

BHANDARI, C. J.—I agree.

APPELLATE CIVIL

Before Kapur, J.

THE UNION OF INDIA,—Appellant

versus

F. GIAN CHAND-KASTURI LAL,—Respondents.

Regular Second Appeal No. 560 of 1951

1953

August 4th.

*Central Excises and Salt Act (I of 1944), Sections 3, 5, 6, 8, 30, 37 and 38—Rules 8 and 11 (framed under section 37)—Notification refunding duty paid on salt on stocks held after 1st April 1947—Notification not in accordance with statute or rules made thereunder—Suit for refund on its basis. whether lies—Practice—Question of law—When can be allowed to be raised for the first time in Second Appeal.*

Salt imported or manufactured in India was exempted from duty with effect from 1st April 1947. By a notification, dated 28th February 1947, duty paid on stocks held or in transit on 1st April 1947 were made refundable under certain conditions. Plaintiffs applied for refund and the applications were rejected. Then the plaintiffs filed suit for refund of the duty paid on stocks held. Government resisted that suit on the ground that such a suit is incompetent.

Both courts below decreed the suit. Government came up in second appeal to the High Court.

*Held*, that the notification in question not being in accordance with any part of the Statute or the rules made thereunder would not confer any enforceable right. The plaintiffs having shown no contract or Statute in support of their claim their suit for refund must fail.

*Held further*, that when a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea.

*Second Appeal from the decree of Shri Ishwar Dass, Senior Sub-Judge, with enhanced appellate powers, Amritsar, dated the 2nd April 1951, affirming that of Shri Rajindara, Sub-Judge, 4th Class, Amritsar, dated the 8th January 1951, granting the plaintiff a decree for Rs. 859-6-0 against the defendant with costs.*

S. M. SIKRI, Advocate-General, for Appellant.

I. D. DUA, for Respondent.

#### JUDGMENT

KAPUR, J. This judgment will dispose of three appeals R.S.A. Nos. 560 to 562 of 1951, which have been brought against three appellate decrees passed by Mr. Ishwar Das, Senior Subordinate Judge, Amritsar, dated the 2nd April 1951, confirming the decrees of the trial Court whereby the three suits brought by the three different plaintiffs were decreed. The point involved in all these cases is the same.

Kapur, J.

On the 28th February 1947, the Government of India issued a notification exempting from the 1st of April 1947, salt manufactured in or imported by land into British India from salt duty. The notification was as follows :—

"No. 1-Salt/47. In exercise of the powers conferred by Sub-rule (1) of rule 8 of Central Excise Rules, 1944, the Central Government is pleased to exempt, with effect from the 1st April 1947, salt

The Union of  
India  
v.  
F. Gian  
Chand Kasturi  
Lal.  
—  
Kapur, J.

manufactured in or imported by land into British India from the whole of the duty leviable thereon under section 3 of the Central Excises and Salt Act, 1944 (I of 1944)."

On the same date another notification No. 2-Salt/47 was issued which was in the following terms:—

"No. 2-Salt/47. By Notification Nos. 1-Customs/47 and 1-Salt/47 of the 28th February 1947, salt imported into or manufactured in British India is, with effect from the 1st April 1947, exempted from payment of the duty leviable thereon. A refund of duty paid on stocks of salt held on the 1st April 1947 or in transit on that date will also be admissible subject to the conditions set out in the following rules."

Under section 37 of the Central Excises and Salt Act (Act I of 1944), hereinafter termed the Act, rules can be framed to carry out the intention of the Act and certain rules have been made which are contained in the Central Excise Manual. Rules 8 and 11 are relevant to this case. Rule 8 gives to the Central Government the power to authorise exemption from duty in special cases and runs as follows:—

"8. Power to authorise exemption from duty in special cases. (1) The Central Government may from time to time, by notification in the Official Gazette exempt subject to such conditions as may be specified in the notification any excisable goods from the whole or any part of the duty leviable on such goods.

(2) The Central Board of Revenue may by special order in each case exempt from the payment of duty, under circumstances of an exceptional nature, any excisable goods."

Rule on the date of the suit, before it was amended, was as under :—

- "11. *No refund of charges erroneously levied or paid, unless claimed within three months.* No duty which has been paid, or has been adjusted in an account-current maintained with the Collector under rule 9, and of which repayment wholly or in part is claimed in consequence of the same having been paid through inadvertence, error or misconception, shall be refunded unless a written claim is lodged with the proper officer within three months from the date of such payment or adjustment as the case may be."

The Union of  
India  
v.  
F. Gian  
Chand Kasturi  
Lal.  
—  
Kapur, J.

In order to understand the case it may be necessary at this stage to refer to certain sections of this Act. Section 3 is the charging section. It provides—

- "3. *Duties specified in the First Schedule to be levied.* (1) There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in India, and a duty on salt manufactured in, or imported by land into, any part of India as, and at the rates, set forth in the First Schedule."

Chapter VII of this Act contains the supplemental provisions and section 37 which empowers the Central Government to make rules :—

" \* \* \* \* "

- (i) provide for the assessment and collection of duties of excise, the authorities by whom functions under this Act are to be discharged, the issue of notices requiring payment, the manner in which the duty shall be payable, and the recovery of duty not paid;

The Unions of  
 India  
 of  
 F. Gian  
 Chand Kasturi  
 Lal  
 Kapur, J.

(ii) prohibit absolutely, or with such exceptions, or subject to such conditions as the Central Government thinks fit, the production or manufacture, or any process of the production or manufacture, of excisable goods, or of any component parts or ingredients or containers thereof, except on land or premises approved for the purpose;

\* \* \* \* \*

(xvii) exempt any goods from the whole or any part of the duty imposed by this Act."

Section 38 deals with the publication of rules and notifications and is as follows:—

"38. *Publication of rules and notifications.* All rules made and notifications issued under this Act shall be made and issued by publication in the official gazette. All such rules and notifications shall have effect as if enacted in this Act:

Provided that every such rule shall be laid as soon as may be after it is made before Parliament while it is in session, for a total period of thirty days which may be comprised in one session or in two or more sessions, and if before the expiry of that period, Parliament makes any modification in the rule or directs that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be."

The plaintiffs in these cases brought three suits for the refund of salt duty which has already been paid alleging that they were stockists of salt and had paid duty and were entitled to refund under the notifications which have been referred to above. The Central Government contested these

suits and pleaded that they were not liable to refund the duty and also raised the plea that the liability to pay, if any, was that of the West Punjab Government. It appears to me that the written statements on behalf of the Central Government were drawn up in a somewhat careless manner without bringing out in clear language as to what exactly was being contested, because I cannot understand that anybody appearing for the Central Government could have pleaded that the liability to refund salt duty was that of a Provincial Government. Although the written statements were not as carefully drawn up as one would expect from the legal advisers of the Union, it cannot be said that the question of liability of the Central Government to refund was not denied. It was also submitted that the plaintiffs had no cause of action.

The Union of  
India  
v.  
F. Gian  
Chand Kasturi  
Lal.  
—  
Kapur, J.

The learned trial Judge was a Subordinate Judge, IV Class, and it appears to me that it was not made clear to him how exactly the liability to refund was being challenged. He raised three issues, but the only issue which is relevant to this appeal is the first one which was—

1. Whether defendant is not liable despite the fact the excise is a Central subject?

He decided the case against the Central Government who went in appeal to the Senior Subordinate Judge. In the grounds of appeal before the appellate Court grounds 1 and 2 stated in a clearer manner the question which was being raised by the Central Government. Those grounds were:—

1. That the learned Sub-Judge has erred in holding that it was obligatory on the appellant to refund the salt duty subject to the conditions published in the *Government of India Gazette* notification No. 2-Salt of 47, dated 28th February 1947 (Finance Department Revenue Division).
2. That the appellant by virtue of the notification referred to above does not incur any legal liability for refund of salt

The Union of  
India  
v.  
F. Gian  
Chand Kasturi  
Lal.  
—  
Kapur, J.

duty received in respect of salt sold by the appellant prior to the 1st April 1947 and held in stock by a dealer on the 1st April 1947 in accordance with the law in force at the date of sale and appellant's offer to refund it is merely an *ex-gratia* offer to do so."

But it appears that when the matter was argued either the gentleman who appeared for the Central Government did not understand what these grounds were or could not explain them to the learned Judge, but the fact remains that the plea of the Central Government failed. The learned Judge in his appellate judgment was of the opinion that the Central Government had not proved that the conditions which were given in the second notification were not fulfilled and said :—

"This being the case I agree with the lower Court that on a clear interpretation of this notification the plaintiff was entitled to the refund claimed by him."

He was also of the opinion that under the notification the Government of India had undertaken to make a refund of the excise duty on the stocks which were held by the salt merchants on the 1st April 1947. On these findings the learned Senior Subordinate Judge confirmed the decree of the trial Court. The Union of India has come up in appeal to this Court.

The learned Advocate-General has taken me through the Act and also the relevant rules as also the notification which is under dispute. The relevant sections and the rules and the notifications have been given *in extenso* earlier in this judgment. Section 3 is the charging section. Section 37 empowers the making of the rules and section 38 deals with the publication of notifications and the rules. Under section 38 the rules which are published in the manner provided in that section and the notifications which are issued under the Act and published in the official Gazette have the

same effect as if they were part of the Act. The question to be decided is whether the notifications on which the plaintiffs rely have any such force. There is no doubt that the rules 8 and 11 are statutory rules and anything which falls within them has the force of the statute, but the question still remains whether this particular notification upon which reliance is placed by the plaintiffs has any statutory force.

The Union of  
India  
v.  
F. Gian  
Chand Kasturi  
Lal.  
—  
Kapur, J.

In some of the sections of the Act notifications are provided for and those would fall under section 38. Under section 3 (2) the Central Government can by notification fix the duties, tariff values, etc. Under section 5 power is given to the Central Government to issue notification to impose customs duty on goods mentioned in the First Schedule. Similarly section 6 gives to the Central Government the power to provide by notification in the official Gazette certain operations to be subject to a licence. By section 8 the Central Government can impose restrictions by notification in the Gazette on possession of excisable goods. Under section 12 the Central Government can by notification declare the provisions of the Sea Customs Act and the procedure thereunder to be applicable under this Act. Chapter III of the Act deals with powers and duties of officers and landlords. Chapter IV deals with transport by sea. In this Chapter under section 30 the Central Government can by notification in the official Gazette exempt from operation of this Chapter the carriage of excisable goods. All these notifications provided for by the various sections of this Act have the force of a statute when they are published in accordance with section 38 of the Act but the present notification on which the plaintiffs rely does not seem to be in accordance with any part of the statute or the rules made thereunder. Unless the plaintiffs bring themselves within a statutory rule or a notification which would fall under section 38 of the Act, they have no enforceable right. The notification which the plaintiffs rely upon does not, in my view, fall under any of the statutory rules or notifications.

The Union of  
 India  
 v.  
 F. Gian  
 Chand Kasturi  
 Lal.  
 ———  
 Kapur, J.

Now the first notification No. 1-Salt/47, dated the 28th February 1947, exempts from duty salt manufactured in or imported by land into British India. It purports to be under sub-rule (1) of rule 8 and, therefore, is a notification which would have statutory force, but the second notification No. 2-Salt/47, which was issued on the same day, makes reference to two other notifications dealing with exemption to salt manufactured in India or brought into India by sea or by land, but no reference is made in this notification to any section or to any rule providing for refund. It may be that the Government because of the policy which the Congress followed under the inspiration of its Great Leader wanted to refund salt duty. But has this policy become effective and has it become enforceable? The Courts have to administer the law as they find it and if the claim of any particular person falls within the law it must be enforced, and if it does not it cannot be enforced even if the intention of the Government of the day was to give this right. The refunds which have been provided for by this notification have not been shown to fall under any of the sections of the statute, the statutory rules or notifications issued under the statute. On the other hand rule 11 of the rules seems to provide that if any duty has been paid through inadvertence, error or misconstruction it cannot be refunded unless a written claim is lodged with the proper officer within three months from the date of the payment, and section 35 of the Act provides for appeals by a person aggrieved by any decision of the Central Excise Officer under the Act or the rules made thereunder and provides a period of three months in which to file this appeal. It is true that the construction of rule 11 or of section 35 and the effect thereof was never agitated in either of the Courts below, but I refer to them because they show that refunds which have been provided for under the rules have to be asked for within a certain period and only those refunds are admissible which are due to inadvertence, error or misconstruction.

In the present case, as I have said above, there is no provision which would entitle the plaintiffs to enforce the refund of the duty paid.

It is well established as their Lordships of The Union of the Privy Council said in *High Commissioner for India v. I. M. Lall* (1):—

India  
v.  
F. Gian  
Chand Kasturi  
Lal.  
Kapur, J.

“It is unnecessary to cite authority to establish that no action in tort can lie against the Crown and, therefore, any right of action must either be based on contract or conferred by statute.”

The learned Advocate-General also relied on the maxim *ex nudo nacto non oritur actio* in Broom's Legal Maxims and reference to a passage of Blackstone which is given at page 510 of Broom's Legal Maxims:—

“A consideration of some sort or other is so necessary to the forming of a contract, that a *nudum pactum*, or agreement to do or pay something on one side, without any compensation on the other, will not at law support an action; and a man cannot be compelled to perform it. The nakedness of a promise, in our system, consists in the absence of consideration, and not in the want of formal conditions, such as writing or registration. Thus, our notion of a bare promise bears no analogy to the *nudum pactum* of the digest. The law, it has been observed, ‘supplies no means nor affords any remedy to compel the performance of an agreement made without sufficient consideration. Such agreement is *nudum pactum ex quo non oritur actio*; and whatsoever may be the sense of this maxim in the civil law, it is in the last-mentioned sense only that it is to be understood in our law.”

(1) A.I.R. 1948 P.C. 121 at p. 127

The Union of India v. F. Gian Chand Kasturi Lal Kapur, J.

In the present case it is not shown that the plaintiffs have any contract or statute in support of their claim, and it is, in my opinion, unsustainable.

Mr. Inder Dev Dua raised an objection that the case which has now been sought to be put forward was never the case of the defendants in the Courts below. I have already said that the Advocate appearing for the Central Government has not put his defence in any very succinct or clear form, but it cannot be said that the case which has now been put forward was never the case of the defendants. On the other hand the written statement did raise the question of the Central Government not being liable and in the grounds of appeal before the learned Senior Subordinate Judge the matter was very clearly put and the judgment of the learned Judge does not indicate that this ground was given up. In any case it is a question of law and can in the circumstances of this case be raised at this stage. In *Connecticut Fire Insurance Company v. Kavanagh* (1), Lord Watson observed:—

“When a question of law is raised for the first time in a Court of last resort (upon the construction of a document, or upon facts either admitted or proved beyond controversy), it is not only competent but expedient, in the interests of justice, to entertain the plea.”

This passage was cited with approval by their Lordships in an Indian case, *the Official Liquidator of M. E. Mola Sons, Ltd. v. Perin R. Burjorjee* (2), where the question of non-registration of a document was allowed to be raised for the first time in appeal before their Lordships.

I am, therefore, of the opinion that the Courts below have taken an erroneous view of the rights of the plaintiffs and have passed a decree in favour of the plaintiffs to which they were not

(1) 1892 A.C. 473 at p. 480.

(2) 59 I.A. 161.

entitled. I would, therefore, allow these appeals, set aside the decrees of the trial Court and dismiss the plaintiffs' suits.

An assurance was given before me that the Union does not propose to apply for restitution in these three cases. In view of the circumstances of this case I think that the costs of all the Courts should be paid by the Union of India although they have succeeded because the responsibility for not presenting their case succinctly and clearly is entirely theirs.

The Union of  
India  
v.

F. Gian  
Chand Kasturi  
Lal

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Kapur, J.