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Court : Delhi

Decided On : Nov-18-1986

Reported in : 1988(14)LC325(Delhi)

Judge : Mahinder Narain, J.

Appeal No. : Civil Writ No. 336 of 1986

Appellant : Autometers Ltd. and anr.

Respondent : Union of India (Uoi) and anr.

Disposition : Petition allowed

Judgement :

Mahinder Narain, J.

1. By this writ petition, the petitioner a company incorporated under the Indian Companies Act, seeks to get an order of refund of part of the amount paid by it as additional customs duty.

2. The petitioner imported copper tubes which were used as raw material in the manufacture of Oil and Temperature Gauges, which are being manufactured by the petitioner company. It is stated in the petition, and as is established by annexure P-I to the writ petition, these copper alloy capillary tubes were imported into India by the petitioner, and they landed in India between 24th September,

1984 and 9th January, 1985, and additional customs duty was paid thereon at the rate of 28%. This duty was paid on account of tariff entry 26(A).

3. It is the case of the petitioner that a notification was published with reference to item No. 26(A) on 17th September, 1984, that is to say a few days before the goods relating to which the additional customs duty was paid, landed in India, and was charged customs duty. This notification reads as under:

In exercise of the powers conferred by Sub-rule (1) of Rule 8 of the Central Excise Rules, 1944, the Central Government hereby exempts pipes and tubes of copper, falling under sub-item (9) of item No. 26A of the First Schedule of the Central Excises and Salt Act, 1944 (1 of 1944), from so much of the duty of excise livable thereon under the said Act at the rate specified in the said First Schedule as is in excess of the amount calculated at the rate of nine per cent ad valorem.

This notification shall be in force up to and inclusive of the 30th day of September, 1985.

(Notification No. 199/84-CE, dt. 17.9.1984)

4. By virtue of this notification, instead of duty being paid, as was paid at the rate of 28%, the duty ought to have been levied and calculated at the rate of 9% only. This means that excess additional customs duty was levied. The excess was to the extent of 19%.

5. The claim of the petitioner in the petition is that taking into account the total amount paid as customs duty, a sum of Rs. 1,70,201.50 p. has become refundable to the petitioner on account of excess duty paid.

Article 265 of the Constitution reads as under:

265. No tax shall be levied or collected except by the authority of law.

It is the contention of the petitioner that in view of the notification No. 199/84-CE dated 17.9.1984, which imposed only 9% customs duty on copper alloy capillary tubes, which were covered by sub-item (9) of item No. 26A of the First Schedule of the Central Excises and Salt Act, 1944 (1 of 1944), the additional customs duty

levied and collected over and above 9% rate mentioned in the notification, has been levied and collected without the authority of law.

6. It cannot be disputed that in view of the notification dated 17th September, 1984, the authority to levy additional customs duty is confined to 9%. The law after this notification, will not permit the collection of additional customs duty on copper alloy tubes in excess of 9%.

7. It is stated by the petitioner that the only reason why the duty was collected at the rate of 28% was that the notification dated 17th September, 1984, aforesaid, was published only on 17th September, 1984 and the factum of publication that notification apparently did not trickle down to the person who levied and collected customs duty from the petitioner. The duration of this notification dated 17th September, 1984 was only up to 30th September, 1985. Thereafter, the date of this notification was extended up to 31st March, 1986. The petitioner says that it came to know about the first notification, dated 17th September, 1985 only when the notification dated 1st October, 1985 came to its notice on publication in BIG's Weekly INDEX OF CHANGES VOL. 11 No. 26 dated 14th October, 1985.

8. On coming to know of the rate of duty which was livable on the copper alloy capillary tubes, which were imported by the petitioner during the period 21st September, 1984 to 8th December, 1984, the petitioner had applied to the authorities concerned for refund, by applications, which applications are collectively marked as annexure P-3 to the writ petition. These applications for refund were made on 16th November, 1985, and covered each of the imports during the period 21st September, 1984 to 8th December, 1984.

9. All these applications for refund were dismissed as being out of time by a common order passed on 27th March, 1986. During the pendency of the refund applications, the petitioner filed the instant petition, in which various reliefs were sought; one was for the calling for the records of the respondent relating to the refund applications, and for quashing of the action thereon ; and the other relief which was claimed, was a writ of or in the nature of mandamus or other appropriate writ, orders or direction be issued, commanding the respondents to act according to law and to forthwith refund to the petitioner company the amount of

Rs. 1,70.201.50 in respect of the period 21.9.1984 to 8.12.1984.

10. The other prayer in Clause (c) only related to directions to the respondents to act in accordance with the law and to consider and dispose of the refund claims without reference to the provisions of Section 27 of the Customs Act read with Section 3(6) of the Customs Tariff Act, 1975.

11. I need not pronounce upon prayer (c) in the instant case. As noted above, the matter has already been disposed of by the order dated 27th March, 1986, passed by the Assistant Collector of Customs (Refund), respondent No. 2.

12. Mr. S.P. Sharma, who appears for the Union of India, refers to and relies upon the judgment of the Supreme Court in M/s. Madras Rubber Factory Limited v. Union of India & Ors. : 1983(13)ELT1579(SC) . In this judgment, a bench of 3 Judges decided an appeal arising out of a Special Leave Petition against the order of the Customs authorities of the Govt. of India. The orders of the Govt. of India were passed under the Cus. Act, 1962. The Central Govt. had passed orders under Section 27(1) of the Customs Act, 1962. This judgment of the Supreme Court is relatable to and applies to cases in which the orders which are impugned, are those which are passed by the authorities under Section 27(1) of the Customs Act, wherein all that is to be seen is whether the authorities under the Customs Act, have acted in accordance with the law Section 27(1) of the Customs Act reads as under:

27(1). Any person claiming refund of any duty paid by him in pursuance of an order of assessment made by an officer of customs lower in rank than an Assistant Collector of Customs may make an application for refund of such duty to the Assistant Collector of Customs before the expiry of six months from the date of payment of duty:

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

Explanation :-Where any duty is paid provisionally under Section 18, the period of six months shall be computed from the date of adjustment of duty after the final

assessment thereof.

13. It is settled law that the authorities under the Act have to act in accordance with law which constitutes it. Because of Section 27(1) of the Customs Act, an authority constituted under that Act, shall have to decide the case before it in accordance with the said provisions. Section 27(1), as for as the authority constituted under the Act is concerned, provides a period of limitation of six months. No claim for refund can be made under that provision unless the claim is made within six months.

14. The judgment of the Supreme Court reported in : 1983(13)ELT1579(SC) would not apply to the instant case inasmuch as the petitioners herein have invoked the extra ordinary jurisdiction of the High Court under, Article 226 of the Constitution of India for protection of their constitutional rights and enforcing constitutional obligations of the State. '

15. The case of the petitioner before me is that they were being made to pay duty which they were not liable to pay under law, and they claim a refund of that amount which they were not liable to pay under law For this proposition the law has been settled by a bench of six Judges of the Supreme Court in the case State of Madhya Pradesh and another v. Bhailal Bhai & Ors. : [1964]6SCR261 . The appeals in that case had been filed by the State of Madhya Pradesh under Article 226 of the Constitution of India. In that case the dealers of tobacco were assessed to sales-tax on their sales of tobacco, in accordance with the notification issued by the State Government in exercise of powers under Section 5 of the State Sales-tax Act, and large amounts were collected by the Madhya Bharat Government, and later by the Madhya Pradesh Government. The petitioners had contended that the taxing provisions under which the tax was assessed and collected from them were unconstitutional, as it infringed Article 301 of the Constitution of India and did not come within the special provisions of Article 304(a). The Supreme Court agreed with the High Court that similar goods manufactured and produced in the State of Madhya Bharat have not been subjected to the tax which tobacco leaves, manufactured tobacco and tobacco used for Bidi manufacturing, imported from other States have to pay on sale by the importer. The Supreme Court also held

that the tax imposed was not within the saving provisions of Article 304(a) of the Constitution The tax contravened the provisions of Article 301 of the Constitution. The tax imposed was, thereforee, held by the Supreme Court also, to be invalid The Supreme Court went on to observe as under:

A portion of the tax thus assessed has been already paid by the petitioners. It cannot be disputed that this payment was made under a mistake within Section 72 of the Indian Contract Act and so the Government to whom the payment has been made by mistake must in law repay it. The question is : whether the relief of repayment has to be sought by the tax-payer by an action in a civil court or whether such an order can be made by the High Court in exercise of its jurisdiction under Article 226 of the Constitution. The jurisdiction conferred by Article 226 is in very wide terms. This Article empowers the High Court to give relief by way of enforcement of fundamental rights and other rights by issuing directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari. According to the petitioners a writ in the nature of mandamus can be appropriately used where money has been paid to the Government by mistake to give relief by commanding repayment of the same. That in a number of cases the High Courts have used the writ of mandamus to enforce such repayment is not disputed. In a recent case in : AIR 1963 SC928 this Court made in a petition under Article 32 an order for refund of tax illegally collected from the petitioner under Rule 16 of the Madras General Sales Tax (Turnover and Assessment) Rules 1939. The question whether the Court has this power to order refund was not however raised there. In Sales Tax Officer, Banaras v. Kanhaiya Lal Mukundlal Saraf : [1959]1SCR1350 the appellants disputed the correctness of the High Court's order made in an application under Article 226 of the Constitution directing refund of taxes that had been paid under the U.P. Sales Tax Act on the respondent's forward transactions in silver bullion. After the levy of sales tax on such transactions was held to be ultra virus by the High Court of Allahabad the respondent asked for refund of the tax paid and when that was refused he applied to the High Court under Article 226 of the Constitution for a writ of certiorari for quashing the assessment orders and a writ of mandamus requiring the appellants to refund the amount illegally collected. The order made in this case by the High Court for refund was affirmed by this Court in appeal. In this case also

the power of the High Court to order such refund was not challenged either before the High Court or before this Court.

We see no reason to think that the High Courts have not got this power. If a right has been infringed-whether a fundamental right or a statutory right-and the aggrieved party comes to the court for enforcement of the right it will not be giving complete relief if the court merely declares the existence of such right or the fact that that existing right has been infringed. Where there has been only a threat to infringe the right, an order commanding the Government or other statutory authority not to take the action contemplated would be sufficient. It has been held by this Court that where there has been a threat only and the right has not been actually infringed an application under Article 226 would lie and the courts would give necessary relief by making an order in the nature of injunction. It will hardly be reasonable to say that while the court will grant relief by such command in the nature of an order of injunction where the invasion of a right has been merely threatened the court must still refuse, where the right has been actually invaded, to give the consequential relief and content itself with merely a declaration that the right exists and has been invaded or with merely quashing the illegal order made.

16. The Supreme Court came to the conclusion that the taxes which have been paid, were paid under a mistake postulated by Section 72 of the Contract Act. The Supreme Court also came to the conclusion that the tax was not under authority of law, and also that in exercise of powers postulated by Article 226 of the Constitution of India, the High Court can make an order for refund of tax which has been levied and collected in contravention of the provisions of the Constitution.

17. Whether the tax is levied and collected in contravention of the provisions of the Constitution, and whether the same is levied and collected in contravention of the provisions of the law, enacted by the Parliament, the effect would be the same, and if any tax is paid which law does not make payable, then it must be tax paid under mistake, and refund thereof can be ordered to be made by the Court in exercise of powers under Article 226 of the Constitution. Such a prayer for refund has been made in this petition.

18. In the present case excessive amount of customs duty have been recovered, whereas the Customs Act read with Tariff Item No. 26A, and the notifications published, authorised imposition of duty on copper alloy capillary tubes at the rate of 9% only, duty has been collected at the rate of 28%. In my view, the duty could not have been levied or collected at the rate of 128%, and the petitioners are entitled to refund of duty paid by them in excess of 9%.

19. The counsel for the petitioners has also brought to my notice a judgment given by a Division Bench of this Court, in the case Barmalt (India) Private Limited v. Union of India & Ors. : 1986(23)ELT411(Del) . In that case the Court was dealing with a claim for refund of excise duty on malt extract which was found to be not leviable, excise duty having been paid on malt and malt extract. In that case the excise duty had been paid under protest. Payment under, protest is of relevance under Section 27(1) of the Customs Act. In the instant case, the payment that was made was a payment made under mistake. The Division Bench of this Court held that the products of the petitioners qualified for exemption from duty under entry 19.

20. This Court also discussed the question of 'unjust enrichment' which was raised by the government in that case. It does not need to be dealt with by me in the instant case as the Division Bench had rejected the plea of the Union of India on the basis of judgments discussed therein. In the Barmalt (India) Private Limited v. Union of India's case (supra) the matter was remanded back to the Collector, Central Excise. I do not see any purpose in remanding the case. In view of the law laid down by the Supreme Court in the case State of Madhya Pradesh v. Bhailal Bhai & others (supra), power exists to order payment of the amount collected without the authority of law. To this effect there is also a judgment of a Division Bench of this Court in the case I.T.C, Limited v. Supdt. of Central Excise & Ors. : 1996(86)ELT477(SC) , wherein in dealing with the matter of excise, it was stated that where excise duty was realised in excess of what was permissible, its realisation is outside the statutory authority. The Division Bench further observed that time limit laid down under the Act, that is to say Section 27(1), would not apply. In that case, while allowing the writ petition a mandamus was issued, directing the respondent to refund to the petitioner the amount of excess

realisation after the same had been verified. In the instant case, in view of the notifications there is no manner of doubt that there is excess realisation of customs duty. This excess realisation of customs duty is without the authority of law, and is liable to be refunded. The petitioners have claimed a sum of Rupees 1,70,201.50 p. as due to them. The same has been levied and collected without the authority of law.

21. It is note worthy that the petitioner company has asserted in para 11 of the petition that similar claims of refund made by the petitioner against 4 subsequent bills of entry bearing Nos. 034085, 019152, 018367 and 042932 dated 25.4.1985, 26.4.1985, 26.7.1985 and 20.9.1985 respectively, the refunds have already been received. The assertion in this para are not disputed in the counter-affidavit by the respondents.

22. For the above said reasons, the writ petition succeeds. A mandamus is issued, directing the respondents to refund to the petitioners a sum of Rs. 1,70,201.50 p. or such other sum as may be found on verification, to be due, within a period of six months from today.

In terms of the above orders, the writ petition is disposed of. Parties are left to bear their own costs.

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