IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 983 OF 2016

Hashem Aligholipour Hammami Alias
Salbas Selva .. Petitioner
V/s
Union of India and Ors. .. Respondents

Mr. Vivek Kantawala with Mr. Amey Patil i/b Vivek Kantawala & Co. for the petitioners.
Mr. Pradeep S. Jetly for the respondents.

CORAM: S.C. DHARMADHIKARI &
SMT. BHARATI H. DANGRE, JJ.

DATE : 6th FEBRUARY 2018

P.C.:

This petition under Article 226 of the Constitution of India seeks the following reliefs:

> *"(a) That this Hon'ble Court be pleased to issue Writ of Certiorari or any other Writ, Order or direction in the nature of certiorari by calling upon the records pertaining to file No. F. No. AIRCUS-39R/ 48/2009 pending before the 3rd Respondent and/or suitable directions to be passed for the Respondent No.3 to decide the interest component whole together under Section 27(a) of the Customs Act, 1962.*

(b) *To issue Writ of Mandamus or any other Writ, Order or direction in the nature of Mandamus by calling upon the records and proceedings pertaining to the file No. F. No. AIRCUS-39R/48/2009 pending before the 3rd Respondent and/or suitable directions to be passed for the Respondents to decide the interest component as decided in the case of M/s Shree Balaji Automobiles v/s. Union of India in Writ Petition No. 2567 of 2001 which was decided by this Hon'ble Court on 14th January 2002.*

(c) *Pending hearing and final disposal of the instant petition the Respondents be directed to consider the interest component of the Petitioner under Section 27(a) of the Customs Act, 1962 and submit the report before this Hon'ble Court.*"

2. The petitioner says that he is an Iranian National being a resident of Iran. He carries Iranian Passport. The 1st respondent is Union of India. The 2nd and 3rd respondents are the officers of the 1st respondent exercising powers, discharging functions and duties under the Customs Act, 1962 (for short "the Act").

3. The petitioner was intercepted at the International Airport at Mumbai on his arrival from Singapore. The petitioner was carrying hand baggage which was brought to the Customs and Intelligence Office. On search, US$ 69,000 in the denominations of 100 and 50 dollars currency notes was recovered. The investigation followed. The petitioner stated that he had not declared the foreign

currency to the Customs which was valued at the time at Rs.28,02,140/-. It was seized on the pretext that the foreign currency was smuggled out of India and was liable for confiscation. There are various other documents seized. The petitioner was subjected to proceedings under both the Customs Act, 1962 and the then Foreign Exchange Regulation Act, 1973. The petitioner was subjected to trial before the Criminal Court and also faced an adjudication after show cause notice was issued on him. On 30th March 2001, an order was passed under the Act imposing a redemption fine of Rs.3,00,000/- and allowing him to keep the seized currency.

4. Being dissatisfied with this order, an appeal was filed before the Customs, Excise and Gold (Control) Appellate Tribunal. That Tribunal made an order on 8th February 2002 and reduced the fine to Rs.1,50,000/- and penalty of Rs.50,000/-.

5. The petitioner then says in this petition that even the Department was aggrieved by a part of the order in original and appealed to the Tribunal, but the Department's appeal was dismissed by the Tribunal on 15th November 2002. Against this order, the Department preferred a writ petition in this Court being Writ Petition No.793 of 2002 which also was dismissed on 23rd August 2006.

6. The petitioner sought refund of the amount paid and that application of the petitioner ended in an order, copy of which is

annexed to the memo of this petition at Annexure "D" page 43 of the paperbook. The petitioner was sanctioned a refund in the sum of Rs.28,56,650/- under this order dated 23rd September 2010. However, the actual payment or receipt is of 4th December 2015.

7. Mr. Vivek Kantawala, learned counsel for the petitioner, would argue that by virtue of the findings and the ultimate conclusion in this order, the refund was sanctioned, but the amount was not disbursed. Since this is a case of delayed refund, the petitioner is entitled to interest within the statute, namely the Customs Act, 1962. Our attention was invited to Sections 27 and 27A of the Act in this behalf.

8. On the other hand, Mr. Jetly would argue that Section 27 of the Act speaks of claim for refund of duty and it is that delayed refund which carries interest in terms of Section 27A of the Act. In this case, the payment is not of duty and, therefore, refund having sanctioned but such delayed payment of the refund in the nature sanctioned in this case does not carry any obligation to pay interest. Hence, the writ petition is misconceived and must be dismissed.

9. On a plain reading of these two provisions, we agree with Mr. Jetly. Sections 27 and 27A of the Act read as under:

> ***"27. Claim for Refund of Duty.-*** *(1) Any person claiming refund of any duty or interest.-*

(i) paid by him; or

(ii) borne by him,

may make an application in such form and manner as may be prescribed for such refund to the Assistant Commissioner of Customs, before the expiry of one year, from the date of payment of such duty or interest:

(1-A) The application under sub-section (1) shall be accompanied by such documentary or other evidence (including the documents referred to in section 28-C) as the applicant may furnish to establish that the amount of duty or interest in relation to which such refund is claimed was collected from, or paid by him and the incidence of such duty or interest, has not been passed on by him to any other person.

(1-B) Save as otherwise provided in this section, the period of limitation of one year shall be computed in the following manner, namely:

(a) in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 25, the limitation of one year shall be computed from the date of issue of such order;

(b) where the duty becomes refundable as a consequence of any judgment, decree, order or direction of the appellate authority, Appellate Tribunal or any court, the limitation of one year shall be computed from the date of such judgment, decree, order or direction;

(c) where any duty is paid provisionally under section 18, the limitation of one year shall be computed from the date of

adjustment of duty after the final assessment thereof or in case of re-assessment, from the date of such re-assessment.

(2) If, on receipt of any such application, the Assistant Commissioner of Customs or Deputy Commissioner of Customs is satisfied that the whole or any part of the duty and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:

Provided that the amount of duty and interest, if any, paid on such duty as determined by the Assistant Commissioner of Customs or Deputy Commissioner of Customs under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -

(a) the duty and interest, if any, paid on such duty paid by the importer, or the exporter, as the case may be if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(b) the duty and interest, if any, paid on such duty on imports made by an individual for his personal use;

(c) the duty and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(d) the export duty as specified in section 26;

(e) drawback of duty payable under sections 74 and 75;

(f) the duty and interest, if any, paid on such duty borne by any other such class of applicants as the Central

Government may, by notification in the Official Gazette, specify;

(g) the duty paid in excess by the importer before an order permitting clearance of goods for home consumption is made where -

(i) such excess payment of duty is evident from the bill of entry in the case of self-assessed bill of entry; or

(ii) the duty actually payable is reflected in the reassessed bill of entry in the case of reassessment.

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty and interest, if any, paid on such duty has not been passed on by the persons concerned to any other person.

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal, National Tax Tribunal or any Court or in any other provision of this Act or the regulations made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).

(4) Every notification under clause (f) of the first proviso to sub-section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if

Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

(5) For the removal of doubts, it is hereby declared that any notification issued under clause (f) of the first proviso to sub-section (2), including any such notification approved or modified under sub-section (4), may be rescinded by the Central Government at any time by notification in the Official Gazette."

*"**27A. Interest on delayed refunds.**- If any duty ordered to be refunded under sub-section (2) of section 27 to an applicant is not refunded within three months from the date of receipt of application under sub-section (1) of that section, there shall be paid to that applicant interest at such rate, not below five percent and not exceeding thirty percent per annum as is for the time being fixed by the Central Government by Notification in the Official Gazette, on such duty from the date immediately after the expiry of three months from the date of receipt of such application till the date of refund of such duty:*

Provided that where any duty, ordered to be refunded under sub-section (2) of section 27 in respect of an application under sub-section (1) of that section made before the date on which the Finance Bill, 1995 receives the assent of the President, is not refunded within three months from such date, there shall be paid to the applicant interest under this section *from the date immediately after three months from such date, till the date of refund of such duty."*

10. Perusal of these provisions would denote that any person claiming refund of any duty or interest paid by him or borne by him may make an application in such form as may be prescribed for such refund to the named authority before the expiry of one year from the date of payment of such duty or interest. How that application should be made, what it should accompany and later on how it is to be dealt with, is set out in sub-section (2) of Section 27 of the Act.

11. Then Section 27A sets out the obligation on delayed refund. That opens with the words "if any duty ordered to be refunded under sub-section (2) of Section 27 to an applicant is not refunded".

12. Mr. Kantawala would argue that the definition of the term "goods" appearing in Section 2(22) of the Act includes currency and negotiable instruments, and by virtue of the provisions contained in Section 120 of the Customs Act, it is possible and permissible to confiscate the seized currency. There is adjudication of confiscation and penalties by virtue of adjudication procedure set out in the Act itself. The amount was directed to be paid. Once that amount of fine was refunded but belatedly, then that carries interest. That obligation, therefore, has to be discharged by respondent nos.2 and 3.

13. We are unable to agree with Mr. Kantawala for more than one reason. In the present case, the order of confiscation of foreign currency was made on 30th March 2001 with option to redeem the same on payment of redemption fine of Rs.3,00,000/- and penalty of Rs.1,00,000/- on the petitioner passenger. Being aggrieved by that order, an appeal was preferred to the Tribunal. The Tribunal directed the petitioner before us to pay penalty of Rs.1,00,000/- before the matter can be listed for hearing. The penalty was paid. Thereafter a final order was passed on 8th February 2002 by reducing the redemption fine to Rs.1,50,000/- and penalty of Rs.50,000/-. The Department's appeal, which was tagged with the petitioner's appeal, came to be dismissed by the Tribunal. However, aggrieved by the Tribunal's order, the Department filed a criminal writ petition in this Court which was also dismissed on 23rd Augusts 2006. The petitioner, therefore, relying on the order passed by the Tribunal, lodged the refund claim. The refund claim itself says that there were confiscation of foreign currency and an order of adjudication was passed post service of a show cause notice on the petitioner. That ended with a direction to pay redemption fine and penalty as above. It is this application which was dealt with by the Deputy Commissioner of Customs. While dealing with the application for refund, the Deputy Commissioner observed that there was no necessity of obtaining any permission from the Reserve Bank of India, in that the Deputy Commissioner relied on the order passed

by the CESTAT in some other case. It is based on these findings that the refund came to be sanctioned.

14. We cannot consider the claim for payment of interest within the statutory mechanism as urged by Mr. Kantawala *de hors* these facts. If any such fine, which was imposed together with penalty, has been set aside in an adjudication order or quantum has been reduced, but, in the meanwhile, certain sums are paid, then, on eventual success the amount paid in excess could be refunded. Merely because such a refund application has been considered on the basis that the power to confiscate and impose redemption fine and penalty would include within its purview a power to grant the refund of the excess amount, still for such delayed refund interest cannot be granted or awarded, absent a specific provision in the statute. Section 27 of the Act is not such a provision and that is erroneously relied upon. Once that provision together with Section 27A deals with specific cases of refund application claiming refund of duty or interest paid or borne by the applicant, then, that refund being sanctioned, delayed payment of that amount carries interest. Such is not the nature of the amount recovered from the petitioner nor borne by him. Once that is the admitted position, then, in the given facts and circumstances, we do not see how a claim for interest can be considered, leave alone granted. The petitioner is not entitled to any interest on this delayed refund within the scheme of the said Act. We are, therefore, not in agreement with the

petitioner's counsel Mr. Kantawala that there is a pre-established or pre-existing legal right based on which the petitioner is seeking a writ of mandamus directing the respondents to pay interest on the delayed refund which came to be sanctioned on 23rd September 2010, but the amount was actually received on 4th December 2015. The petitioner may lay a claim for interest on receipt of such amount belatedly under general law, but within the four corners of the statute before us, namely the Customs Act, 1962, we do not find any provision enabling the petitioner to recover the interest as claimed.

15. As a result of the above discussion, we do not find any merit in the writ petition which is dismissed with no order as to costs.

(SMT. BHARATI H. DANGRE, J.) **(S.C. DHARMADHIKARI, J.)**