

(2010) 03 CAL CK 0106

Calcutta High Court

Case No: A.P.O. No. 314 of 2009 and W.P. No. 42 of 2009

Commissioner of Customs

APPELLANT

Vs

Dilip Kumar Jain

RESPONDENT

Date of Decision: March 25, 2010**Acts Referred:**

- Customs Act, 1962 - Section 27, 27A

Citation: (2010) 257 ELT 379**Hon'ble Judges:** Sengupta, J; Kalidas Mukherjee, J**Bench:** Division Bench**Advocate:** Roy Chowdhury, for the Appellant; Dutt, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

1. This appeal was against the judgment and/or order of the learned Single Judge of this Court dated 16th September, 2009 by which relief, as prayed for, was granted to the petitioner.

2. The short fact, which arises for consideration, is set out hereunder:

The writ petitioners-respondents filed a writ petition being W.P. No. 1778 of 2000 on 19th July, 2000 challenging show cause notice for short levy in respect of five consignment of KHS-68. During pendency of this writ petition anti dumping duty was imposed on the said imported materials. So another writ petition being W.P. No. 2772 of 2001 was filed challenging the said order imposing duty, in or about 2001. The said writ petition [hereinafter referred to as the "earlier writ petition"] was admitted by the learned Single Judge of this Court and stay was granted on condition that the writ petitioners-respondents would deposit the entire amount of the anti dumping duty so assessed by the customs authorities and the same should be kept deposited with the learned Advocate on Record for the Central Government. The writ petition thereafter was heard by the learned Single Judge, and it resulted in

dismissal on 29th January, 2002 [Dilip Kumar Jain Vs. Commissioner of Customs,](#). The writ petitioners-respondents preferred appeal against the order of dismissal and while admitting the appeal, the Division Bench of this Court presided over by Samaresh Banerjea, J. [as His Lordship then was] and P.N. Sinha, J. [as His Lordship then was] passed an interim order dated 17th May, 2002 directing the appellant to make payment of the entire anti dumping duty to the respondents with the rider that in the event the writ petitioners succeeded, the entire amount, so paid, should be refunded with interest at the rate prevailing in the bank. In terms of the said two interim orders the writ petitioner/respondent deposited a sum of Rs. 42,77,418/-. Ultimately, the said appeal was allowed by the Division Bench of this Court and the order of the learned Single Judge was set aside and held that the writ petitioners-respondents are not liable to pay anti dumping duty. Therefore, an order was passed allowing the writ petitioners-respondents to make an application for refund with interest.

3. The said application though filed by the writ petitioners/respondents was not disposed of and as such contempt proceedings was initiated and only then principal amount of the duty deposited was refunded but the interest was neither computed nor paid. The Division Bench, while disposing of the contempt application, granted liberty to the writ petitioners/respondents to make an application for payment of interest and the respondent/appellant to consider the same.

4. In the meantime, nothing was done. So, another writ petition being W.P. No. 1003(w) of 2007 was filed by the writ petitioners/respondents and the same was disposed of by the learned Single Judge of this Court by an order dated 24th June, 2008 directing the Assistant Commissioner of Customs to consider the application and to determine the payment of interest with reasons. The said officer thereafter heard the matter and granted interest at the rate of 9% per annum.

5. The said order granting interest was challenged by the department before the internal Appellate Authority followed by the Revisional Authority under Customs Act unsuccessfully. Thereafter, an appeal had been preferred before the Tribunal concerned, where the application for stay was filed but stay of order was not obtained.

6. On the aforesaid backdrop of the facts when the said order was not stayed, the petitioners/respondents filed a writ application for enforcing the said order of the said Assistant Commissioner for payment of interest as calculated by him. The learned Trial Judge did not interfere with the said order of the Assistant Commissioner for payment of interest as calculated by him. From the narration of the fact as stated above it appears to us that the parties are fighting for the claim of interest as admittedly principal amount has been refunded. In terms of the judgment of Justice Pal the Assistant Commissioner of Customs has decided the question of payment of interest and also the rate thereof. He has while concluding the matter passed the order as follows:

I, therefore, sanction Rs. 20,13,991/- only as interest on delayed refund of Rs. 42,66,418/- @ 9% to Dilip Kumar Jain.

7. It is very clear that the said Commissioner has not assigned any reason as to why the interest at the aforesaid rate has been awarded though writ petitioner/respondent claimed @ 16% per annum. No material is to be found for discussion nor relied on. According to us this is not the lawful decision making process in terms of the order of Justice Pal. Unfortunately, the learned Trial judge has failed to take note of the same. The learned Trial Judge also overlooked that this decision is reached without any material or evidence whatsoever as to rate of interest, so much so, it suffers from perversity. The matter could have been ended here passing appropriate order.

8. But this cannot be resorted to immediately unless we consider fundamentally legal point raised by Mr. Roy Chowdhury appearing for the appellant. He argued that the Division Bench while admitting the earlier appeal presided over by Justice Samaresh Banerjea (as His Lordship then was) passed interim order providing for refund of interest at the prevailing bank rate. This order is without jurisdiction as no Court can pass order contrary to the provisions of the statute inasmuch as Section 27A of the Customs Act, 1962 provides for interest on delayed refund. According to him originally there has not been any provision for payment of interest on refund, if it was not done within the time stipulated or within the reasonable time. However the aforesaid Section has been amended. He submits that payment of interest can only be made if the conditions as provided in the said Section are fulfilled. He submits that claim of interest is not allowed as a matter of course.

9. We are of the view this argument does not impress us at this stage for the simple reason that the Division Bench had passed interim order earlier and such order had not been challenged, as rightly pointed out, by Mr. Dutt appearing for the respondent, before the appropriate forum. Therefore, the said interim order has to be accepted and it is not open for Mr. Roy Chowdhury's client to challenge in collateral proceeding later on. Therefore, aforesaid ordering portion of the Appeal Court is binding. However, the effect thereof has to be examined, whether this order merged with the final order of the Appeal Court presided over by Justice Ashim Kumar Banerjee while allowing the appeal. We, therefore, feel it proper to quote the appropriate portion of the final judgment in the appeal preferred earlier to understand whether the merger doctrine will be applied or not.

The appeal succeeds. The appellant would be entitled to claim for refund of the duty so paid by him under protest [emphasis supplied]. If such application for refund is made the authority must dispose of the same in accordance with the observations made within a period of one month from the date of making such application.

10. It is clear that earlier interim order has not been vacated or modified rather by implication it is accepted. While passing interim order the Division Bench earlier

ruled that in the event the appeal succeeds refund would be with interest at the prevailing bank rate.

11. Therefore, we are unable to accept the submission of Mr. Roy Chowdhury that by final order the interim order has been varied as appellant has been asked to make an application for refund and which obviously has to be dealt with in accordance with the provisions of the statute. We think that by the final order mere methodology of claim of refund with interest has been provided.

12. He further submits that the order passed by the Assistant Commissioner is de hors the provision of law. In support of his argument he has cited decision of the Hon'ble Supreme Court reported in [Official Trustee, West Bengal and Others Vs. Sachindra Nath Chatterjee and Another](#). The ratio laid down in the said Supreme Court judgment cannot be disputed but it cannot have application in each and every case as in that case the Supreme Court found the Court ignoring the express prohibition of the trust deed passed order of sale of trust property and in that context it was held the Court lacks jurisdiction with regard to the subject matter while passing order of sale. We are of the view in this case while overruling the argument of Mr. Roychowdhury that Assistant Commissioner did not decide the matter under the provisions of the Customs Act, he has simply carried out the solemn direction given by this Court and to our mind it was necessary to pass such direction by the Appeal Court but it was not done so perhaps for the reason that at the time of disposal of the appeal no material was available to pass consequential relief in order to grant complete relief in the Appeal. The rate of interest prevailing in the year 2002 does not appear to have been placed, perhaps for this reason. Their Lordships thought it prudent to relegate the matter to the Assistant Commissioner to take decision on the question of refund as well as award of interest. Hence, it cannot be said that the officer was obliged to act or indeed acted while deciding the question of refund as well as interest under the four corners of the Customs Act, 1962. It was a fact finding task in terms of the solemn judgment and order of the Court and not under the statutory provision.

13. In view of this discussion we do not think that the decision of the Supreme Court reported in 1997 (5) SCC 526 [Agricultural Market Committee, Appellant v. Shalimar Chemical Works Ltd. Respondent cited by Mr. Roychowdhury is of no assistance as that judgment was rendered on the factual position that the importer after assessment of duty and payment of the same asked for the refund under the provisions of the Customs Act. In this circumstances, the said judgment was rendered.

14. According to us, provisions of Section 27 of the Act for claiming refund of duty will be applicable when the following conditions are satisfied:

- (i) The person has already paid the duty in pursuance of an order of assessment; or
- (ii) The duty borne by him.

15. Hence, pre-condition is that there must be an order of assessment of duty payable and then there must be a payment pursuant to such order of assessment or is borne by any other person voluntarily.

16. Factually in this case as we have noted that at the very beginning the respondent challenged the attempt of the department to impose the antidumping duty and before such assessment order could be passed the challenge was made filing a writ petition. As such the Learned Single Judge later on when payment was made under protest pursuant to order of assessment during pendency of the challenge, in order to secure the interest of the revenue asked to make a deposit of the amount of anti dumping duty with the Central Government Advocate on Record. The said amount was lying deposited. Later in terms of the Division Bench order of this Court the said amount so deposited was directed to be made over. We feel it expedient to quote the said portion of the Division Bench order as follows:

But the question of granting any interim order does not arise. Since question of revenue is involved the appellant must go on paying the antidumping duty to the respondents subject to the condition that in the event the writ petition succeeds, the respondents will be liable to refund such amount to the appellant with interest at the prevailing bank rate.

We are informed that an interim order was granted by the Trial Court to the effect that such duty shall be paid to the learned Central Government Advocate who will keep the same in fixed deposit. We direct the said learned Central Government Advocate to pay to the respondent customs authorities such amount of duty paid to him together with interest accrued thereon. The customs authorities will be liable to refund such amount also with such interest, as aforesaid, if the writ petition succeeds.

17. From a plain reading of the aforesaid portion of the judgment and order it is crystal clear that the intention of the Court all along was to secure the revenue as such payment made in terms of the Court's order and making over of the deposited amount with interest in terms of the said order cannot be equated with the payment as mentioned in Section 27 of the Customs Act, 1962. In order to have the clear conception on this issue it is apposite to set out the relevant portion of Section 27 of the Customs Act, 1962;

27. Claim for refund of duty. - (1) Any person claiming refund of any duty:

(i) paid by him in pursuance of an order of assessment; or

(ii) borne by him,

may make an application for refund of such [duty and interest, if any, paid on such duty] to the [Assistant Commissioner of Customs or Deputy Commissioner of Customs]:

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, before the expiry of one year;

(b) in any other case, before the expiry of six months,

18. We, therefore, hold that the payment and deposit in terms of Division Bench judgment and order is not the payment made in terms of the order of assessment. The writ petition was filed challenging the exigibility of the anti dumping duty. So, the assessment, if made is not the assessment at all in the eye of law until the matter is settled. Here the jurisdiction for assessment was challenged in the writ petition so also in the appeal. When Trial Court found that anti-dumping duty is not payable question of passing order of assessment does not arise. Indeed there is no material placed before us at any point of time any order of assessment was. made.

19. The decision of the Supreme Court reported in [Union of India and Another Vs. Kirloskar Pneumatic Company Limited](#), has been rendered on the fact where admittedly refund is sought to be made and interest thereon is sought to be claimed clearly in relation to order of assessment u/s 27 of the Customs Act. Putting it otherwise the said judgment will be applicable in a case when there has been an admitted case of order of assessment and payment of duty made, and further refund is claimed. We think that the said judgment, is not of much assistance to take note in this matter.

20. Turning to the question of rate of interest, it is argued by Mr. Roy-chowdhury that the rate of interest or claim of interest as a whole has to be governed and guided by Section 27A of the said Act. We do not find any force in this argument for the simple reason that we have held that Section 27 in the present facts and circumstances has no application for the claim of interest of the petitioner has arisen not from the statutory provision but from the order of the Court viz. the Division Bench judgment as quoted above and the same has not been varied and/or discharged and it cannot be discharged even subsequently since the said order has been accepted by the parties finally by acting thereon. The said order was sought to be implemented in a meaningful manner by asking authority concerned to decide the matter instead of deciding by the Court itself. In our view the appellant cannot treat the Court's desire for getting this amount of interest quantified by the department as an action under the statute for this official cannot be said in the circumstances acting as an authority under the Customs Act rather an official having acted as an officer of this Court.

21. According to us, the said order was taken to the Commissioner of Appeals to impugn unsuccessfully in sheer abuse of the law. Thereafter the matter was taken to the Learned Tribunal who refused to grant any order of stay. However, the matter is pending before the Learned Tribunal. When the order is remaining subsisting and valid, and it was not questioned before the appropriate forum viz, before this Court,

the said order has to be examined for implementation. Therefore, the writ petitioner/appellant has rightly brought the matter before the Learned Trial Judge for implementation of the same.

22. We, therefore, hold that claim of interest of the petitioner arising out of the Court's order not in terms of the statute, but as we have already noted the said Assistant Commissioner has not decided the matter with the evidence and/or material or with reason as far as the rate of interest is concerned, we are of the view that the Learned Trial Judge ought to have looked into this order of the Assistant Commissioner with greater degree of application of mind. It is true the action was for enforcement of the order, not for revising the same, but when a prayer for enforcement is opposed, the Court must see the question of enforce-ability, while doing so, irrespective of points taken, the order must be scrutinized on plain reading. If it is found the same is perverse and no reason therefore is recorded the Court may refuse to enforce rather ask for fresh decision.

23. Therefore, the judgment and order of the Learned Trial is not sustainable so also the order of the Assistant Commissioner on the ground as discussed above.

24. We dispose of the appeal directing Assistant Commissioner of Customs (Appraising and Refund Section) to redetermine this matter in terms of the earlier judgment and order of this Court taking note of the observation of the Division Bench as quoted above. In the process he must calculate the prevailing rate of bank interest on 17-5-2002. As this money was lying deposited for a quite pretty long time, the bank rate of interest prevailing at that point of time should be the rate of interest on fixed deposit. It would be open for the parties to produce the authenticated document showing the rate of bank interest prevailing at that point of time. He shall decide the matter afresh with reasons upon giving hearing but the hearing will confine to the actual rate of bank interest and not on any other subject. He shall calculate the amount of interest up to the date of passing of the order in terms of the order of this Court.

25. This exercise shall be completed within three months from the date of communication of this order.

26. There will be no order as to costs.

27. Let urgent xerox certified copy of this order, be made available to the parties, if applied for.