Haji Habib Haji Pir Mohammed Vs Assistant Collector Of Customs and Others

Court: Calcutta High Court

Date of Decision: Jan. 31, 1961

Acts Referred: Constitution of India, 1950 â€" Article 226

Citation: 65 CWN 1070

Hon'ble Judges: A.N. Ray, J

Bench: Single Bench

Advocate: E.R. Meyer and T.K. Basu, for the Appellant;G.P. Kar, for the Respondent

Judgement

A.N. Ray, J.
The petitioner obtained a rule for a writ in the nature of certiorari calling upon the respondents to certify and send up the

entire records and proceedings relating to the orders dated December 21, 1957 and November 13, 1959, and for a writ in the nature of

Mandamus directing the respondents to forthwith recall, can-cell and withdraw the said orders and to forbear from giving effect thereto in any

manner whatever, and for a further writ in the nature of Mandamus directing the respondents to refund to the petitioner a sum of Rs. 10,885/-

which was paid as duty on 48 duty bags of goods forming the subject-matter of the petition. The petitioner was the consignee of two hundred bags

of betelnuts. The goods were shipped per M. V. Noreverett. The bill of lading was dated May 2, 1957. On May 17, 1957 the petitioner filed a bill

of entry for Home consumption. The bill of entry was filed in anticipation of the arrival of the vessel. On May 21, 1957 duty on the said two

hundred bags was assessed at Rs. 45.066.66 nP. at the rate of Re. 1/- per lb. On May 29, 1957 the petitioner paid the said sum as duty.

2. The said vessel arrived at Calcutta in the end of May, 1957 and was berthed at No. 3, Hastings Moorings.

3. Part of the cargo was discharged at the wharf and part was landed on various country boats engaged by the steamer agents. On the discharge

of the entire cargo the petitioner discovered that seventy bags out of the said consignment of two hundred bags were short landed. On July 30,

1957 the petitioner received a certificate from the Commissioners for the Port of Calcutta in form "B" certifying the said short landing of seventy

bags.

4. On August 13, 1957 the petitioner made a claim before respondent No. 1, Assistant Collector of Customs, intimating that seventy bags were

short landed. The refund claimed was Rs. 15,813/-. On October 23, 1957 the petitioner received a letter from the Assistant Collector of Customs

intimating that unless a certified claim bill accepted by the steamer agents was produced, the claim of the petitioner could not be examined.

5. On December 21, 1957 respondent No. 1, Assistant Collector of Customs, rejected the petitioner''s claim. On February 28, 1958 the

petitioner preferred an appeal. On March 18, 1958 the petitioner was called upon by respondent No. 1, Assistant Collector of Customs, to

produce the accepted claim bill from the steamer agents in connection with the petitioner''s pending appeal. On November 13, 1959 respondent

No. 2, Collector of Customs, passed an order in the appeal allowing the petitioner''s claim in respect of twenty two bags and rejecting the claim in

respect of forty eight bags of the said goods.

6. Counsel on behalf of the Customs Authorities contended, first, that this Court had no jurisdiction to interfere on the ground that the assessment

order was administrative, secondly, that the money that was paid belonged to the Union and could not be refunded at all; thirdly that the petitioner

had an alternative remedy of suit and that the petitioner had in fact instituted a suit against the shipping company for the shortage of goods. Counsel

for the Customs Authorities relied en the decision of Glaxo Laboratories (India) Private Ltd. Vs. A.V. Venkateswaran and Another, in support of

the contention that the assessment order was administrative and as such the Court had no jurisdiction under Art. 226 of the Constitution. Counsel

for the Customs Authorities also relied on the decision of East India Commercial Ltd. Vs. Collector of Customs and Another, in support of the

contention that the order of the Assistant Collector merged in the order of the Collector on appeal and as such the order on appeal being equally

on assessment would not be disturbed in proceedings under Art. 226 of the Constitution.

7. Counsel for the petitioner relied on the recent decision of the Appellate Court in the case of Assistant Collector of Customs, for Appraisement

and Others Vs. Mercantile Express Co. Ltd., . It has been held there that the assessing authority discharging administrative functions is not above

the law. The assessing authority is bound to assess the Customs duties in accordance with law, and if the very basis of assessment is illegal a writ of

Mandamus will go requiring the respondents to forbear from enforcing the illegal order. The appellate order is quasi-judicial in character and as

such this is amenable to the remedy of a writ of certiorari. It is true that sec. 188 of the Sea Customs Act makes the order on appeal final. Such

provision in the Sea Customs Act does not take away the power of High Court to quash the order. The remedy of certiorari is not taken away

except by express and clear words. It has been held by the Appellate Court that notwithstanding the decision of the Customs authorities on appeal

being made final by the statute certiorari may still issue for excess of jurisdiction or for an error on the face of the record. The Bombay decision in

the Glaxo Laboratories case (1) has been referred to and discussed in the decision reported in (3) Assistant Collector of Customs, for

Appraisement and Others Vs. Mercantile Express Co. Ltd., . In the Glaxo Laboratories case it was held that at the initial stage of assessment the

proceeding is administrative. After the assessment has been completed and there is the order of the Collector on appeal it is a quasi-judicial order

and is amenable to the writs of Mandamus and Certiorari. The decision in East India Commercial Company case reported in (2) East India

Commercial Ltd. Vs. Collector of Customs and Another, , has in my opinion, no application to the facts of this case. In that case the Collector of

Customs whose office was situated within the jurisdiction of the High Court at Calcutta passed an order under the Sea Customs Act. The order

was confirmed by the appellate authority, the Central Board of Revenue, whose office was located outside the jurisdiction of this Court. The

original order made in that case by the Collector of Customs was contended to be operative of its own force after the appeal had been dismissed.

It was on the strength of that original order that the duty became payable. It was held in that case that the order of the appellate authority added

nothing to the force of the original order. On these facts it was held by the Special Bench that after the appeal had been dismissed and the original

order was confirmed, the formal existence of the order by the appellate authority was no reason why the Court should not exercise jurisdiction

under Art. 226 of the Constitution in respect of the original order. It was further held that the Court had jurisdiction to issue a writ to the Collector

of Customs in respect of the order made by him and could give appropriate relief under Art. 226 of the Constitution in respect of the original order

if the merits of the case would justify. In the present case the order of the Collector of Customs on appeal was made within the jurisdiction of this

Court. It is open to the petitioner to challenge the order made on appeal. The case relied on by Counsel for the customs authorities holds that the

Court can end does interfere in a case where the order impeached is against law.

8. In the recent decision of the Appellate Court (Assistant Collector of Customs, for Appraisement and Others Vs. Mercantile Express Co. Ltd.,

) it has been held that the power of the High Court to issue an order in the nature of certiorari under Art. 226 of the Constitution cannot be taken

away even by express words. The Constitution is paramount. Any law which courts or fetters or restricts the power of the High Court under Art.

226 is to that extent void. I therefore hold that the contention of the Customs Authorities is without any substance. The Court has jurisdiction to

interfere in orders passed by the Collector of Customs. Such orders are quasi-judicial.

9. The next question is whether the petitioner is entitled to any relief. It is indisputable that the bill of entry was filed in anticipation of the arrival of

the consignment. The bill of entry was filled in by the petitioner and the amount was calculated in accordance with tariff rates. The money was, in

fact, paid on May 27. The Collector''s order is as follows:-

Out of the 70 bags shortlanded 48 bags were loaded in a boat which sank on 27-5-57. Since the relative bill of entry was filed on 17-5-57, any

loss occurring in respect of the said goods should be borne by the importers as a normal trade risk. As regards the remaining 22 bags shortlanded,

the steamer agents have failed to submit satisfactory explanation and consequently necessary penal action has been taken against them.

ORDER

Having regard to the circumstances of the case, I allow the appeal in so far as it relates to the shortlanding of 22 bags and order that the appellants

be allowed the consequential refund.

The appeal in respect of 48 bags shortlanded is dismissed as inadmissible.

10. It is curious that the Collector in his order admitted that 48 bags were shortlanded and yet he dismissed the appeal as inadmissible. The

Collector''s order gives two reasons, first that 48 bags were loaded in a boat which sank on May 27, 1957 and secondly, that since the bill of

entry was filed on May 17. 1957 any loss occurring in respect of the said goods should be borne by the importers as a normal trade risk. Counsel

for the customs authorities was unable to show any evidence on record that 48 bags were loaded in a boat which sank on May 27, 1957, but he

contended that the customs authorities obtained the information that the boat sank on May 27. Counsel for the petitioner rightly contended that

even if the boat sank on May 27 it was a boat belonging to or hired by the steamer agents and that no part of the said 70 bags of goods in question

ever passed to the custody of the petitioner. The ship-owner does not discharge his duty to deliver the goods until the ship-owner is in a position

to, and does, deliver the goods. The contract between the petitioner and the shipping company will ordinarily regulate the rights and liabilities of the

parties regarding loss of goods. In view of the Collector''s finding that there was short-landing of 70 bags there is no dispute as to loss of goods.

The questions for consideration are whether the petitioner is entitled to refund and whether the petitioner can contend in view of the shortlanding

that the customs duties have been paid through error. Counsel for the petitioner contended that in view of the admission of shortlanding of 48 bags

the order of the Collector was without, jurisdiction in disallowing refund in respect thereof. The short-landing of 48 bags shows that the petitioner

did not obtain the goods. If the petitioner did not receive the goods it is inexplicable as to why he should bear any loss in respect thereof as a

normal trade risk. The petitioner''s case has all throughout been that 70 bags were shortlanded. It is stated in paragraph 6 of the petition that M. V.

Noreverett which carried the consignment arrived at Calcutta towards the end of May, 1957 and was berthed at her Moorings at No. 3, Hastings

Moorings. The said steamer discharged a part of her cargo into boats employed by Steamer Agents for landing the same at No. 9 Calcutta Jetty

which is a Customs Wharf. This statement in paragraph 8 of the petition is dealt with by Karimble Sumathi on behalf of the Customs Authorities in

an affidavit affirmed on August 6, 1960. In paragraph 7 of the said affidavit it is stated that the statements contained in paragraph 8 of the petition

are substantially correct. In paragraph 9 of the petition it is stated that upon the discharge of the entire cargo at the Customs Wharf it was

discovered that only 130 bags had landed out of petitioner''s consignment of 200 bags. It is further stated in paragraph 9 of the petition that the

remaining 70 bags out of the petitioner''s consignment could not be traced either from the cargo which was landed directly or from the cargo which

was landed through the medium of the said boats employed by the said agents. This statement in paragraph 9 of the petition has been dealt with in

paragraph 8 of the affidavit in opposition. The deponent on behalf of the Customs Authorities states there that the petitioner lodged a claim for

refund of duty for 70 bags short-landed. It was not until then that the Customs House became aware of the alleged short-landing. The petitioner

lodged the claim on August 13, 1957. The case of the Customs Authorities is that it was not aware of short-landing until August 13, 1957.

11. It is obvious that when the Customs duty was assessed in the month of May, 1957 and when the petitioner paid the duty on May 27, neither of

the parties was aware as to what in fact were the goods which had been landed. The duty was assessed and paid before the entry of the goods.

The original Bill of Entry marked as an Exhibit in this Court would also show that. Counsel for the petitioner, in my view, rightly contended that the

entire assessments was on the basis of the bill of entry which mentioned that 200 bags were to be landed and were thus liable to be assessed to

duty.

12. I am unable to appreciate the contention of counsel for the Customs that money which is paid becomes the property of the Union and can

never be refunded or repaid. Sec. 40 of the Sea Customs Act specifically enacts that no customs-duties or charges which have been paid, and of

which repayment, wholly or in part, is claimed in consequence of the same having been paid through inadvertence, error or misconstruction, shall

be returned, unless such claim is made within three months from the date of such payment. In the present case the petitioner preferred a claim

within three months from the date of such payment. Counsel for the Customs Authorities relied on the decision of Union of India (UOI) Vs.

Bhagwan Industries Ltd., in support of the contention, that if money had once been paid one was prevented from claiming repayment by reason of

sec. 40 of the Sea Customs Act. In the Allahabad case the plaintiff instituted a suit for recovery of the sum of Rs. 8182/12, on the ground that the

plaintiff was able to export only 513 Mds. 6 seers of mustard oil and that the plaintiff was entitled to a refund inasmuch as the plaintiff there had

deposited Rs. 10,990/14/ in advance on 1870 maunds. It was contended there that the plaintiff was not entitled to any repayment by reason of

sec. 40 of the Sea Customs Act. Under sec. 40 of the Sea Customs Act a claim has to be preferred within three months. In the Allahabad case no

claim was prefeired within three months. The plaintiff"s claim was allowed hi the Allahabad case on the ground that sec. 40 dealt with refund of

duties which had actually been levied, that is lo say, duties which had been appropriated. It was held there that neither sec. 40 nor sec. 140 of the

Sea Customs Act deal with amounts paid for future appropriation towards export duty and if there was no export there was no appropriation. On

that reasoning it was held that sec. 40 has no application, to cases for refund of duties not actually appropriated towards levy of duty. It appears to

me that the Allahabad decision on which counsel for Customs Authorities relied does not support his contention but aids the petitioner in his

contention that under the provisions of sec. 40 there can be repayment in cases of inadvertence, error or misconstruction or where the amount of

duty has been deposited but not appropriated. Mr. Meyer contended that duty was deposited before entry or import, and if there was no landing

of goods there was no import.

13. Counsel for the petitioner in my was rightly contended that the amount was paid to the Customs Authorities under error or common mistake of

fact that 200 bags would arrive and thus be liable to be assessed. It is indisputable that 70 bags are short landed. The Collector"s order admits not

merely the short-landing of 22 bags but also of 48 bags. There is in my opinion an error as to the payment of duty regarding 70 bags. Customs

Authorities assessed duty on the basis that 200 bags were to arrive. Counsel for the. petitioner posed a question that if the ship never came could

the Customs contend that the petitioner could not get back the duty that was paid. The question was raised in order to test the absurdity of the

contention of the Customs Authorities that under no circumstances would the importer be entitled to refund or repayment of money which had

been parted with or deposited with the Customs Authorities.

14. Counsel for the petitioner invited my attention to the fact that, after the petitioner had on February 28, 1958 preferred an appeal, the Assistant

Collector of Customs by letters dated 18th March, 1958 and 23rd November, 1958 informed the petitioner that if the latter failed to submit the

documents in support of the petitioner"s case within a fortnight the appeal would be disposed of on the basis of evidence on record without further

reference to the petitioner. It is surprising and amazing that when the appeal is pending before the Collector of Customs the Assistant Collector of

Customs would state that the appeal would be disposed of on the basis what the Assistant Collector of Customs thinks fit and proper in the case.

To say the least it is most improper and it shows that the Customs Authorities are not aware of the duties of persons who are entrusted with the

task of adjudication of customs duties.

15. Mr. Meyer counsel for the petitioner in my view rightly contended that the correspondence in this matter showed beyond any doubt that the

Collector of Customs allowed his judgment to be influenced by extraneous consideration that the petitioner was unable to submit the document

described as certified acceptance claim bill. I was told by counsel for the petitioner as well as for the Customs Authorities that the certified

acceptance claim bill means that the shipper accepts liability. The Customs Authorities for the first time on October 23, 1957 stated that in the

absence of certified claim bill accepted by the Steamer Agents showing running number of the short landed goods the claim could not be examined.

The petitioner wrote to the shipping company on October 26, 1957 that the Customs Authorities required the petitioner to produce the certified

claim bill accepted by the Steamer Agents showing running number of the short landed goods failing which the petitioner"s application for refund of

Customs duty would be filed without further reference. The Assistant Collector of Customs by his order dated December 21, 1957 rejected the

petitioner"s claim for refund on the ground that the certified and accepted claim bill was not filed. Counsel for the Customs Authorities contended

that the Collector by his order did not reject the claim for 48 bags on the ground of non-production of this document. I have already referred to the

correspondence started by the Assistant Collector of Customs after the petitioner had preferred his appeal to show that the Assistant Collector of

Customs was still insisting on the production of the certified claim bill. Counsel for the petitioner in my view rightly contended that one of the

grounds for the rejection of the petitioner''s claim by the Collector was that this document had not been produced. It will appear at p. 27 of

annexure to the petition that the petitioner on March 25, 1958 stated that in spite of the demand the petitioner failed to get the claim bill accepted

by the carriers and that the petitioner filed the suit against the carriers. It did not lie within the petitioner''s power to compel the shipping company

to give the document. The petitioner could not compel the shipping company to produce a document showing that the shipping company accepted

liability in respect of the short landing. I fail to understand and appreciate as to how the Customs Authorities could insist on the production of the

certified claim bill and how the petitioner''s claim could be rejected on the ground of non-production of that document. The petitioner submitted the

Port-Commissioners'' short-landing certificate. Short-landing has been accepted by the Customs authorities. The Collector''s order does not state

that import is complete and that therefore there can be no refund. The Customs authorities rejected the petitioner''s claim on extraneous

consideration without applying mind to the real question.

16. Counsel for the petitioner invited my attention to paragraph 25 of the affidavit in opposition on behalf of the Customs Authorities. It is stated

there:

I submit that the certified claim Bill from the Steamer Agents is the basic document which would prove the loss and at the same time would

substantiate the petitioner''s claim and in the absence of the said document the petitioner''s claim is liable to be rejected on the merits for want of

proof of the loss itself. The allegation that the respondents in calling for the said certified claim bill and in rejecting the petitioner''s claim in the

absence thereof usurped any jurisdiction not vested in them, is incorrect and misconceived in law.

17. Chagla, C.J., in Glaxo Laboratories case (1) said that the Customs Authorities in making orders on appeal should give reasons for their

decision and if reasons are not given in the order and if the persons making affidavits in support, of the order mention reasons in affidavits, such

reasons would be treated as reasons in support of the order. Counsel for the petitioner in my view rightly extracted paragraph 25 of the affidavit in

opposition as showing that in this particular case the Customs Authorities made the order on the basis that this particular document was not

produced by the petitioner. The deponent on behalf of the Customs Authorities gives one of the reasons for rejection of the petitioner''s claim,

namely, non-production of the document. Loss of goods is admitted by the Collector. In that view of the matter it is manifest that the Customs

Authorities rejected the petitioner''s claim on one of the grounds, namely, non-production of this document. This is an extraneous consideration

which vitiates the order of the Collector.

18. It was contended on behalf of the Customs authorities that the petitioner had instituted a suit against the shipping company and therefore there

was an alternative remedy. Mr. Kar conceded that no suit would lie against the Union in respect of an assessment. The suit against the shipping

Company is in respect of loss of goods. The petitioner has not preferred any claim against the Shipping Company in respect of duty. The

petitioner''s suit against the Shipping Company is not an alternative remedy, for such a remedy must be against the same person. In the present

case the remedy sought is against the Customs Authorities. The remedy in the suit is gainst the shipping Company. The cause of action is separate.

I am, therefore, of opinion that the petitioner is justified in making this application. The petitioner in the present case has asked for refund of money.

This is a difficult question as to whether a Court exercising jurisdiction by issue of writs of mandamus and certiorari can"" order payment of money.

There is one old English decision where such payment has been ordered. In R. v. Bristol and Exeter Ry. Co. (5) 1845 3 Ry. & Can. Gas. 777 a

Corporation was compelled to pay a sum of money pursuant to an agreement which could not be enforced by action. Mr. Meyer cited R. v. Clark

''(6) 5 Q.B. 887: 114 E.R. 1483 as an authority for the proposition that mandamus might be granted for payment of a specific sum. The question is

not free from doubt in that decision. Mr. Meyer invited my attention to a recent decision of the Supreme Court, Universal Imports Agency and

Another Vs. The Chief Controller of Imports and Exports and Others, . In that case Universal Imports Agency filed a petition under Art. 32 of the

Constitution for quashing orders of the Assistant Controller of Imports and Exports; the Collector of Customs, Central Excise; the Board of

Revenue and for an appropriate direction requiring the respondents to refund the amount realised from the petitioners. The petitioners there placed

several indents with their overseas supplier Shimada Trading Co. Ltd. of Japan. The value of the consignment was Rs. 40,470/14/-. The goods

were in different stages of shipment and in some cases the goods were in course of shipment in the months of January and February. 1955. The

goods arrived at the port of Pondichery. The Collector of Customs treated the imports of the goods as unauthorised and confiscated the same and

gave the petitioners option to pay, in lieu of confiscation, a penalty amounting to Rs. 27,700/ -. The petitioners paid the penalty under protest and

cleared the goods. The petitioners succeeded in the Supreme Court and orders of the respondents were quashed and they were directed to refund

to the petitioners the amount illegally collected from them. This is the law of the land. I have therefore justification to order refund. The Rule is

therefore made absolute. The orders dated December 21, 1957 and November 30, 1959 are quashed. The respondents are directed to cancel the

said orders and to forbear from giving effect to them in any manner whatever. There will also be a writ in the nature of mandamus directing the

respondents to refund the sum of Rs. 10,885/- to the petitioner. The petitioner is entitled to costs. Certified for two counsel.