

(1959) 12 MP CK 0027

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 144 of 1958

Bhailal Bhai

APPELLANT

Vs

State of M.P. and Another

RESPONDENT

Date of Decision : 16-12-1959

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 226, 265, 286
Contract Act, 1872 — Section 72

Citation : (1960) JLJ 656 : (1960) 5 MPLJ 601 : (1960) 11 STC 511

Hon'ble Judges : P.V. Dixit, C.J.; K.L. Pandey, J

Bench : Division Bench

Advocate : K.S. Chitale, S.D. Sanghi and V.S. Pandit, for the Appellant; M. Adhikari, Advocate-General and Balwansingh, for the Respondent

Final Decision : Allowed

Judgement

P.V. Dixit, C.J.

This order will also govern Miscellaneous Petitions Nos. 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158 and 160 all of 1958.

In these sixteen applications under Article 226 of the Constitution of India, the petitioners challenge the validity of imposition of sales tax under the Madhya Bharat Sales Tax Act, 1950, on "leaves of tobacco, manufactured tobacco used for eating, smoking and for snuff and tobacco chura used for the manufacture of bidis" imported by them from outside the quondam State of Madhya Bharat and sold in that State. They pray that the imposition be declared to be illegal and ultra vires the Constitution and an appropriate writ or direction be issued to the opponents to refund the tax already collected from them during the period from 1st April, 1951, to 30th September, 1957.

All the petitioners carry on business in Ujjain (a city located in that part of the new Madhya Pradesh which was formerly Madhya Bharat) as importers of tobacco and as such are registered as dealers under the Act. By Notification No. 59/7-

S.R.-55(5) dated the 24th October, 1953, issued by the Government u/s 5 of the Act, sales tax is chargeable on "leaves of tobacco, manufactured tobacco and tobacco used for smoking, eating and for snuff" sold by an importer at the rate of Rs. 6-4-0 per cent and on "tobacco chura used for bidi manufacturing" sold by an importer at the rate of Rs. 1-9-0 per cent. During the period relating to the assessment years from 1950 to 1956, the petitioners' sold imported as well as locally grown-that is in Madhya Bharat-tobacco of the above description. The sales tax authority assessed them to sales tax for these assessment years on the basis of taxable turnover determined after deducting from their turnover the sale of "domestic tobacco" and recovered the tax accordingly.

On 17th January, 1956, a Division Bench of the Madhya Bharat High Court held in Mohammad Siddiq v. The State of Madhya Bharat A.I.R 1956 M.B. 214, that the sales tax levied under the Act on pugrees made of handloom cotton cloth imported within the State of Madhya Bharat was illegal and repugnant to Article 304 of the Constitution inasmuch as handloom cloth manufactured at four places in Madhya Bharat was exempt from sales tax. Taking cue from this decision, the petitioners contended successfully in some of the appeals against some assessments pending before the appellate authority under the Act that they were not liable to pay any sales tax on imported tobacco sold by them when locally grown tobacco was not subject to a similar tax. They also served on the respondent State notices for the refund of the amount of tax already paid by them on the sale of imported tobacco. As their demand for refund of the tax amount was not conceded, they filed the present petitions.

In all these petitions, the validity of the imposition of the sales tax is challenged on similar grounds. The grounds on which the respondents have opposed the petitions are also common. Shri Chitale, learned counsel who appeared in support of M.P. No. 145 of 1958, contended that by the notification issued on 24th October, 1953, u/s 5 of the Act sales tax was levied on the sales by the importer of tobacco of the type referred to above and was payable by the importer; that no sales tax was charged on similar home-grown tobacco, though, as was evident from the various Government publications themselves, a considerable quantity of tobacco was grown in the State of Madhya Bharat; that the imposition of the tax was, therefore, contrary to Article 304 and illegal; and that the imposition of the tax being illegal, the assessment and collection thereof from the assessee was under a mistake of law and the respondents were bound to repay the amount of tax collected from the assessee in his case u/s 72 of the Contract Act. He further argued that even if the levy of sales tax on the sales of imported tobacco was illegal, none the less the assessment in respect of that tax was "an assessment made under the Act" for the purpose of Section 17 of the Act so as to prevent the assessee from instituting a suit calling in question the assessment made against him and from applying for a refund u/s 21; that as the tax levied was without any authority and illegal, its imposition invaded the petitioner's fundamental right guaranteed by Article 19(1)(f) and (g) of the Constitution; and that, therefore, on the mere ground of existence of an

alternative adequate legal remedy this Court could not refuse to make an appropriate direction for the enforcement of the assessee's fundamental right, which was violated on account of the imposition of an wholly illegal tax and for the refund of the tax amount illegally recovered from the petitioner in his case. Shri Sanghi, learned counsel for the petitioner in M.P. No. 144 of 1958, in supplementing the arguments of Shri Chitale, after referring to several cases, emphasised that if the imposition of sales tax was illegal and ultra vires the Constitution, then the remedy of a suit or an application for refund was not available to the assessee for whom he was appearing or to any other petitioner and that the only remedy that the petitioners could resort to for the protection of their fundamental right was under Article 226 of the Constitution. Learned counsel appearing for the petitioners in other cases adopted the arguments of Sarvashri Chitale and Sanghi.

In reply, learned Advocate-General put in the forefront of his arguments the contention that Article 304(a) was not concerned with taxes on sales or purchases of goods; that it referred to taxes on imported goods in the act of import; that it was Article 286 which related to taxes on sales or purchases of goods; and that consequently the impugned levy of sales tax could not be regarded as contravening the provisions of Article 304(a) of the Constitution. Learned Advocate-General proceeded to say that the wording of the relevant entries in the notification issued on 24th October, 1953, indicated that sales tax was payable by an importer on all sales of tobacco, no matter whether it was imported or obtained by him locally. Learned Advocate-General did not dispute that some tobacco was grown and produced in the erstwhile Madhya Bharat State. But he submitted that the production of the tobacco was so small and insignificant as compared with the tobacco imported from outside that State that even the home-grown tobacco went in substantial quantity to the importers for sale and that it was for this reason that the "importer" was selected as a convenient point for the assessment of sales tax. It was admitted that if a person, who was not an importer and who sold domestic tobacco, was not liable to pay any sales tax on the sale transactions then there might be inequality of treatment amounting to discrimination within Article 14 of the Constitution as between an importer and a dealer. But it was said that the petitioners did not rest their claim on the violation of Article 14 and it was because of this feature that the case of *Umraolal Subalal v. State of Madhya Pradesh* M.P. No. 122 of 1958 decided on 30th November, 1959; Since reported at *Umraolal Subalal*, a partnership firm of *Bhind Vs. State of M.P. and Others*, which dealt with the validity of sales tax on "bura" sugar and exemption from sales tax of sugar manufactured in Madhya Bharat, was distinguishable from the case of the present petitioners. Learned Advocate-General, though at first inclined to argue by reference to several Supreme Court decisions, which we will notice presently, that even if the imposition of sales tax on the petitioners was illegal and unauthorised, no direction as to the refund of the amount already collected from them could be made under Article 226 and that the petitioners had the remedy

of a suit open to them, ultimately conceded that if the levy of the tax was ultra vires the Constitution and the petitioners were entitled to be repaid the amount of tax already collected from them, then, looked at from the practical point of view, it made little difference whether an order for refund was made in these proceedings or in a suit that the petitioners might file for that purpose.

On these contentions, the three points that arise for decision are : (i) whether the levy of sales tax on sales by an importer of tobacco imported into Madhya Bharat was repugnant to Article 304(a); (ii) whether, if the imposition was illegal, the petitioners are entitled to recover back the amount of tax paid by them; (iii) and whether for claiming back the refund of the amount the petitioners must resort to the remedies available under the ordinary law, or whether they can invoke Article 226 of the Constitution.

On the first question it is necessary to refer to Article 304(a) of the Constitution, which says :

Notwithstanding anything in Article 301 or Article 303, the Legislature of a State may by law-

(a) impose on goods imported from other States any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and

(b)... ..

The plain meaning of this provision is that a State may impose any tax on goods imported from other States only if it taxes similar locally manufactured or produced goods as not to discriminate between imported goods and domestic goods. The Supreme Court observed in *The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others*, that by that clause-

...the principle of freedom of inter-State trade and commerce declared in Article 301 is expressly subordinated to the State power of taxing goods imported from sister States, provided only no discrimination is made in favour of similar goods of local origin. Thus the States in India have full power of imposing what in American State legislation is called the use tax, gross receipts tax, etc., not to speak of the familiar property tax, subject only to the condition that such tax is imposed on all goods of the same kind produced or manufactured in the taxing State, although such taxation is undoubtedly calculated to fetter inter-State trade and commerce.

We are not prepared to adopt the construction suggested by the learned Advocate-General, namely, that Article 304 does not deal with the imposition of taxes on purchase or sale of goods and that it refers to tax on imported goods in the act of import. Such a construction is not warranted at all by the language of Article 304(a). That article, as it is worded, gives to the State Legislature the power to impose on goods imported from other States any tax to which similar

goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and similar goods of local origin. Its object is to maintain freedom of inter-State trade and to ensure that no special tax on the act of import or on the imported goods as such is levied. The discrimination spoken of in that Article is not discrimination as between the import of goods from outside the State and import of goods of local origin. It is difficult to conceive of import into a State of goods manufactured in that State itself. Learned Advocate-General sought to support the construction contended by him by pressing into service the observation in paragraphs 20, 40 and 83 of the judgments of Patanjali Sastri, C.J., Bose and Bhagwati, JJ., in *The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others*, to the effect that Article 304 deals with the restrictions as to imposition of tax on goods or tax on imported goods while Article 286 deals with the restrictions as to imposition of tax on sales or purchases of goods. Support was also sought in the observation of Venkatarama Ayyar, J., in *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, that under Article 304(a) the tax is levied on the goods whereas under Article 286(2) it is levied on the transactions of buying and selling. As we read those observations, it appears to us that by those observations the learned Judges stated and emphasized that the provisions of Article 286 could not be construed with reference to the provisions of Article 304(a). We do not read those observations as holding that a discriminatory sales tax on goods imported from other States is outside the purview of Article 304(a) of the Constitution. That would have been an impossible finding on the clear language of Article 304(a) of the Constitution.

This brings us to the question whether under the notification dated 24th October, 1953, sales tax was chargeable under the relevant entries only on sales of imported tobacco. The sales tax was charged under entry No. 5 of Schedule III and entry No. 3 of Schedule V of the notification. Those entries, which are in Hindi, when translated read as follows:-

S. No. Description of goods Point of sale in Madhya Bharat at which tax is payable. Schedule III 5 Leaves of tobacco, manufactured On sale by tobacco used for eating, smoking importer. Schedule V 3 and snuffing, Tobacco used for On sale by bidi manufacturing. importer.

We think, it is plain from the wording of those entries that sales tax is chargeable only on the sales by the importer of the tobacco imported by him. This is how the taxing authorities themselves regarded the entries and excluded from the petitioners' turnover the sale of locally produced tobacco for purposes of assessment. The argument of the learned Advocate-General that the expression "on sale by an importer" was wide enough to include sale by an importer of even home-grown tobacco, though attractive, ignores the premise that home-grown tobacco not being imported tobacco, its sale by a person who also deals in imported tobacco is not "a sale by an importer." The relevant entries have to be construed strictly and according to the plain and natural meaning of the words

used therein. So construed, it is clear that under those entries sales tax is chargeable on the sale of imported tobacco by the person importing it. One does not find any words in the entries to suggest that a tax was imposed on the sales of tobacco of local origin. The definition of "importer of goods "given in Section 2 (i) of the Act does not really assist the learned Advocate-General in the construction sought to be put by him on the words "on sale by an importer ". That definition is as follows :-

"Importer of goods " means a dealer who brings or causes to be brought into Madhya Bharat any goods from outside for the purpose of processing, manufacturing or sale and also includes a dealer who purchases goods in Madhya Bharat for the purposes of sale from a dealer who does not ordinarily carry on business in Madhya Bharat.

The first part of the definition makes a dealer bringing in or causing to be brought goods into Madhya Bharat for the purposes mentioned therein an importer. In the scheme of the Act, the latter part of the definition must be taken to mean that a dealer, who purchases imported goods in Madhya Bharat for purposes of sale from a dealer ordinarily carrying on business outside Madhya Bharat, is included in the definition of "importer of goods ". It cannot be read as meaning that a dealer in Madhya Bharat acquiring locally for sale goods manufactured or produced in that State from a resident or nonresident person in Madhya Bharat is an importer of those goods. In connection with the question whether the impugned imposition of tax offended Article 304(a) of the Constitution, the material point to be considered is whether under the relevant entries sales tax was chargeable on sales of tobacco produced in the former State of Madhya Bharat and not as to the persons connoted by the above definition of "importer of goods ". In our opinion, there is nothing in the relevant entries or in the definition of "importer of goods" to persuade us to hold that under those entries sales tax was charged even on the sales of domestic tobacco. That apart, the taxing authorities themselves did not construe the entries so as to enable them to tax sales by any dealer or importer of locally grown tobacco. Therefore, even if it be said that the provision imposing tax on sales of tobacco was on the face of it fair and not discriminatory in appearance, yet if in its actual working, effect and operation it has proved to be discriminatory between tobacco imported and tobacco grown in Madhya Bharat, it must be adjudged as repugnant to Article 304(a). It has been observed by Prof. Weaver at page 404 of his book "Constitutional Law" that the validity or invalidity of a statute often depends on how it is construed and applied and that it may be valid when given a particular application and invalid when given another-see also *The State of West Bengal Vs. Anwar Ali Sarkar*, On the learned Advocate-General's own statement that the tobacco sold in Madhya Bharat was substantially imported tobacco and that the taxing authorities did not construe the relevant entries as permitting them to tax sales of tobacco grown in Madhya Bharat and excluded those sales in determining the taxable turnover of the petitioners, it is clear that the entries imposing sales tax on tobacco worked out in their actual

administration, discriminatory. We are clear in our mind that the imposition of sales tax on the petitioners in respect of the sales of tobacco imported into Madhya Bharat was in violation of Article 304(a) and thus illegal.

The question whether, if as we think the levy of sales tax on the petitioners in respect of the sales effected by them of the imported tobacco is ultra vires, they can ask for a refund of the amount of sales tax already paid by them, is concluded by the decision of the Supreme Court in *Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf*, That was a case in which imposition of sales tax on forward transactions in silver bullion was held to be ultra vires by the High Court of Allahabad in *Budh Prakash Jai Prakash and Another Vs. The Sales Tax Officer and Others*, which was subsequently affirmed by the Supreme Court in *The Sales Tax Officer, Pilibhit Vs. Budh Prakash Jai Prakash*, Thereafter, the assessee-firm in that case applied to the Sales Tax Officer, Banaras, for a refund of the amount of sales tax paid by it. When this was refused, the firm filed an application in the Allahabad High Court under Article 226 of the Constitution and asked for a writ of certiorari for quashing three assessment orders and a writ of mandamus requiring the Sales Tax, Officer to refund the tax amount. That petition was allowed and a writ of mandamus directing the taxing authority to refund the amount to the assessee was issued. The learned single Judge of the Allahabad High Court took the view that the payment of illegal tax by the assessee was a payment under mistake and that, therefore, u/s 72 of the Contract Act the taxing authority was bound to refund the moneys unlawfully received by it from the assessee on account of sales tax. When the matter went up before the Supreme Court, the main question that was canvassed was whether Section 72 of the Contract Act applied. It was held by the Supreme Court that the term "mistake" in Section 72 of the Contract Act has been used without any qualification or limitation whatever and comprises within its scope a mistake of law as well as of fact and that where it is once established that the payment, even though it be of a tax, has been made by a party labouring under a mistake of law, the party is entitled to recover the same and the party receiving the same is bound to repay or return it. The effect of the decision of the Supreme Court is that payment by the assessee of a tax, which is subsequently declared to be ultra vires, must be regarded as a payment made under mistake and the party receiving the same is bound to return the amount of tax irrespective of any consideration whether the moneys have been paid voluntarily, subject, however, to questions of estoppel, waiver, limitation or the like. Here there is nothing to show that when the petitioners paid the tax amount, they paid it as a gift or bounty or conscience money to the State. The mistake of law became apparent to the petitioners on 17th January, 1956, when the Madhya Bharat High Court held in *Mohammad Siddiq v. The State of Madhya Bharat* AIR 1956 MP. 214 that the levy of sales tax on pugrees imported into Madhya Bharat from outside that State to be repugnant to Article 304 of the Constitution when similar goods manufactured in Madhya Bharat were not subject to any sale's tax; On the basis of that authority the petitioners called

upon the opponents, within 3 years of the date of that decision, to refund the amount of Sales tax collected from them. It must be noted that there is no provision in the Madhya Bharat Sales Tax Act, 1950, or in the rules framed thereunder constituting a dealer liable to pay tax under the Act as an agent of the Government for the collection of the tax. It is the dealer who is liable to pay the tax under the Act. The dealer may himself bear the burden of the tax or may pass it on to the purchaser by including the amount of sales tax in the sale price or by collecting it in addition to the sale price. But the tax is payable by the dealer and no one else and if he fails to pay the tax, it is recoverable from him as arrears of land revenue and it is he who is liable to penalty if he fails to pay the amount within the time allowed. The Act and the rules do not say anything as to whether a dealer has to pay to the Government all the amounts realised by him as tax if they are in excess of the tax actually assessed or if the tax is illegal. It cannot, therefore, be argued that even if the levy of the sales tax on the petitioners was illegal, they are not entitled to a refund of the amount inasmuch as it was collected by them as agents of the respondents.

The last question as to the remedy available to the petitioners for the refund of the tax amount illegally recovered from them does not require consideration at length in view of the Full Bench decision of this Court in *Mullaji Jamaluddin and Co. Vs. The State of Madhya Pradesh and Others*, and in view of the fact that the learned Advocate-General did not oppose the prayer of the petitioners for refund, when he said that if the levy of the tax was ultra vires the Constitution and the petitioners were entitled to be repaid the amount of tax already collected from them, then it did not make any difference whether an order of refund was made in these proceedings or in a suit. In the case of *Mullaji Jamaluddin and Co. Vs. The State of Madhya Pradesh and Others*, the Full Bench, while holding that the recovery of sales tax under the C.P. and Berar Sales Tax Act, 1947, from the assessee before them in respect of certain transactions in which goods were sent outside the State of C.P. and Berar for delivery to consumers offended Article 286(1) of the Constitution and was invalidly collected, issued a direction for the refund of the tax amount to the assessee. The Full Bench decision is sufficient to grant the petitioners' prayer for a direction for the refund of the tax amount illegally collected from them. But as learned counsel for the petitioners sought to fortify their elaborate arguments on this point by several decisions of the Supreme Court, it would but be proper to notice them.

The argument that a suit for challenging the validity of assessment and for refund was barred u/s 17 of the Act was based on the Privy Council decision in *Raleigh Investment Co., Ltd. v. The Governor-General in Council* AIR(1947) P.C. 78, where with reference to Section 67 of the Income Tax Act, 1922, it was held that an assessment made under the machinery provided by the Act, if based on a provision subsequently held to be ultra vires, was not a nullity but a mistake of law made in the course of its exercise, that the assessment was one "made under the Act" and, therefore, a suit for a declaration that any of the provisions of the Income Tax Act was ultra vires and for repayment of the tax on that basis

was barred by Section 67. It was said that the provisions of Section 17 of the Madhya Bharat Sales Tax Act, 1950, were, in material particulars, analogous to Section 67 of the Income Tax Act and that the said decision of the Privy Council was approved by the Supreme Court in *The State of Tripura Vs. The Province of East Bengal*, The effect of the Privy Council's decision in *Raleigh Investment Co. Ltd. v. The Governor-General in Council* (1947) AIR 1947 P.C. 78 is, no doubt, that even if an assessment is ultra vires or made without jurisdiction, it is none the less an assessment made under the Act and a suit for setting aside the assessment and for refund on that ground is not maintainable. But it seems to us that this effect has been considerably whittled down by the decision of the Supreme Court in *The State of Tripura Vs. The Province of East Bengal*, That was a case where a person, who had been served with a notice calling upon him to furnish a return of income, filed a suit for a declaration that the provision of law under which he was sought to be assessed was ultra vires and void and for a perpetual injunction to restrain the taxing authority from taking any steps to assess him. The Supreme Court distinguished the decision of the Privy Council in *Raleigh Investment Co., Ltd. v. The Governor-General in Council* (1947) AIR 1947 P.C. 78 and held that such a suit was not a suit to set aside or modify an assessment inasmuch as no assessment had been made till the institution of the suit. The ratio decidendi of the case was that service of a notice calling for a return of income for purposes of assessment under a provision which was said to be ultra vires was a wrongful act which was actionable. It, however, seems to us that in principle no real distinction can be drawn between a suit for a declaration that any of the provisions relating to assessment are ultra vires and for an injunction restraining the taxing authority from making assessment and a suit for the same declaration and seeking the relief of repayment of the tax already paid. It is possible to argue on the basis of the Supreme Court's decision in *The State of Tripura Vs. The Province of East Bengal*, that the petitioners before us could have filed a suit for the relief they are seeking here. It was further said that no application for refund could be made u/s 22 of the Act as the claim for refund of the tax amount declared to be illegal and ultra vires the Constitution was not a claim for a refund of "any excess amount" recovered over and above a permissible limit. It must be said that this contention is not one which can be rejected outright as lacking in substance altogether. It may come up for consideration later on on a proper occasion and we prefer to express no opinion on it.

In support of the contention that even if the remedy of a suit or an application for a refund was available to the assessee, the imposition of an illegal tax being an infringement of the petitioners' fundamental right under Article 19(1)(e) and (g) of the Constitution, they were entitled to invoke the powers of this Court under Article 226 of the Constitution for an appropriate writ for the refund of the tax amount already collected from them, learned counsel for the petitioners relied mainly on the decisions of the Supreme Court in *The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others*, , *Himmatlal Harilal Mehta*

Vs. The State of Madhya Pradesh and Others, , Wazir Chand Vs. The State of Himachal Pradesh, , The Bengal Immunity Company Limited Vs. The State of Bihar and Others, , Kailash Nath and Another Vs. State of U.P. and Others, and Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf,

In our opinion, none of these decisions can be regarded as concluding the question that in a case, such as the one before us, the assessee is, as a matter of course, entitled to the relief of a direction for refund of the illegal amount of tax recovered from him. It must first be noted that in Ramjilal Vs. Income Tax Officer, Mohindargarh, as also in Laxmanappa Hanumantappa Jamkhandi Vs. The Union of India (UOI) and Another, the Supreme Court ruled that as Article 265 was not a fundamental right conferred by Part III of the Constitution it could not be enforced under Article 32. The decisions in the first, second, fourth and fifth cases mentioned above, all proceeded on the footing that though Article 265 was not a fundamental right, the imposition of sales tax, under the provisions of the relevant Sales Tax Act was in the nature of restrictions upon the fundamental right to carry on business guaranteed by Article 19(i)(g) and therefore if the imposition was without legal authority, the assessee could resort to the remedy provided under Article 32 or Article 226. In all these cases, the imposition of a sales tax, which was illegal and constituted an infringement on the freedom of business guaranteed by Article 19(i)(g), was prevented by the issue of an appropriate writ restraining the taxing authorities from imposing or authorizing the imposition of the impugned tax. In those cases, the question whether when an illegal tax had already been collected from the assessee, a writ for the refund of the tax amount could be issued under Article 32 or Article 226 of the Constitution did not arise for consideration. In Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf, on which strong reliance was placed by the learned counsel for the petitioners, an objection was no doubt taken before the Supreme Court by the Additional Solicitor-General appearing for the sales tax authority that the assessee should have followed the procedure laid down in the U.P. Sales Tax Act for claiming a refund of the tax amount already collected from him the levy of which had been declared by the Allahabad High Court and the Supreme Court as ultra vires and that this, not having been done, the assessee was debarred from claiming back the amount in a writ petition under Article 226 of the Constitution. The objection was overruled by the Supreme Court on the ground that no such contention had been raised by the State Advocate-General before the High Court and the whole matter had proceeded there on the basis that the assessee was entitled to recover the amount claimed in the writ petition which he had filed. In the Allahabad High Court, the Advocate-General had categorically stated that he did not contend that the assessee ought to have proceeded for the recovery of the amount claimed otherwise than by a petition under Article 226 of the Constitution. Thus the decision of the Supreme Court in Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf, which upheld the decision of the Allahabad High Court issuing a writ of mandamus directing the taxing authorities to refund the tax amount paid by the assessee,

cannot be treated as expressing any opinion of the Supreme Court on the question of issue of a writ under Article 226 of the Constitution for a refund of a tax impugned in the circumstances such as those present in the instant case.

Shri Chitale, learned counsel appearing for one of the petitioners, urged that if the imposition of a tax was held to be ultra vires, then in essence no difference could be made between the issue of a writ restraining the taxing authority from imposing or authorising imposition of that tax and the issue of a suitable direction for the refund of the illegal tax amount already recovered from the assessee. The difference would, in our view, arise on the kind of considerations mentioned in paragraph 27 of the judgment in *Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf*, and reiterated by Bhagwati, J., in *Basheshar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another*, In *Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf*, Bhagwati, J., said :-

If mistake either of law or of fact is established, he is entitled to recover the moneys and the party receiving the same is bound to repay or return them irrespective of any consideration whether the moneys had been paid voluntarily, subject however to questions of estoppel, waiver, limitation or the like.

Then again, in *Basheshar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another*, Bhagwati, J., observed that if payment was made voluntarily in circumstances such as those which existed in *Gopal Das v. Union of India* AIR 1955 S.C. 1 and *Laxmanappa Hanumantappa Jamkhandi Vs. The Union of India (UOI) and Another*, the person claiming the relief of a refund of the amount by an application under Article 226 of the Constitution would be confronted with the argument that the Court could in exercise of its discretion refuse him the relief prayed for. He went on to say :-

The remedy is purely discretionary and no Court in those circumstances would exercise its discretion in his favour.... Even then he might merely obtain a relief declaring the legislation ultra vires the Constitution and the Court would not grant him any consequential relief. For that relief he would have to approach the regular courts of law, when all questions of law, apart from the mere constitutionality of the provision would be considered by the Court on a contest between the parties, e.g., estoppel, acquiescence, limitation and the like.

It is, perhaps, because the considerations pointed out in the cases just referred to above are not present here that the learned Advocate-General did not contend seriously that the appropriate remedy of the petitioners for recovery of money lay in a suit. The decision in *Wazir Chand Vs. The State of Himachal Pradesh*, is not in point here as it related to the return of certain goods which had been illegally seized.

Reference was also made by Shri Sanghi to *Orient Paper Mills Ltd. v. State of Orissa* AIR 1957 Orissa 240, *Indian Steel and Wire Products Ltd. Vs. Superintendent of Commercial Taxes and Others*, *Sales Tax Commissioner, U.P. v.*

Sada Sukh Vyopar Mandal [1950] 10 S.T.C. 57 RAJ , Rayalseema Constructions Vs. Deputy Commercial Tax Officer, Mannady Division, Madras 1 and Others, and Chhotabhai Jelhabhai Patel and Co. v. The Union of India AIR 1952 Nag. 139 . In the first case, the question that was considered was whether an application for grant of refund of the tax amount declared to be ultra vires u/s 14 of the Orissa Sales Tax Act, 1947, could be entertained by the Sales Tax Officer. It was held that the officer had power to receive the application even though he might not have jurisdiction to pass orders on the application if the amount of refund exceeded his pecuniary jurisdiction. This decision is of no assistance here. The decision in the second case no doubt supports the contention of the petitioners that a direction under Article 226 could be made for the refund of a sum illegally realised as sales tax. The decision of the Allahabad High Court in Sales Tax Commissioner Vs. Sada Sukh Vyopar Mandal, that the amount of tax deposited by a dealer, which was held to be an illegal imposition, was refundable, was given in a reference arising u/s 11 of the U.P. Sales Tax Act. This decision does not really carry the question before us much further. The case reported in Rayalseema Constructions v. Deputy Commercial Tax Officer [1959] 10 S.T.C. 345 MP is again a case in which a writ was issued forbearing the sales tax authority from collecting the tax amount impugned in that case. In Chhotabhai Jethabhai Patel and Co. v. The Union of India AIR 1952 Nag. 139 also a writ restraining the Union of India from recovering duty on tobacco under a demand made, was issued.

For the foregoing reasons, we declare that the imposition of sales tax on the petitioners on sales of imported tobacco during the material years was repugnant to Article 304(a) of the Constitution and they are entitled to be paid back the amount of tax already paid by them. We, therefore, direct the issue of a writ enjoining the opponents to refund to each of the petitioners the amount of tax collected from him. Having regard to the circumstances in which the assessment was made and the tax was collected from the petitioners, we think the petitioners should not be allowed any costs. The outstanding amount of security deposited by each of the petitioners be refunded to him.