

(1998) 03 PAT CK 0059
In the Patna High Court
Case No : C.W.J.C. No. 98 of 1998 (R)

Aman Coke Plant (P), Limited

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 26-03-1998

Acts Referred:

Constitution of India, 1950 — Article 226, 265, 32

Citation : (1998) 1 BLJR 721 : (1998) 2 PLJR 559

Hon'ble Judges : R.A. Sharma, J;A.K. Prasad, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

R.A. Sharma, J.—On 2.9.1997 the petitioner was granted a certificate of exemption from payment of sales tax on purchase of raw material under the Bihar Finance Act (hereinafter referred to as the Act) for the period from 5.4.1993 to 4.4.1998. Before the exemption, certificate was granted on 2.9.1997 although with effect from 5.4.1993 the petitioner has already paid the tax for the part of the period, (5.4.1993 to 1.9.1997) for which it was granted exemption. It, therefore, requested the Bharat Coking Coal Limited and the Central Coal fields Limited (respondent Nos. 4 and 5 respectively) to refund the tax collected by them from it on purchase of raw materials. The tax not having been refunded the petitioner has filed this writ application seeking a writ of mandamus directing the respondent Nos. 4 and 5 to refund the tax paid by it to them from 5.4.1993 to 2.9.1997. Prayer seeking appropriate writ directing the respondents to give it the benefit of exemption on purchase of raw materials in terms of Government notification dated 10.9.1987 and the resolution dated 1.9.1986 and 28.12.1992 has also been made.

2. At the threshold, the learned S.C.I., has raised a preliminary objection about maintainability of this writ application before this Bench at Ranchi on the ground that no part of the cause of action has arisen within the territory over which this Bench has jurisdiction. In this connection, it has been pointed out that the

petitioner's company is registered and is assessed at Aurangabad which is admittedly outside the jurisdiction of the Bench. It is further stated that the respondent Nos. 1 to 3 are also outside the territorial limit of the Bench and, therefore, no direction, can be issued to them by us. The learned Counsel for the petitioner had admitted that the petitioner is registered at Aurangabad and is assessed over there. He also did not dispute that the respondent Nos. 2 and 3 are outside the territorial jurisdiction of the Bench. His submission, however, is that as part of the cause of action has arisen within the territorial limit of the Bench, this writ application is maintainable at Ranchi. In this connection, it is contended that as, at the time of purchase of raw material from the respondent Nos. 4 and 5, who are admittedly within the territorial jurisdiction of the Bench, the tax was paid to them by the petitioner, direction can be issued to them to refund the same. For the reasons given hereinafter, no such relief can be granted to the petitioner.

3. The respondent Nos. 4 and 5 collect tax at the time of sale of raw materials for and on behalf of the State Government. The amount so collected by them is deposited with the State. Therefore, no direction can be issued to the said respondents to refund the tax. The petitioner is to seek refund under and in accordance with the Act and the Rules framed thereunder. In *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, , the Constitution Bench consisting of nine Hon'ble Judges, while considering the claim of refund of tax/duty under the Central Excise Act and Customs act, has laid down that the claim for refund of the tax has to be made under and in accordance with the Taxation Act under which it has been realised except when the refund is claimed on the ground that the provisions of the Act are unconstitutional/ultra vires, in which case suit or writ petition can be filed for refund to tax. It was further laid down that the indirect tax cannot be refunded unless the dealer/claimant pleads and proves that the tax collected by him has not been passed on to the consumers/other persons. The extracts of the judgment of the Supreme Court in the above case in so far as they are relevant for the purpose of the present case are reproduced below:

(I) Where a refund of tax/duty is claimed on the ground that it has been collected from the petitioner/plaintiff-whether before the commencement of the Central Excises and Customs Laws (Amendment) Act. 1991 or thereafter by misinterpreting or misapplying the provisions of the Central Excises and Salt Act. 1944 read with Central Excise Tariff Act. 1985 or Customs Act, 1962 read with Customs Tariff Act or by misinterpreting or misapplying any of the rules, regulations or has necessarily to be preferred under and in accordance with the provisions of the respective enactments before the authorities specified thereunder and within the period of limitation prescribed therein. No suit is maintainable in that behalf. While the jurisdiction of the High Courts under Article 226 and of this Court under Article 32 cannot be circumscribed by the provisions of the said enactment, they will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction

consistent with the provisions of the Act. The writ petition will be considered and disposed of in the light of and in accordance with the provisions of Section 11-B. This is for the reason that the power under Article 226 has to be exercised to effectuate the rule of law and not for abrogating it.

(II) Where, however, a refund is claimed on the ground that the provision of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way or a suit or by way of a writ petition. This principle is, however, subject to an exception: Where a person approaches the High Court or the Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot reopened on the basis of a decision on another person's case; this is the ratio of the opinion of Hidayatullah. C.J., in Tilokchand Motichand and we respectfully agree with it.

(III) A claim for refund, whether made under the provisions of the Act as contemplated in Proposition (i) above or in a suit or writ petition in the situations contemplated by Proposition (ii) above, can succeed only if the petitioner/plaintiff" alleges and establishes that he has not passed on the burden of duty to another person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so passed on , as the case may be. Whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation but is subject to the above requirement, as explained in the body of the judgment. Where the burden of the duty has been passed on, the claimant cannot say that he has suffered only real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund. But where such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that amount is retained by the State, i.e. by the people. There is no immorality or impropriety involved in such a proposition.

The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country, No one can speak of the people being unjustly enriched.

(IV) While examining the claims for refund, the financial chaos which would result in the administration of the State by allowing such claims is not an irrelevant consideration. Where the petitioner-plaintiff has suffered no real loss or

prejudice, having passed on the burden of tax or duty to another person, it would be unjust to allow or decree his claim since it is bound to prejudicially affect the public exchequer. In case a large claims, it may well result in financial chaos in the administration of the affairs of the State.

4. Supreme Court in *Mafatlal Industries Ltd.*'s case (supra) has considered the correctness of its earlier decision relating to refund of tax including sales tax, decided the questions involving the concept of undue enrichment and interpretation of Article 265 of the Constitution and has also laid down the conditions for refund of indirect tax. The law laid down by the Supreme Court in *Mafatlal Industries Ltd.*'s case is applicable not only to a case where refund is claimed under Central Excise or Customs Acts but also to all such claims made under other Taxation Acts including the Sales Tax Acts. In fact, as is mentioned in the first paragraph of the majority judgment delivered by Hon^{ble} B.P. Jeevan Reddy, J., the first reference to seven-Judge Bench was made because the referring Bench doubted the correctness of the decision of five-Judge Bench *Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf*, , wherein Supreme Court has upheld the right of the dealer to seek refund of the sales tax paid under a mistake without any limitation/condition. Before the referred matter could be heard, *Kanhaiya Lal* case was followed by seven-Judge Bench in *State of Kerala v. Aluminium Industries Ltd.* (1965) 16 STC 689 (SC), on account of which the reference was made to the nine-Judge Bench. In *State of Kerala v. Aluminium Industries Ltd.* (supra) also, the question of refund of sales tax under Kerala Sales Tax Act was involved Supreme Court in *Mafatlal Industries Ltd.* case, disagreeing with the views expressed in the case of *Kanhaiya Lal* and other cases which followed it. has laid down that the claim for refund of tax paid under mistake of fact or of law has to be preferred under and in accordance with the Taxation Act under which it was paid and it is not open to the claimant to file a suit or a writ petition for refund of tax in such cases. The only exception to the above rule, as observed by the Supreme Court, is when the refund is claimed on the ground that the Taxation Act under which the tax was paid is unconstitutional/*ultra vires* in which case, suit and writ petition for refund of the tax are maintainable.

5. Section 42 of the Act deals with and provides for refund of the tax. Rule 34 of the Bihar Sales Tax Rules has prescribed the authorities for the purpose of refund and has also laid down the procedure in connection therewith. Presuming, without deciding, that the petitioner is entitled to refund of the tax, it has to seek the refund under and in accordance with the Act and the rules framed thereunder. In such a matter the writ application cannot be entertained.

6. Relying on a judgment of this Court in *Swastika Smokeless Coke Co. (P) Ltd. v. The State of Bihar and Ors.* C.W.J.C. No. 1609/96 decided on 11.12.1997, the learned Counsel for the petitioner has submitted that this Court can direct the respondent Nos. 4 and 5 to refund the tax to the petitioner. This submission cannot be accepted. In the above case, this Court directed the Commissioner of

Commercial Taxes to consider the claim of the petitioner therein for refund of tax afresh. It may here be mentioned that in the said case the petitioner therein has stated that he has not realised any tax from the customers. It is clear from the following extracts from page & of the said judgment:

...The petitioner has asserted that it has not realised any tax from the customers in view of the fact that it is entitled to exemption from payment of tax on purchase of raw materials....

If the petitioner wants direction to the Commissioner of Commercial Taxes or the Assessing Officer at Aurangabad to consider its claim for refund, it has to file a writ application before this Court at Patna. Such a direction cannot be issued by us from Ranchi.

7. For the reasons given above, this writ application cannot be entertained and is accordingly dismissed. The petitioner will have the liberty to approach the appropriate forum the redressal of its grievance. No costs.

A.K. Prasad, J.

8. I agree