

(1983) 11 MP CK 0005

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 351 of 1980

Bharat Commerce and Industries Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 02-11-1983

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35, 36
Constitution of India, 1950 — Article 22, 226, 32
Contract Act, 1872 — Section 72

Citation : (1987) 14 ECC 110 : (1988) 36 ELT 383

Hon'ble Judges : K.N. Shukla, J;J.S. Verma, J

Bench : Division Bench

Advocate : A.D. Desai, for the Appellant;

Final Decision : Dismissed

Judgement

J.S. Verma, J.—The petitioner is a limited company engaged in the business of manufacture of various types of yarn at their factories situated in different parts of the country. This petition relates to the petitioner's manufacturing unit at Nagda in Ujjain District of the State of Madhya Pradesh. The petitioner paid excise duty assessed under tariff item 18 on blended yam manufactured by it in its factory at Nagda for the period December 10, 1968, to January 29, 1972, amounting to Rs. 10,66,555.52, as detailed in Annexure-B to the petition. This excise duty was paid by the petitioner without any protest and without disputing its liability to pay the same. The petitioner claims that this amount was paid by it under a mistake of law which came to be known to the petitioner only on 9-11-1976, when it came to know that the Gujarat High Court had held that prior to the insertion of tariff item 18-E by notification dated 16/17th March 1972, no excise duty was payable on blended yarn. Based on this discovery made on 9-11-1976 after the payment of the aforesaid amount of Rs. 10,66,555.52 for the period between December 10, 1968 and January 29, 1972, this petition under Article 226 of the Constitution, has been filed on 23-6-1980 for a direction to the respondents to refund this amount to the petitioner. The petitioner had also filed

a revision u/s 36 of the Central Excises and Salt Act, 1944 against this levy on 6-11-1979, which was dismissed by the Central Government on 26-5-1980, and the Order being communicated to the petitioner after filing of this petition, the further relief of quashing the Central Government's order dated 26-5-1980 has also been claimed by amendment of the petition.

2. Shortly stated, the petitioner's case is that the payment of the aforesaid amount of Rs. 10,66,555.52 having been made by the petitioner as excise duty under a mistake of law, the respondents are bound to refund the same. The petition has been opposed by the respondents on several grounds. In reply, it has been contended that there has been Inordinate delay in filing of the petition on account of laches of the petitioner"" which alone is sufficient for refusing the discretionary relief under Article 226 of the Constitution. It is contended that refund is claimed in this petition filed on 23-6-1980 of the amount of excise duty paid without any dispute on protest for the period ending on January 29, 1972, and even if the petitioner's version of deriving knowledge of the mistake of law on 9-11-1976 is accepted, the petition was filed more than three years after that date, when a civil suit for this relief was barred on the petitioner's own case. It is claimed that there is no reasonable explanation for the inordinate delay of several years, even assuming that the Gujarat decision delivered on 15-1-1976 was known to the petitioner only on 9-11 -1976, for the period thereafter till the filing of the petition. Admittedly, the burden of this excise duty paid by the petitioner has been passed ultimately to the consumers so that the refund, if any, must go to those consumers and, therefore, it is contended that a direction to refund the amount to the petitioner would result in unjust enrichment of the petitioner. Learned counsel for the petitioner countered this argument of unjust enrichment by contending that suitable directions can be given by the Court requiring the petitioner to refund the amount to the consumers in order avoid any unjust enrichment of the petitioner. Learned counsel for the petitioner also contended that mere unjust enrichment of the petitioner cannot be a ground for refusing refund of the excise duty illegally paid by the petitioner under a mistake of law discovered subsequently.

3. The only relevant facts are those already stated. Admittedly, excise duty was levied on the blended yarn manufactured by the petitioner in its Nagda factory under tariff item 18 for the period December 10,1968, to January 29,1972, amounting to Rs. 10,66,555.52 and the same was paid without raising any dispute on protest by the petitioner. Subsequently, by a notification dated 16/17th March 1972, tariff item 18-E was introduced providing for assessment of excise duty on blended or mixed yarn. Accordingly, with effect from 17-3-1972 excise duty has been levied and paid on blended yarn in accordance with tariff item 18-E, about which there is no controversy. After the introduction of tariff item 18-E. providing separately for excise duty on blended or Mixed yarn with effect from 17-3-1972, a doubt appears to have arisen in the mind of persons who had paid excise duty earlier, like the petitioner, on blended yam in accordance with tariff item 18 or tariff item 18-A. Challenge by one of them in

Gujarat High Court led to the decision in *The Ahmedabad Manufacturing and Calico Pvt. Ltd. v. Union of India and Ors.* special Civil Application No. 1058 of 1972, decided on 15-1-1976, which was also reported in the March 1976 part of the Central Excise and Customs Journal. Therein, it was held that tariff item 18 or 18-A did not cover blended yam and, therefore, excise duty could be levied on it only with effect from 17-3-1972 on introduction of tariff item 18-E to cover that commodity. On the petitioner's own case, the payment made by it under mistake of law of the aforesaid amount was known to it only on 9-11-1976, when one of the officers of the company was told about the Gujarat decision given earlier, at the time when the officer met the petitioner's advocate at Delhi for consultation in respect of a connected matter. The period after 9-11-1976, when the petitioner admits deriving knowledge of payment under a mistake of law, till filing of this writ petition on 23-6-1980, is attempted to be explained as stated hereafter. It is contended that the petitioner filed a revision u/s 36 of the Central Excises and Salt Act, 1944, on 6-11-1979 before the limitation of three years for a suit had run out, treating 9-11-1976 the date of knowledge, as the starting point of limitation, and this petition was filed on 23-6-1980 even before coming to know that the revision had been dismissed on 26-5-1980, since the order dismissing the revision was communicated to the petitioner after this petition had been filed. It is also contended that even though an appeal u/s 35 of the Act could have been filed but the limitation for filing an appeal having expired prior to discovery of mistake of law on 9-11-1976 and there being no provision to condone the delay in filing the appeal u/s 35, a revision u/s 36 was filed for which there is no limitation. The fact that 9-11-1976 was the date on which the petitioner derived knowledge of the payment under a mistake of law, according to the petitioners own case, on coming to know of the Gujarat decision is contained in the averments made in the petition and the petitioner's rejoinder, which shows that the latest date of the petitioner's knowledge could not be beyond 9-11-1976. This being the significance of the date 9-11-1976, unless there be any cogent explanation to account for the period of more than three and half years, thereafter till the filing of the petition on 23-6-1980, the petition will have to be dismissed on the short ground of inordinate delay and petitioner's laches, even assuming that the period between 29-1-1972 and 9-11-1976 is not required to be explained by the petitioner.

4. Having heard both the sides, we are satisfied that there is no cogent explanation to explain the delay in filing the petition after 9-11-1976 and a suit for refund on the date of the petition being barred by limitation, this is a good ground to disentitle the petitioner to grant of the discretionary relief of directing refund under Article 226 of the Constitution.

5. Shri A.D. Desai, learned counsel for the petitioner contended that the petitioner's case for refund being good on merits, the question of delay is of no consequence. He also argued that technical pleas, such as that of limitation, should not be taken by the Government as repeatedly observed by the Supreme Court and the High Courts. He also argued that notwithstanding the Gujarat

decision, as a result of which the petitioner discovered payment of excise duty under a mistake of law, when that decision was known to it on 9-11-1976, the petitioner was entitled to wait till any decision of the Supreme Court or of this Court was given on the point. Admittedly, no decision on the point of the Supreme Court or this Court has been given so far and, therefore, if the learned counsel for the petitioner be right, then no occasion has arisen even now for the petitioner to apply for refund. It is sufficient to say that this last argument is contrary to the petitioner's own case of discovery of payment under a mistake of law by it on 9-11-1976. This last argument is based on a passing observation made in a decision of this Court In *Caltex (India) Ltd., Indore Vs. Assistant Commissioner of Sales Tax, Indore Region, Indore and Another*, , to which reference will be made later. We shall now refer to the decisions on which reliance has been placed by both sides.

6. It is settled, as has been reiterated recently in *Smt. Sudama Devi Vs. Commissioner and Others*, , that there can be no hard and fast rule of limitation for a writ petition but the general rule of laches alone can be applied depending on the facts and circumstances of each case. The Supreme Court observed that "there is no period of limitation prescribed by any law for filing a writ petition under Article 226 of the Constitution and" in every case it would have to be decided on the facts and circumstances, whether the petitioner is guilty of laches and that would have to be done without taking into account any specific period as a period of limitation. These observations were made by the Supreme Court in dealing with an appeal against dismissal of a writ petition merely because it was filed beyond the period of 90 days, treating it as time barred. Reference may now be made to some decisions of the Supreme Court in which this question directly came up for consideration.

7. By the decision in *Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf*, , it was settled that the amount of tax paid under a mistake of law was recoverable from the State in accordance with Section 72 of the Contract Act, since the mistake lies in thinking that the money paid was due when in fact it was not due. In *State of Madhya Pradesh Vs. Bhailal Bhai and Others*, it was held that in exercise of its jurisdiction under Article 226 of the Constitution, the High Court has power to give consequential relief by ordering repayment of the money realised by the Government without authority of law. However, it was further held that the special remedy provided in Article 226 of the Constitution is not intended to supersede completely the modes of obtaining relief by an action in a civil Court or to deny defence legitimately open in such actions. Among the several matters which the High Courts rightly take into consideration in the exercise of the discretionary power under Article 226 of the Constitution, is the delay made by the aggrieved party in seeking this special remedy and what excuse there is for it. It was further stated as a general rule that if there has been unreasonable delay the Court ought not to lend its aid to a party by this extraordinary remedy of mandamus. The Supreme Court, while pointing out that the provisions of the Limitation Act do not as such apply to the granting of relief

under Article 226 of the Constitution, laid down that the maximum period fixed by the legislature as the time within which relief by a suit in a civil Court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Article 226 can be measured. The position was ultimately summarised by their Lordships as under :-

"It appears to us however that the maximum period fixed by the legislature as the time within which the relief by a suit in a civil Court must be brought may ordinarily be taken to be a reasonable standard by" which delay in seeking remedy under Article 226 can be measured. This Court may consider the delay unreasonable even if it is less than the period of limitation prescribed for a civil action for the remedy but where the delay is more than this period, it will almost always be proper for the Court to hold that it is unreasonable. The period of limitation prescribed for recovery of money paid by mistake under the Limitation Act is three years from the date when the mistake is known."

This decision was approved by a Bench of 7 Judges in *State of Kerala v. Aluminium Industries Ltd.* (1985) 16 STC 689, (S.C.) and has been consistently followed thereafter. It was expressly held that the question whether the writ petition was within three years of the date on which the mistake first became known to the petitioner so that a suit on that date for refund would not be barred by limitation, was decisive in a petition for refund of tax, filed under Article 226 of the Constitution. It was stated at the Bar that there is no subsequent decision of the Supreme Court of a Bench of equal or greater strength on the point. It follows that according to the law laid down by the Supreme Court, ordinarily a writ petition for refund of a tax paid under a mistake of law filed beyond the period of three years of the date on which the mistake first became known to the petitioner, must be dismissed merely on the ground of inordinate, delay inasmuch as a suit for refund on that date was barred by limitation. It is only where the delay has been explained on the basis of cogent reasons indicating the extraordinary circumstances that exception to this ordinary rule may be possible. We may here state that there are no extraordinary circumstances present in this case to indicate the desirability of deviating from this normal rule laid down by the Supreme Court on this point.

8. The next decision on the point is *Tilokchand and Motichand and Others Vs. H.B. Munshi and Another*, . The same principles were reiterated by a Bench of 5 Judges, following the aforesaid two Supreme Court decisions. This decision is also significant for the reason that the rule of laches and delay applicable to a writ petition under Article 226 of the Constitution was also applied to a petition under Article 32 of the Constitution, which is itself a fundamental right. Reference may now be made to the decision *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, . The above quoted earlier decisions of the Supreme Court were followed and the position was reiterated as under :-

"Therefore, where a suit will lie to recover moneys paid under a mistake of law, a writ petition for refund of tax within the period of limitation prescribed i.e. within

3 years of the knowledge of the mistake, would also lie. For filing a writ petition to recover the money paid under a mistake of law, this Court has said that the starting point of limitation is from the date on which the judgment declaring as void the particular law under which the tax was paid was rendered, as that would normally be the date on which the mistake, becomes known to the party. If any writ petition is filed beyond three years after that date, it will almost always be proper for the Court to consider that it is unreasonable to entertain that petition, though, even in cases where it is filed within three years, the Court has a discretion having regard to the facts and circumstances of each case, not to entertain the application."

9. Learned counsel for the petitioner himself placed greatest reliance on *O. Cawasji's* case (supra). The summary of the decision quoted above indicates that the Supreme Court reiterated once again what had been said in the earlier decisions, after referring to those earlier decisions, and it was once again held that a writ petition filed beyond three years of the date on which the mistake is discovered, will almost always be considered to be unduly delayed, even though a petition filed within three years may, in certain circumstances, be also treated as delayed. This case does not in any manner assist the petitioner.

10. Reference may now be made to the decision of this Court in *Caltex (India) Ltd., Indore Vs. Assistant Commissioner of Sales Tax, Indore Region, Indore and Another*, , which was relied on by the learned counsel for the petitioner to contend that the above period of three years has not yet begun to run for the petitioner inasmuch as there is no decision of the Supreme Court or this Court, taking the same view, as in the Gujarat decision. In that case, the question before this Court was as to when did the petitioner acquire knowledge of the fact that it paid the amount of tax under a mistake of law. It was held that the petitioner's knowledge cannot be taken to be prior to the date of the Supreme Court decision on 14-4-1967 reported in *State of Madras Vs. R. Nand Lal and Co.*, , as there was no material to show as a fact that the petitioner got knowledge of the decision of the Madras High Court at any time before coming to know of the Supreme Court decision in 1967. The writ petition in that case was filed within three years of the date of petitioner's knowledge and, therefore no further question arose for decision therein. However, a casual passing observation was made that the claim for refund could have been made only when the Supreme Court or this Court had rendered a decision on the point. Apart from the fact that this further observation is not the ratio of the decision, on the facts found proved, according to which the petition was filed within three years, this decision has to be read in consonance with the earlier Supreme Court decisions which have been referred and followed therein, including the above quoted decision by a Bench of 7 Judges in *State of Kerala v. Aluminium Industries Ltd.* (supra), in which it was clearly held that the period of three years was to be computed from "the date on which the mistake first became known". There was no further rider introduced specifying the manner in which the mistake came to be known and the starting point of limitation of three years was

mentioned as the date when the mistake first became known, in whatever manner. We are therefore, unable to read the decision of this Court in *Caltex (India) Ltd. (supra)*, in the manner suggested by Shri Desai, learned counsel for the petitioner.

11. The above principle is well known and reference to any authority for this purpose was not necessary. However, the above cases have been cited because of the vehemence with which the point was argued before us, referring to those authorities. It is sufficient to observe that there is no cogent explanation to account for the delay in filing this petition from 9-11-1976 when the petitioner claims to have known for the first time that payment of the aforesaid excise duty was made by it under a mistake of law. A period of nearly five years had already elapsed by then from the expiry of the period for which refund was claimed and there is no reason why the petitioner should have delayed filing the petition thereafter. Not only this, the delay after 9-11-1976 itself is more than three years and the petition was filed only on 23-6-1980. We have no doubt that a civil suit filed for refund of the excise duty on discovery of the mistake of law on 9-11-1976 would have been clearly time barred on the date of this petition. There are no circumstances, much less any extraordinary circumstances to overcome this difficulty and to account for the delay in filing the petition in order to enable us to depart from the ordinary and normal rule to be applied in such cases, as indicated by the Supreme Court time and again in the decisions cited earlier. We are, therefore, of the opinion that the petition should be dismissed on this ground alone, without going into the further question of unjust enrichment of the petitioner. We may, however, indicate that in case we were inclined to allow the petition and direct refund of the amount, we would have preferred to follow the course indicated by the Supreme Court in its decision in *The Newabganj Sugar Mills Co. Ltd. and Others Vs. The Union of India (UOI) and Others*, by issuing suitable directions to ensure refund of the money directly to the consumers, instead of the petitioners, in view of the fact that the learned counsel for the petitioner very rightly did not dispute the petitioner's liability to refund that amount to the consumers to whom it belongs. However, this situation not having arisen, no further discussion of the aspect is necessary, even though both sides have argued this point also with considerable vehemence citing decisions of some High Courts, which it is unnecessary to refer for the reasons stated.

12. Consequently, the petition fails and is dismissed. In the circumstances of the case, there shall be no order, for costs. The security amount, if any, be refunded to the petitioner.