

(1986) 11 AP CK 0017
In the Andhra Pradesh High Court
Case No : Writ Appeal No. 370 of 1979

Assistant Collector of Central Excise, Guntur

APPELLANT

Vs

Andhra Fertilizer Ltd.

RESPONDENT

Date of Decision : 13-11-1986

Acts Referred:

Constitution of India, 1950 — Article 226, 226(3), 265

Citation : (1989) 19 ECC 99 : (1989) 20 ECR 177 : (1987) 32 ELT 343 : (1989) 175 ITR 549 : (1989) 72 STC 299

Hon'ble Judges : P.A. Choudary, J; I. Panduranga Rao, J

Bench : Division Bench

Advocate : K. Jagannadha Rao, to Central Government, for the Appellant; M. Dwarakanath, for the Respondent

Judgement

P.A. Choudary, J.—This is a writ appeal filed against the judgment of a learned single Judge allowing W.P. No. 4815 of 1977 and directing the Assistant Collector, Central Excise, Guntur, to refund to the writ petitioner-company an amount of Rs. 3,59,113.68 which was collected as excise duty from the writ petitioner-company for the period of March, 1969. The quantity of fertilizer which is the subject-matter of this writ litigation was manufactured by the petitioner-company by that date. But the fertilizer so produced was packed and was not made ready by then for marketing. On that basis the department demanded on that quantity of fertilizer payment of excise duty by taking the position that although the fertilizer was produced prior to the above crucial date, the production could not be considered complete because the fertilizer was not marketable. The department held that only when the fertilizer so produced was loaded into bags and was made marketable, its production should be deemed to be complete. Till then fertilizer should be deemed to have been produced. As the loading of the fertilizer into the bags had taken place subsequent to 1st March, 1969, the department had demanded and collected the excise duty. The petitioner-company had paid the demanded amount under protest during the period of March, 1969 to July, 1969.

2. It appears that the excise authorities, according to this view of the matter, had collected excise duty from the fertilizer-manufacturers of the State of Tamil Nadu also. The validity of such imposition of excise duty and collection of the same by the department on the basis of the test of marketability was successfully challenged in the Madras High Court by E.I.D. Parry Limited and Shaw Wallace & Co. Ltd. The Madras High Court, in W.P. Nos. 1746 and 1453 and 1676 of 1973, held that the production was complete the moment the fertilizer was produced without waiting for the date of marketability. In Tamil Nadu fertilizer produced prior to 1st March, 1969 was, therefore, held not liable to any excise duty. Accordingly, those writs have been allowed by the Madras High Court by its judgment dated 11th March, 1977. A few days thereafter, on 9th September, 1977 the present writ petition has been filed in this Court for the grant of similar reliefs. It is represented that the judgment of the Madras High Court in the above batch of writ petitions delivered on 11th March, 1977, was allowed by the department to become final and it was never challenged in appeal.

3. When this writ petition had come up before the learned single Judge, the only point that has been seriously argued was the point of limitation. The contention of the department that the writ petition was barred by limitation was rejected by the learned single Judge and the learned single Judge directed the refund of the abovementioned excise duty collected by the department from the petitioner. It is against the above order of the learned single Judge that this writ appeal has been filed by the Excise Department.

4. Three submissions have been made by the learned counsel for the appellant-department, Sri Jagannadha Rao. His contention is that the writ petition ought to have been dismissed by holding that the claim for refund had been made after a lapse of unconscionably long number of years. The argument of the appellant is that this is not a case where the company was unaware of the legal position. It had paid the amount of excise duty under protest, which would show the awareness on the part of the company that the levy of excise duty is illegal. It is, therefore, argued that the petitioner-company, which has allowed about seven years to lapse from the date of the collection of excise duty, should have been non-suited. The second contention of the appellant is that, inasmuch as the writ petition was filed in September, 1977, the learned Judge ought to have dismissed the writ petition applying article 226(3) of the Constitution as it stood then denying jurisdiction to the High Courts to entertain writ petitions where there was an alternative provided by a statute. The argument of the appellant is that against the Collector's order, there is a statutory right of appeal and a further right of revision. The petitioner's writ petition filed in this Court ignoring the above constitutional prohibition ought not to have been entertained. His final contention is that this Court should not order refund of any excise duty collected by the State even though illegally, because the burden of excise duty being an indirect tax must have been passed on to the consumer and that, therefore, the writ petitioner cannot be said to have suffered any loss.

5. On the other hand, the successful writ petitioner argues that the limitation of rule 11 of the Excise Rules applies only to the claims made to the department for refund of excise duty collected and not to the writ petitions or to the suits filed in the civil court. Sri Ramasubrahmanyam, learned counsel for the petitioner, argues that the writ petitioner had come to know of the invalidity of the collection only by and through the judgment of the Madras High Court delivered on 11th March, 1977 and that the present writ petition which has been filed within a few months thereafter is well within time. In reply to the second contention of the appellant, the petitioner's answer is that this plea of the appellant, which has not been raised before the learned single Judge, ought not to be permitted by this Court to be raised, as the petitioner will otherwise suffer grave prejudice. In reply to the third contention of the appellant, the petitioner argues that the judgment of the Supreme Court in *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, is a clear authority for the proposition that no court could deny refund of tax illegally collected on the ground that the person who paid it has collected it from his customers and has no subsisting obligation to refund to the consumer or the intention to refund it to the consumer, or, for any reason, it is impracticable to do so.

6. We now proceed to consider the validity of these rival contentions.

7. The claim of the writ petitioner for the refund of the excise duty which has been collected in 1969 is essentially a claim for the enforcement of article 265 of the Constitution. Article 265 of the Constitution injuncts the State from levying or collecting any tax or any impose except under the authority of law. That article contains a prohibition against the use of public machinery in collecting moneys from the citizens by the all powerful State except in cases where such levy is authorised by law. Judged from the point of view of article 265, we cannot but hold that the collection of the amount of excise duty in this case is nakedly illegal. The entire attempt of the department to collect excise duty is based upon the hypothesis that the process of manufacturing would not be complete unless the fertilizer is loaded into the bags and made marketable. For the reasons for which the Madras High Court has allowed the abovementioned batch of writ petitions, we are of the opinion that this contention of the department which is opposed to common sense is palpably unsustainable. When the Excise Act seeks to impose excise levy on the manufactured goods, it could not be understood as having any reference to the subsequent event of packing the goods for the purpose of marketing. Excise duty is leviable only on manufacture and not on marketability. We are, therefore, of the opinion that the fertilizer which has been produced prior to 1st of March, 1969 was manufactured by that date and would not be exigible to excise duty. It, therefore, follows that the collection of the excise duty from the petitioner by the department is clearly unauthorised by law.

8. The question that would then arise is whether the courts would be justified in refusing the petitioner their aid and assistance for refund of those amounts which were illegally collected by the State from the petitioners. It is well-accepted that

the primary duty of the courts is to enforce the Constitution and the laws without taking into account any other consideration. The old saying that justice should be done even if the heavens fall, represents this ideal of justice. Normally, therefore, an amount of money collected by the State illegally and unconstitutionally from the petitioner by the use of State force should be ordered by the court to be refunded and restored. But judicial decisions have admitted several exceptions to the application of this principle. It has been said that the direction to refund an illegally collected amount of money after a lapse of long number of years might cripple the working of the Government and might work to the disadvantage of the public. From that point of view, the courts have taken a pragmatic view of the matter and laid down that the sale claims for refund of taxes illegally collected which would be held to be barred in civil suits filed for recovery of the illegally collected amounts should also be held to be barred under article 226 of the Constitution although that article does not lay down any such rule of limitation. Considering the matter from the above point of view, the explanation offered by the writ petitioner that he had come to know of the illegality of the collection of excise duty only after the judgment of the Madras High Court, cannot be rejected. Payment under protest only registers private doubts. That cannot be counted as the starting point of limitation. Inasmuch as the writ petition has been filed within three years from the date of the judgment of the Madras High Court which is a period of time that the civil court will normally allow for filing of a civil suit for recovery of illegally collected tax, we hold on the first point that the petitioner is entitled to file the writ petition and that it is not barred by limitation.

9. The argument of the appellant based upon rule 11 of the Excise Rules is hardly relevant in this case. That is a rule which relates to claims made to the department, which has no application to the writ petition filed under article 226 of the Constitution. We accordingly hold on the first point against the appellant and in favour of the writ petitioner.

10. On the second question, there is no serious dispute that article 226(3) of the Constitution, as it stood then, debarred this Court from entertaining the writ petition filed by the petitioner in September, 1977. If this argument had been raised by the excise authority before the learned single Judge, the petitioner would have, in all probability, taken appropriate steps to agitate his claims before the appropriate forums. But the department did not. In our opinion, the conduct of the department in omitting to raise that contention before the learned single Judge debars it now at this late stage from urging that argument. The decision of the Division Bench of this Court in *K. Gopal Rao v. Excise Superintendent, Adilabad* (1980) 1 APLJ 65 relied on by the appellant, no doubt, held that article 226(3) debars the court from entertaining a writ petition during the lifetime of that constitutional provision. But that decision does not deal with the question whether such a plea can be allowed to be raised by a party at a late stage. We accordingly hold that the appellant should fail on his second contention also.

11. On the third and last contention, which is no doubt the most important contention in this case, we are shown by the appellant and the respondent two judgments of the Supreme Court conflicting with each other. The appellant relied upon the judgment of the Supreme Court in *State of Madhya Pradesh Vs. Vyankatlal and Another*, wherein a Division Bench of the Supreme Court consisting of Murtaza Fazal Ali and R. B. Misra, JJ., held that an amount of money collected by the State illegally as sugar fund from the writ petitioner should not be directed to be refunded, because the burden of paying the amount in question was shifted by the writ petitioner to the purchasers and, therefore, the writ petitioner was not entitled to get a refund and that only the person on whom lay the ultimate burden to pay the amount would be entitled to get a refund of the same. This judgment, which is based upon the theory of unjust enrichment, was followed by this Court in *Ramaiah v. State of A.P.* (1986) 2 ALT 206. But the judgment of the Supreme Court in *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, has laid down directly a contrary proposition by holding that the court would not deny refund of tax even if the person who paid it has collected it from the customers and has no subsisting liability or intention to refund it to them or for any reason it is impracticable to do so. According to the judgment of the Supreme Court in *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, the relief of refund of illegally collected tax cannot be denied merely on the ground that the person who paid it has collected it from his customers. In fact, in common law, we can find no scope for such a view. Under the Constitution and laws the right to obtain refund of illegally collected tax is a right which is recognised by article 265 and the right to sue. Article 265 enjoins the State from not levying or collecting taxes except by authority of law. The theory of unjust enrichment cannot be directly applicable to a taxpayer who had first paid illegal taxes to the State and later collected the amount from his customers. Illegal collection is what is unconditionally forbidden by article 265 of the Constitution. In logic, therefore, we find considerable support for the view which has been taken by the earlier judgment of the Supreme Court in *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, . The observations of the latter Bench of the Supreme Court in *State of Madhya Pradesh Vs. Vyankatlal and Another*, would, however, show that the Supreme Court in laying down that the excise taxpayer cannot claim refund of illegally collected excise duty, has laid down a proposition just contrary to the law laid down by the first case. This makes an examination of the matter by us necessary. In our view, the theory of unjust enrichment referred to by the second judgment does not apply to a situation dealt with by article 265. Such a situation should be left to be dealt with more appropriately by the legislature as suggested by the earlier judgment of the Supreme Court. We are clearly of the opinion that the theory of unjust enrichment will have no application where the citizen seeks enforcement of the constitutional limitations under article 265. In fact, the concept of unjust enrichment would in our considered opinion be inapplicable to a situation like this where the petitioner is complaining to this Court against the unjust enrichment of the State. The fact that the petitioner made good his loss from his unjust

collections from its customers affords no answer to the petitioner's legal claim. To that extent, we respectfully disagree with the decision in *Ramaiah v. State of A.P.* (1986) 2 ALT 206. In the circumstances, the relief to the petitioner under article 226, in our opinion, can only be refused on the ground that granting of such relief would not be in the public interest. A Division Bench of this Court has taken that view in *Gurram Sreeramulu, Garlapati Anjaneyulu & Company v. State of A.P.* [1972] 30 STC 120. The question then would be whether it would be in promotion of justice in a case like this to deny the refund to the writ petitioner. In answering that question, we must first remember the naked and wholly arbitrary character of the illegal collection of excise duty by the department which, without any semblance of legal authority, treated the manufacture of fertilizer to be incomplete without its being packed and stitched and made marketable. We must also note the fact that the department had allowed the judgment of the Madras High Court to become final and had thereby allowed a situation to develop wherein a large number of fertilizer manufacturers were found entitled for the refund of this money. We cannot find any sound reason why one manufacturer alone out of several manufacturers should be compelled to pay an impost or tax which cannot be legally collected from the other. In the above circumstances, we are of the opinion that justice demands that the petitioner should also be accorded a similar treatment. Accordingly, following the judgment of the Supreme Court in *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, , we dismiss this writ appeal with costs. Advocate's fee Rs. 250.

12. In view of the conflicting observations of the two Supreme Court judgments, we certify that this case involves a substantial question of law of general importance and, in our opinion, the said question needs to be decided by the Supreme Court.

13. Writ appeal dismissed.