforms to a pharmacopoeial standard. Admittedly, or rather allegedly, Phenol imported by the petitioners was a 'chemical' and so it is loudly asserted by the respondents. All that requires to be further seen, is that whether Phenol because of its being a 'chemical' could not be a 'drug'. Reference has been made by Dr. Kantawala to a circular issued by the Central Board of Excise and Customs bearing No. C.B.E. & C. Budget. Circular No. 11/75 dated 8.5.1975. In this circular, it was specified that a bulk pharmacopoeial drug, even if it contained single therapeutic agent, which was not in the nature of patent or proprietary medicine, would be a 'drug'. Placed on record in the compilation of Writ Petition No. 2751 of 1986 is Ex. F showing the recognition of Phenol to be a 'drug'. It was argued that in the Central Excise Tariff, Phenol found a place at Item No. 14AAA, which dealt with Organic Chemicals. Now Phenol can be an organic chemical, but in that case it will be the rate of duty charged by the respondents, which will be determinative as to the substance being imported. In the two cases before me, Additional Duty was charged at the rate of 10%. This was the rate prescribed for drugs. In that view of the matter, there can be no doubt that the goods were classified for the purposes of Additional Duty as falling under residuary item viz. Item 68. Dr. Kantawala is right in saying that an assessment having been made, it is not now open to the respondents to go back and assert something which was never their case at any earlier stage. He relies upon Section 17 of the Customs Act in support of this contention. Section 17 requires duty to be assessed after ascertainment of certain particulars. This is done after the goods

enter the territorial limits. In the instant case, the petitioners had imported Phenol for home consumption. Clearance was given after an assessment and duty was paid on the basis that the product was a 'drug'. That is the basis on which Additional Duty was recovered at the rate of 10%. Another indication to this is the stand taken by the respondents when petitioners came forth to seek a refund. At that stage, the claim was not disputed on the ground of Additional Duty having been rightly recovered as the article imported was not a 'drug'. In fact, the order passed by the Assistant Collector of Customs implies that the only reason for rejecting the refund applications was the plea of the Assistant Collector that the matter was governed by Section 27(1) of the Customs Act. It is not necessary to labour over this contention any further. I, therefore, hold that in both the cases the Phenol imported was a 'drug' entitled to exemption set out in the notification mentioned above.

5. The next question is whether the claim for refund could be refused on the ground of bar of limitation? In decision after decision given by this Court, it has been held that monies recovered without authority of law can be got back within three years after the discovery of mistake in regard to the legal position. So far as Additional Duty not being leviable upon the drugs is concerned, it was so held in the case of Rakesh Enterprises and Anr. v. Union of India and Anr. : 1986(25)ELT906(Bom) . In regard to the ineligibility of the respondents to put forth Section 27(1), the authority is Shalimar Textile Mfg. Pvt. Ltd. v. Union of India and Ors. 1986 (10) ECC 83 . Therefore on this ground also the Customs officers were in error.

6. The result of the foregoing discussion is that respondents are liable to make a refund of the Additional Duty collected by them from the petitioners. Petitioners claim interest at rate 18% p.a. from the date of collection and a directive to the respondents to deposit the amount payable unto them in this Court. So far as the first item is concerned, in accordance with my decision in Writ Petition No. 2228 of 1986 along with others decided on 15.1.1987, I will allow interest at only 12% p.a. and that from the expiry of eight weeks as from today. There is no reason why the respondents should be directed to deposit the amount in Court as solicited by the petitioners. If there is any difficulty in the realisation of the amount from the

respondents, petitioners can take appropriate steps. Therefore the order.

ORDER

Respondents to refund the Additional Duty collected from the petitioners within eight weeks from today. In case they fail to make a deposit within the aforesaid time, they shall be liable to pay in addition to the Additional Duty interest at rate 12% per annum to commence from the expiry of eight weeks and until the payment is made. Petitioners shall get their costs from the respondents who shall in addition bear their own. Rules, in both the cases made absolute as above.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com