MOTIBHAI FULABHAI PATEL & CO.

v.

M/S. R. PRASAD AND ORS.

October 30, 1968

[S. M. SIKRI, R. S. BACHAWAT AND K. S. HEGDE, JJ.]

Central Excise Rules, 1944, *r.* 40—*Appellants guilty of violating r.* 40 *for mixing duty-paid tobacco with quantity of tobacco on which no duty had been paid—Collector confiscating entire mixture and levying fine on its value—Whether collector could confiscate only so much of the mixture on which no duty paid.*

The appellants were tobacco merchants in Baroda in Gujarat State and were holding Central Excise licence in Forms L-2 and L-5 for the purpose of storing, selling and processing duty paid and non-duty paid tobacco. On December 23, 1958 while the process of mixing some tobacco was going on in a godown where duty-paid tobacco was kept, the Superintendent of Central Excise, Preventive Headquarters, Baroda and his party raided the premises of the appellants and seized a mixture of tobacco weighing 1,64,834.50 lbs. tobacco This mixture included 60,770 lbs. of tobacco on which duty had not been paid. After the appellants were issued a show-cause notice why action should not be taken against them under rule 40 of the Central Excise Rules, 1944, and after they had filed their reply, the Collector, Central Excise, by his order dated April 13, 1959 held the appellants guilty of contravening rule 40 levied on them a penalty of Rs. 2,000 as well as the duty payable under the law, and also ordered the confiscation of the entire quantity of the tobacco seized. As he gave the appellants the option of redeeming the same on payment of a fine of Rs. 1 lakh, they paid the fine under protest and secured release of the tobacco. The appellants' appeal as well as revision against the Collector's order under the provisions of the Central Excise and Salt Act, 1944, were both dismissed. The appellants then filed a writ petition under Art. 226 of the Constitution challenging the legality of the Collector's order but this was dismissed by the High Court.

In appeal to this Court the only challenge was to the Collector's order of confiscation. It was contended, relying on the decision in *Messrs. Valimahomed Gulamhusain Sonavala & Co.* v. *C.T.A. Pillai,* (1960) 42, B.L.R., p. 634, that the Collector could not have confiscated the tobacco mixture as it consisted of both duty-paid tobacco as well as tobacco on which duty had not been paid, the alternative contention was that the Collector could not in any event have confiscated more than 60,770 lbs. of mixture which could be said to represent tobacco on which duty had not been paid.

HELD : Rule 40 permits the Central Excise authorities to confiscate only those goods on which duty had not been paid. It does not permit them either specifically or by necessary implication to confiscate other goods. Therefore it was not permissible for the Collector to confiscate the entire tobacco mixture. At the same time no person can be permitted to benefit by his wrongful act. No rule of law should be so interpreted as to permit or encourage its circumvention. If by the wrongful act of a party he renders it impossible for the authorities to confiscate under

A rule 40 the non-duty paid goods, it is open to those authorities to confiscate from out of the goods seized, goods of the value reasonably representing the value of the non-duty paid goods mixed in the goods seized. Applying that rule to the facts of the present case it follows that althuough the appellants were guilty under Rule 40 of an unlawful act in mixing duty-paid tobacco with non-duty paid tobacco, the Collector could have confiscated out of the tobacco seized so much of it as can be held to reasonably represent the value of the tobacco on which the duty had not been paid. [586 G—581 B]

As the parties were agreed that the value of the tobacco used in the mixture for which no duty had been paid could be fixed at Rs. 35,000, the fine to be levied on the appellant in lieu of the confiscation that could have been ordered had to be fixed at Rs. 35,000. The Collector therefore had to refund to the appellant a sum of Rs. 65,000.

C *Institutes of Justinian*, p. 104; Williams on *Personal Property* (18*th* edition) p. 50; *Spence and Anr.* v. *The Union Marine Insurance Co. Ltd.*, Law Reports (Common Pleas) 3, 1867-68 and *Smurthwaite and Ors.* v. *Hannay and Ors.*, [1894] A.C. p. 494; referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 13 of 1966.

D Appeal from the judgment and order dated January 13, 1964 of the Punjab High Court, Circuit Bench at Delhi in Civil Writ No. 557-D of 1961.

M. P. Vashi, Dalip K. Kapur, S. V. Tambwekar and *A. G. Ratnaparkhi*, for the appellant.

E *D. Narsaraju, R. M. Mehta* and *S. P. Nayar*, for the respondents.

The Judgment of the Court was delivered by

Hegde, J. In this appeal by certificate though several contentions were raised in the memo of appeal only two of them were pressed at the time of hearing. They are : (1) under the circumstances of the case the confiscation ordered by the Collector, F Central Excise is illegal and (2) under any circumstance he could not have confiscated the entire quantity of tobacco used in the mixture.

The appellants are tobacco merchants in Dashrath village near Baroda in Gujarat State. At the relevant time they were G holding Central Excise licence in form L-2 and L-5 for the purpose of storing, selling and processing duty paid and non-duty paid tobacco. They had their own duty paid and non-duty paid godowns. In about December 1958 according to their books they possessed the following lots of different varieties of tobacco.

Variety of tobacco		Quantity	Rate of duty	
H	Bmds.		Rs.	
Biri Patti	,,	251·8	1·20 nP	per lb.
Stems Kandi	,,	287·20	0·50	Do.
Rava	,,	1326·14	0·50	Do.
Stalk Kandi	,,	57·20	0·06	Do.

On December 13, 1958 the appellants obtained permission from the Local Central Excise authorities to mix the above lots of tobacco. The percentage of different varieties of tobacco when mixed would have been as under :

Rava	68·97%
Stems Kandi	14·86%
Biri Patti	13·07%
Stalk Kandi	3·00%

On December 23, 1958 when the process of mixing was still going on the Superintendent of Central Excise, Preventive Headquarters, Baroda and his party raided the duty paid premises of the appellants. There he seized the entire mixture tobacco weighing Mds. 2004.3 srs. *i.e.* 1,64,834.50 lbs. of tobacco. According to that Superintendent when experiments were conducted he found in the above mixture percentage of different varieties as under :

Rava	44%
Biri Patti	51·50%
Stems Kandi	3·74%

From this he concluded that considerable quantity of non-duty paid Biri Patti tobacco had been utilised in the manufacture of the mixture. Hence notice was issued to the appellants on January 6, 1959 to show cause why action should not be taken against them under rule 40 of the Central Excise Rules 1944 inasmuch as they brought into duty paid premises 60,770 lbs. of Biri Patti tobacco without payment of duty. It was also alleged in that notice that the appellants had removed certain quantity of Rava tobacco from L-2 premises. The appellants submitted their reply on March 13, 1959. At the hearing before the Collector as the appellants challenged the correctness of the experiments conducted by the Superintendent, Central Excise, the Collector himself in the presence of the appellants conducted a fresh experiment. On the basis of that experiment he came to the conclusion that the results obtained by the experiment conducted by the Superintendent, Central Excise are by and large correct.

By his order dated April 13, 1959, the Collector, Central Excise held the appellants guilty of contravening rule 40 and consequently levied on them a penalty of Rs. 2,000 as well as the duty payable under law. He also ordered the confiscation of the seized tobacco weighing 1,64,834.50 lbs. But he gave an option to the appellants of redeeming the same on payment of a fine of Rs. 1 lac. The appellants paid the amount of fine under protest and got the goods released.

Thereafter they moved the High Court of Bombay under Art. 226 of the Constitution for quashing the order of the Collector but that application was withdrawn as the appellants first

A wanted to exhaust their remedy under the Central Excise Act. The appellants unsuccessfully went up in appeal and thereafter in revision under the Central Excise and Salt Act, 1944 against the order of the Collector. After the 3rd respondent dismissed their revision petition they filed in the High Court of Punjab at Delhi Civil Writ No. 557-D of 1961 challenging the legality of the order made by the Collector of Central Excise on April 13, B 1959. That petition was dismissed by a Division Bench of that Court on January 13, 1964. This appeal is brought against that decision.

In this Court the finding of the Collector of Central Excise that the appellants were guilty of mixing the duty paid tobacco with non-duty paid tobacco and thereby they contravened rule C 40 was not challenged. Nor was there any dispute about the quantity of non-duty paid tobacco used in the mixture. The main contention of Mr. M. P. Vaish, learned Counsel for the appellants was that under rule 40, the Collector could not have confiscated the tobacco mixture as it consisted of both duty paid tobacco as well as tobacco on which duty had not been paid. D His alternative contention was that under any circumstance the Collector could not have confiscated anything more than 60,770 lbs. of the mixture which can be said to represent Biri Patti tobacco on which duty had not been paid. In support of his first contention he heavily relied on the decision of K. T. Desai, J. in *Messrs. Valimahomed Gulamhusain Sonavala & Co.* v. *C. T. A. Pillai*(1).

E The seized tobacco mixture weighed 1,64,834.50 lbs. That included 60,770 lbs. of Biri Patti tobacco on which duty had not been paid. But on the remaining quantity duty had been paid. The tobacco seized was found in the godown licenced to store duty paid tobacco. Hence the appellants were clearly guilty of contravening rule 40 of the Central Excise Rules which reads :

F "Except as provided in the proviso to sub-rule (1) of rule 32 and in rule 171 no wholesale purchaser of unmanufactured tobacco for the purpose of trade or manufacture and no wholesale purchaser of other unmanufactured products from a curer shall receive into any part of his premises or into his custody or possession, any unmanufactured tobacco or other unmanufactured products, other than tobacco or other unmanufactured products imported from a foreign country otherwise than under a valid permit granted by an officer showing that the proper duty has been paid; and every such wholesale purchaser who receives or has in his custody or possession any such goods, in H contravention of this rule shall, in respect of every such offence, be liable to pay the duty leviable on such

(1) (1960) 42 B.L.R., p. 634.

goods, and to a penalty which may extend to two thousand rupees, and the goods shall also be liable to confiscation."

In view of this rule the legality of the order made by the Collector in so far as he levied duty as well as penalty cannot be challenged and was not challenged before us. But so far as the confiscation is concerned it was urged that under the rule in question only tobacco on which duty had not been paid could alone have been confiscated. In the instant case even according to the finding of the Collector only on 66,770 lbs. of Biri Patti tobacco the duty had not been paid; but on the remaining tobacco seized duty had been paid, it was not possible to separate the duty paid tobacco from the non duty-paid tobacco; hence it was impermissible for the Collector to confiscate the said tobacco under Rule 40 as that rule permitted the confiscation of only non-duty paid tobacco. In *Sonavala's* case(1) referred to earlier Desai, J. had held that the right to confiscate smuggled goods under s. 167(8) of the Sea Customs Act, 1878 does not carry with it the right to confiscate unsmuggled goods. The words 'such goods' appearing in s. 167(8) of the Act cannot be interpretted to mean similar goods. It is not open to the Customs authorities to confiscate similar goods even though they may be of the same quality, bulk and value. The words 'such goods' mean the very goods which have been smuggled. If the smuggled goods lose their identity, it would not be open to the Customs officers to confiscate any part of those goods. Where, therefore, gold that has been smuggled has in the melting process got so mixed up with gold that is unsmuggled that it is impossible to separate the smuggled gold from the unsmuggled one, the right to confiscate smuggled gold ceases when the two get inextricably mixed up. The broad proposition laid down by Desai, J. undoubtedly supports the contention advanced on behalf of the appellants. We shall presently show that this statement of the law is not correct but it is necessary to mention at this juncture that in the *Sonavala's* case(1) an innocent third party had purchased the smuggled gold for proper value and mixed the same with unsmuggled gold, which circumstance had an important bearing on the decision of the case.

In Institutes of Justinian at page 104 dealing with the topic *commixtio* it is observed :

"If the things mixed, still remaining the property of their former owners, were easy to separate again, as for instance, cattle united in one herd, when one owner brought his claim by *vindicatio* his property was restored to him without difficulty but if there was difficulty in separating the materials from each other, as in dividing the grains of wheat in a heap, the obvious

(1) (1960) 42 B.L.R. p. 634.

A mode would be to distribute the whole heap in shares proportionate to the quantity of wheat belonging to the respective owners. But it might happen that the wheat mixed together was not all of the same quality, and therefore the owner of the better kind of wheat would lose by having a share determined in amount only by the quantity of his wheat; and the judge therefore was permitted to exercise his judgment how great an addition ought to be made to his share to compensate for the superior quality of the wheat originally belonging to him."

In Williams on Personal Property (18th Edn.) at p. 50, it is observed :

"The acquisition of ownership by accession or confusion of substances also presupposes a previous title. Thus the young of a domestic animal belong to the owner of the mother. If any substances, for instance tallow, belonging to various owners be mixed by consent or accidentally, the mass appears to belong to the owners of its parts in common. And if the confusion be made wilfully by one without the other's leave, the mass belongs to the latter, whose ownership is thus unlawfully invaded."

Dealing with the same topic it is observed in Halsbury's Laws of England 3rd Edn. (Vol. 29) at p. 378.

"Ownership of goods may be acquired by confusion or intermixture, if the goods, when mixed, are indistinguishable. If the goods are mixed by agreement or consent the proprietors have an interest in common in proportion to their respective shares; if mixed by accident or the act of a third party, or which neither owner is responsible, the proprietors become owners in common of the mixed property in proportion to the amounts contributed. Where, however, one man wilfully mixes his goods with those of another without the approbation or knowledge of the other, the whole belongs to the latter."

The law on this topic was stated by Bovill, C.J. as early as 1868 in *Spence and Anr.* v. *The Union Marine Insurance Co. Ltd.*(1) thus :

"In our own law there are not many authorities to be found upon this subject but, as far as they go, they are in favour of the view, that, when goods of diffe-

(1) Law Reports (Common Pleas) 3, 1867-68.

rent owners become by accident so mixed together as to be undistinguishable, the owners of the goods so mixed become tenants in common of the whole, in the proportions which they have severally contributed to it. The passage cited from the judgment of Blackburn, J., in the case of the tallow which was melted and flowed into the sewers, is to that effect : *Buckley* v. *Gross*. And a similar view was adopted by Lord Abinger in the case of the mixture of oil by leakage on board ship in *Jones* v. *Moore*.

"It has been long settled in our law, that where goods are mixed so as to become undistinguishable, by the wrongful act or default of one owner, he cannot recover, and will not be entitled to his proportion, or any part of the property, from the other owner, but no authority has been cited to shew that any such principle has ever been applied, nor indeed could it be applied, to the case of an accidental mixing of the goods of the two owners; and there is no authority nor sound reason for saying that the goods of several persons be the property of their several owners, and become *bona-vacantia*."

The same principle was again reiterated by the House of Lords in *Smurthwaite and Ors.* v. *Hannay and Ors.*(1)

The rules enunciated above are of assistance in finding out a solution to the problem before us though they do not govern the same. In the instant case there is no doubt that the appellants were guilty of an unlawful act in mixing duty paid tobacco with the non-duty paid tobacco but the fact remains that they were the owners of both those lots at the time they mixed them and hence the legal principles set out earlier do not cover such a case. It must also be remembered that in dealing with a provision relating to forfeiture we are dealing with a penal provision. It would not be proper for us to extent the scope of that provision by reading into it words which are not there and thereby widen the scope of the provision relating to confiscation. Rule 40 permits the Central Excise authorities to confiscate only those goods on which duty has not been paid. It does not permit them either specifically or by necessary implication to confiscate other goods. Therefore it was not permissible for the Collector to confiscate the entire tobacco mixture. At the same time no person can be permitted to benefit by his wrongful act. No rule of law should be so interpreted as to permit or encourage its circumvention. If by the wrongful act of a party he renders it impossible for the authorities to confiscate under rule 40 the non-

(1) [1894] A.C. p. 494.

A duty paid goods it is in our opinion open to those authorities to confiscate from out of the goods seized, goods of the value reasonably representing the value of the non-duty paid goods mixed in the goods seized. Applying that rule to the facts of this it follows that the Collector, Central Excise could have confiscated out of the tobacco seized, so much of it as can be held to B reasonably represent the value of the tobacco on which the duty had not been paid.

As noticed earlier the tobacco confiscated had been returned to the appellants after realising from them a sum of Rs. 1 lac as fine. The Counsel for the parties agreed at the hearing that the value of the Biri Patti tobacco used in the mixture for which no C duty had been paid could be fixed at Rs. 35,000. In view of this agreement it is not necessary for us to remit the case back to the Collector of Central Excise for assessing the value of the tobacco on which duty had not been paid. In view of our earlier findings the fine to be levied on the appellants in lieu of the confiscation that could have been ordered has to be fixed at D Rs. 35,000. From this it follows that the Collector has to refund to the appellants a sum of Rs. 65,000 which he has collected from them in excess of the aforementioned Rs. 35,000. The appeal is allowed to that extent. In the circumstances of the case we direct the parties to bear their own costs both in this Court as well as before the High Court.

R.K.P.S. *Appeal allowed in part.*