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Calcutta High Court

Case No: Civil Rule No. 11824 (W) of 1975

Inchek Tyres Ltd.	APPELLANT
Vs	
Union of India (UOI) and Others	RESPONDENT

Date of Decision: June 21, 1978

Acts Referred:

- Customs Act, 1962 - Section 131, 131(1), 27
- Sea Customs Act, 1878 - Section 40

Citation: (1978) 2 ELT 643

Hon'ble Judges: Ganendra Narayan Ray, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Ganendra Narayan Ray, J.
In the instant writ petition, order passed by the Assistant Collector of Customs for Refund Section dated 23rd November, 1972 rejecting the petitioner"s claim for refund as time barred u/s 27 of the Customs Act, 1962 and the appellate order passed by the Collector of Customs, Calcutta, dated 9th July, 1973 affirming the decision of the Assistant Collector of Customs for refund and the revisional order passed u/s 131 of the Customs Act by the Joint Secretary, Government of India, Ministry of Finance, dismissing the revisional application are under challenge.

2. The case of the petitioner company in short is that the petitioner had been carrying on the business of manufacturer of rubber tyres and in course of its said business the petitioner had to import Insoluble sulphur under the trade name "Crystex N-Insoluble Sulphur" in bulk quantities since required for the manufacture of rubber tyres. The petitioner contends that Sulphur including the "Crystex N-Insoluble Sulphur" falls under Item No. 28 (3) of the Indian Customs Tariff and by notification issued by the Government of India dated August 20, 1965 "Sulphur" is exempted from the whole of the Customs

duty leviable thereon under the Indian Tariff Act, 1944. Between November 1969 and April 1971 the petitioner imported a number of consignments of "Crystex N-Insoluble sulphur" and the petitioner claimed that all the said goods were exempted from duty by virtue of the aforesaid notification. But the Customs authorities wrongfully and without jurisdiction levied duty on each of the said consignments inter alia alleging that the goods in question did not fall under item 28 (3), but they fall under item 28 of the Indian Customs Tariff being "Drugs and Chemicals" and as such the duty leviable on the said goods was 60 per cent ad valorem. In order to avoid demurrage charge the petitioner paid the said illegal demand of duty and applied for refund of duty paid as aforesaid. Such demand was made in respect of goods covered by Bills of Entry dated November 20, 1969 and November 21, 1969. On or about April 3, 1970 and April 9, 1970 the claims in respect of the said items of goods were rejected by the Assistant Collector of Customs. The petitioner thereafter preferred an appeal to the Appellate Collector against the said order of rejection by Assistant Collector and the said appeal was allowed and by an order passed on July 12, 1971 the Appellate Collector directed for giving refund to the petitioner. Against the said order of Appellate Collector a show cause notice was issued by the Government of India inter alis asking the petitioner to show cause why the said appellate order of refund should not be annulled but ultimately the said notice was withdrawn by the Government of India and the appellate order or refund remained in force. The petitioner contends while the aforesaid proceedings for refund were pending, other consignments also arrived and the Custom authorities, as before, wrongfully and without jurisdiction levied duty on all the said goods on the ground that the goods fell under item 28 of the Indian Customs Tariff. The petitioner in order to avoid demurrage had also to pay the duty and the total duty paid was Rs. 23,214.09 P. in aborted, excepting in respect of two items of goods, the petitioner did not receive any order of refund but the petitioner subsequently claimed for refund in respect of all the other items of goods on the same ground The Assistant Collector of Customs, however, by his order dated November 23, 1972 rejected the claim of the petitioner for refund u/s 27 of the Customs Act, 1962 inter alia holding that the said application for refund had been filed after the expiry of six months from the date of payment of duty and as such the said claim for refund was barred by limitation. Against the said order passed by the respondent No. 1, the petitioner filed a petition of appeal before the Collector of Customs but the said contention of the petitioner was also not up held by the respondent No. 2. Thereafter the petitioner made an application u/s 131(1) of the Customs Act, 1962 before the Joint Secretary, Ministry of Finance, for revision of the said order and also for refund of the claim for Rs. 23,234.09 P. but the said revisional application was also dismissed and against the aforesaid orders of adjudication in respect of the claim for refund by the petitioner, the instant writ petition Was moved before this Court.

3. Mr. Snehangshu Sekhar ray the teamed counsel appearing for the petitioner contended that under proviso to Section 27 of the Customs Act, the limitation of 6 months shall not apply if the duty has been paid under protest Mr. Ray contended that from the facts and circumstances stated hereinbefore, it is quite evident that the petitioner had

been objecting all the time about the liability of the petitioner to pay duty in respect of the goods in question and, as a matter of fact, in respect of earlier two consignments, the petitioner had preferred claims for refund and also preferred appeals against the order to avoid payment of demurrage, the petitioner had to pay the duty but as the petitioner had been perusing the aforesaid proceedings for refund in respect of the earlier consignments, it must be held that the petitioner had been claiming all through that the petitioner was not liable to pay any duty in respect of the goods in question and payment of duty in order to avoid demurrage, in the aforesaid facts and circumstances, must be held to be payment under protest within the meaning of Section 27 of the Customs Act. Mr. Ray in this connection referred to the Chamber''s 12th Century Dictionary (New Edition), 1972. The word ''protest'', according to the said Dictionary means ''to express or record dissent or objection''. Mr. Ray contented that the petitioner always expressed its dissent or objection to pay the duty charged by the Customs Authorities and as a matter of fact, in respect of the earlier consignments, the petitioner took legal proceedings which were pending. In such circumstances, the subsequent payment of duty cannot but be held as payment under protest because the petitioner did not give up the said legal proceeding but pursued the same by preferring appeals on the footing that realisation of such duty was unjust and illegal. Mr. Ray also in this connection referred to the decision of the Supreme Court made in the case of Patel India (Private) Limited v. Union of India and Ors., reported in AIR 1973 S.C. 1310 In the said case, the claim of the petitioner for refund of excess duty u/s 40 of the Sea Customs Act was under consideration. The Customs Authorities in the said case refused to treat the invoice price as the real value but the Government of India subsequently held that invoice price should be treated as real value and on such basis there should be reassessment and refund of excess duty. It was held by the Supreme Court that as the assessment of excess duty was without authority, the provisions of Section 40 of the Sea Customs Act not attracted and Potel India (Private) Limited was entitled to refund in respect of all the items in respect of which excess duty was realised. Relying on the aforesaid decision, Mr. Ray contended that although legal proceeding were taken by the petitioner in respect of earlier two consignments and against the order of rejection of the claim of the petitioner, appeals were also preferred in respect of the said two consignments, the petitioner is entitled to claim in respect of the said two consignments, the petitioner is entitled to claim refund in respect of all the other item in view of the fact that admittedly the Customs authorities had unlawfully realised Customs duty from the petitioner in respect of all the said consignments. Mr. Ray contended that it is immaterial where claim was made or not in respect of remaining consignments. If the petitioner can establish that duty was realised by the Customs authorities unlawfully then in respect of all the consignments, petitioner is entitled to claim refund.

4. Mr. Banerjee the learned counsel appearing for the Union of India however contended that in view of the decision made by the Appellate Authority the petitioner may contend that duty which was not payable was realised from the petitioner and for that reason the petitioner was entitled to claim refund u/s 27 of the Customs Act, but Mr. Banerjee

contended that such claim not having been made within a period of six months from the date of payment, the claim must be held to be barred by limitation and the petitioner was also not entitled to take the advantage of the proviso because such payment was not made by the petitioner under protest. Mr. Banerjee contended that the payment made under protest must appear ex facie Mr. Banerjee contended that admittedly in respect of other consignments, the petitioner never communicated to respondents that they had been making payment under protest. Hence even assuming that the petitioner was entitled to claim refund u/s 27 of the Customs Act, such claim must be held to be barred by limitation because of not claiming such refund within the stipulated period and as such the impugned orders were quite legal and justified. Mr. Banerjee also contended that by preferring objections in respect of two consignments, the petitioner cannot ipso facto claim that other subsequent payments of duty were also made under protest. Mr. Banerjee further contended that it is immaterial to consider in the present application as to whether the petitioner is entitled to claim for refund because even assuming that petitioner was entitled to claim for refund such claim was barred by limitation. Mr. Banerjee further submitted that payment in respect of each Bill of Entry constituted separate cause of action and unless protest was made for payment made in respect of each of such consignments, it cannot be held that the petitioner made payment under protest within the meaning of proviso to Section 27 of the Customs Act. In my view, the contention made by Mr. Banerjee appears to be reasonable and of substance and I am inclined to accept the same. It is true that the petitioner had protested against payment of Customs duty in respect of two earlier consignments and as a matter of fact took up appropriate legal proceedings in respect of such payment and ultimately succeeded in his contention but by the said fact alone it cannot be held that the petitioner had made payment in respect of other consignments under protest. In my view, until the payment is made under protost explicitly, there is no scope to infer from circumstance that the petitioner had paid the duty in respect of other consignments under protest so as to entitle the petitioner to get the benefit of the proviso to Section 27 of the Customs Act. It is not enough to proceed on the footing that there is no liability to pay the duty in question and because of illegal demand involuntary payment was made. In my view, it is also necessary to lodge protest in clear terms that the payment was made not only involuntarily but under protest. Involuntary payment and payment under protest are not the same thing. For imposition of unjust duty one may be compelled to make payment and such payment will then be involuntary but every involuntary payment cannot be held payment under within the meaning of proviso to Section 27 of the Customs Act. Accordingly, the petitioner is not entitled to any relief in the instant Rule and the Rule is discharged but 1 make no order as to costs.