

**(2012) 07 GUJ CK 0059**

**In the Gujarat High Court**

**Case No : Special Civil Application No. 24506 of 2006**

Binani Cement Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

---

**Date of Decision : 25-07-2012**

**Acts Referred:**

Coal Mines (Conservation and Development) Act, 1974 — Section 10, 6, 7, 9  
Constitution of India, 1950 — Article 226, 265  
Contract Act, 1872 — Section 72  
Customs Act, 1962 — Section 12(1), 2(15)  
Customs Tariff Act, 1975 — Section 3  
Limitation Act, 1963 — Section 17, 17(1), 17(1)(c)

**Citation : (2013) 288 ELT 193**

**Hon'ble Judges :** Harsha Devani, J; Akil Abdul Hamid Kureshi, J

**Bench :** Division Bench

**Advocate :** Abhishek M. Mehta, for the Appellant; A.Y. Kogje, for the Respondent

---

## **Judgement**

Akil Kureshi, J.—The petitioners have prayed for a writ or a direction holding that the levy and collection of cess by the respondents from the petitioners on import of coking and non-coking coal is unlawful, unconstitutional and void. The petitioners have by way of consequential relief, also prayed for a direction to the respondents to refund the entire amount of Rs. 67.17 lakhs paid by the petitioners towards such cess during the period between January, 1997 to December, 2005. Facts may be noted at the outset:

1.1. The petitioner No. 1 is a company registered under the Companies Act and is engaged in the business of manufacturing cement. For the purpose of its manufacturing activities, the Company imported coking coal falling under Customs Tariff Heading No. 2701.19 during the period between January, 1997 to December, 2005. During such period, the petitioners received 45 shipments of such imported coal at Navlakhi Port. To clear such consignment, the petitioners also filed bills of entry. On such imports, the respondents levied additional duty at the rate of Rs. 3.50 per metric tonne or Rs. 10/- per metric tonne depending

on the period when such imports were made, in terms of notification Nos. S.O. 95(E), dated 8-2-1983 and S.O. 727(E), dated 25-6-2003 in addition to the Customs duties payable under the Customs Act, 1962. The above mentioned notifications were issued u/s 6 of the Coal Mines (Conservation and Development) Act, 1974 (hereinafter to be referred to as "the Coal Mines Act").

1.2. The case of the petitioners is that such demand and levy of additional duty was wholly unauthorized, illegal and unconstitutional. Stated in brief, the petitioners contend that u/s 6 of the Coal Mines Act, the authorities had power to collect only additional duty over and above excise duty on the excisable goods and therefore, any notification issued u/s 6 of the Coal Mines Act would not permit the customs authorities to collect any such additional duty on the imported goods. The petitioners point out that Section 7 of the Coal Mines Act prescribed such additional duty on imported goods. When no notification u/s 7 of the Coal Mines Act was issued the authorities did not have any authority to collect such duty on the imports made by the petitioners. It is not in dispute that the petitioners paid the entire duty on the imports made from time to time and never challenged the levy thereof.

1.3. It would be useful to take note of contents of such notifications which read as under:

In exercise of the powers conferred by sub-section (1) of Section 6 of the Coal Mines (Conservation Development) Act, 1974 (28 of 1974) and in supersession of the notification of the Govt. of India in the Ministry of Energy (Department of Coal) No. S.O. 159(E), dated the 29th March, 1975 as amended by the Notification of the Govt. of India in the Ministry of Energy (Department of Coal) No. S.O. 686(E) dated the 9th November, 1978 except as respects things done or omitted to be done before such supersession, the Central Govt. hereby fixes, with effect on and from the 9th February, 1983 the rates specified in column (2) of the Table annexed hereto as the rates at which the duty of excise referred to in the said section shall be levied on coal of the description specified in column (1) of the Table against each rate, namely:-

Note:-

(1) The expression "tonne" shall have the meaning assigned to it in the notification of the Government of India in the Ministry of Commerce and Industry No. S.O. 290 dated 30-1-1950.

(2) The expression "non-coking coal" means all types of coal which had been classified as such by the Coal Board constituted under the Coal Mines (Conservation and Development) Act, 1952 (12 of 1952) and such other types of coal as may be declared by the Central Government as coal from which on carbonization coke suitable for being used in metallurgical industries, particularly in iron and steel industries, can be prepared.

Noti. Min. of Energy (Dept. of Coal) S.O. 95(E) dt. 8-2-1983.

NOTIFICATION New Delhi, the 25th June, 2003

S.O. 727(E). In exercise of the powers conferred by sub-section (1) of Section 6 of the Coal Mines (Conservation and Development) Act, 1974 (28 of 1974) and in supersession of the notification of the Government of India in the erstwhile Ministry of Energy (Department of Coal) number S.O. 95(E), dated the 8th February, 1983 except as respects things done or omitted to be done before such supersession the Central Government hereby fixes, with effect on and from the 26th June, 2003 the rates specified in column (2) of the Table given below as the rates at which the duty of excise referred to in the said section shall be levied on coal of the description specified in column (1) of the said Table namely:-

1.4 We may notice that the department has been collecting such duty under said two separate notifications. As noted in the first notification No. S.O. 95(E) dated 8-2-1983 it was provided that on the excise duty payable by the manufacturer, additional duty shall be levied on coal of the description specified in that table at the rates specified therein. For coking coal, the rate specified was Rs. 4,25 per tonne and for non-coking coal, such rate was Rs. 3.50 per tonne. In the subsequent notification dated 25-6-2003, such rates were revised to Rs. 10/- per tonne for coking as well as non-coking coal.

1.5. The petitioners point out that the Supreme Court in the case of Commr. of C. Ex. and Cus., Bhubaneswar-I Vs. Tata Iron and Steel Co. Ltd., , examined the validity of collection of such duty under the Coal Mines Act held that in absence of any notification issued u/s 7 of the Coal Mines Act, no additional duty could be levied.

1.6. At one stage, even the department accepted the case of the petitioners that by virtue of the decision of the Apex Court in the case of Commissioner of Central Excise & Customs, Bhubaneswar-I v. Tata Iron & Steel Co. Ltd. (Supra), no such additional duty could be levied. In response to a show-cause notice dated 23-3-2005 issued by the Superintendent of Customs, Navlakhi why a differential amount of Rs. 6,81,908/- of cess should not be recovered, the petitioners opposed the proceedings. Such show cause notice proceedings were adjudicated and the Assistant Commissioner, Customs Division, Jamnagar by his order dated 30-9-2005 ordered as under:

I hold that Cess imposed u/s 6 of the Coal Mines (Conservation and Development) Act, 1974 is not leviable as additional duty of Customs via Section 3 of the Customs Tariff Act, 1975.

I drop the demand issued by the Superintendent of Customs, Custom House, Navlakhi, vide SCN No. VIII/23-30/CH-NLK/04-05 dated 23-3-2005, for short payment of additional duty of Customs amounting to Rs. 6,81,908/- along with demand for interest at appropriate rate thereto.

2. With this background, the petitioners have approached this Court and made the prayers noted above.

3. The learned counsel for the petitioners contended that the entire demand and levy of the duty was wholly unauthorized, unlawful and unconstitutional. The petitioners are, therefore, entitled to refund of such unlawfully collected duty. The learned counsel submitted that the writ petition for such purpose would be maintainable. In this respect, the learned counsel heavily relied on the decision of the Apex Court in the case of Commissioner of Central Excise & Customs, Bhubaneswar-I v. Tata Iron & Steel Co. Ltd. (supra). He would contend that the issue is squarely covered by the said decision and no further debate is possible.

4. The learned counsel further submitted that in absence of any notification issued u/s 7 of the Coal Mines Act, the amount collected from the petitioners must be seen as one under mistake of law. Such a collection does not partake the character of Customs duty. The petitioners, therefore, can claim refund thereof at any point of time and at any rate within three years from the date the petitioners discovered the mistake. For this purpose, heavy reliance was placed on the provisions contained in Section 17(1) of the Limitation Act.

5. The learned counsel further submitted that the petitioners had not passed on the burden of this duty on the consumer. He submitted that coal is used for energy generation for manufacturing of cement. It is not a component and, therefore, there would be no question of passing on the burden of such additional duty on the consumer. The learned counsel submitted that during the period under consideration, the Company was running losses. For this purpose, he relied on the certificate of the Cost Accountant, which is produced on record by the petitioners.

6. In addition to the decision in the case of Central Excise & Customs, Bhubaneswar-I v. Tata Iron & Steel Co. Ltd. (supra), the counsel relied on the following decisions:

(i) In the case of M/s. Shree Baidyanath Ayurved Bhawan Pvt. Ltd. Vs. State of Bihar and others, , wherein the Apex Court observed that writ petition for refund of tax illegally collected was maintainable. He pointed out that the Apex Court finding that the writ petition was filed within two months of the decision of the Supreme Court, held that such petition was within time.

(ii) In the case of Godavari Sugar Mills Ltd. Vs. The State of Maharashtra and Others, , wherein the Apex Court had the occasion to examine the scope of writ petition filed for refund of money illegally collected by the State, it was held that where the dispute had a public law character, relief under Article 226 would be maintainable.

(iii) The learned Counsel also relied on the decision of the Division Bench of this Court in the case of Union of India and Others Vs. Ahmedabad Manufacturing and Calico Printing Co. Ltd. and Others, , wherein the Bench held that in terms of Section 17(1) of the Limitation Act, 1963, a suit for recovery of excise could be filed within three years of detection of the mistake of fact as well as law.

7. On the other hand, learned counsel Mr. A.Y. Kogje opposed the petition contending that number of disputed questions of fact are involved. The payment of a total additional duty of Rs. 67,17,000/- during the above period is not admitted. He, therefore, contended that writ petition should not be entertained.

8. The learned counsel further submitted that in any case the refund claim cannot be entertained beyond a period of one year prescribed under the Customs Act, 1962. He submitted that merely because the Apex Court in the case of another assessee declared such duty as unlawful, the petitioners cannot make a refund claim without any reference to time.

9. The learned counsel further submitted that in any case a question of unjust enrichment must be examined before any refund can be granted to the petitioner.

10. From the above discussion, it clearly emerges that insofar as the collection of so called additional duty is concerned, the same was wholly illegal. With respect to this aspect even the department is unable to raise any contention. This is so because in an identical situation, the Apex Court in the case of Central Excise & Customs, Bhubaneswar-I v. Tata Iron & Steel Co. Ltd. (supra) held that such additional duty on imported coal could not be levied. The Apex Court noted that Section 6 of the Coal Mines Act pertains to collection of additional duty on excise. Section 7, on the other hand, pertains to collection of additional duty as Customs duty. The Apex Court noted that in absence of any notification u/s 7 of the Coal Mines Act, no such duty could be levied on import of coal made by the importers. We may notice that both the notifications noted above and relied upon by the department for collection of such duty have been issued in exercise of powers u/s 6 of the Coal Mines Act and referred to as collection of excise duty. In that view of the matter, the entire collection of additional duty in the name of Customs duty was wholly unauthorized. Even the department dropped the demand in the order dated 30th September, 2005 passed by the Assistant Commissioner of Customs, Jamnagar. Such order, we are informed, was never challenged. In any case the decision of the Apex Court being amply clear and squarely covering the case of the petitioners, we have no hesitation in holding that the entire levy of the duty was without authority of law.

11. The question is to what extent and under what circumstances, can the petitioners claim refund. The fact that the petition is maintainable for such refund can hardly be disputed. The duty has been declared illegal by the Supreme Court. The petitioners' claim that in view of such decision they are entitled to refund of such illegally collected duty. Can such a claim, however, be made at any point of time without reference to limitation, is a question, which is required to be decided?

12. As noted earlier, the learned counsel for the petitioners had contended that the duty being collected without authority of law and such fact having come to the notice of the petitioners some time in the year 2004, the refund claim could be made within three years of limitation prescribed under the Limitation Act.

Such limitation, according to the petitioners, would commence when such mistake was detected. For such purpose, reliance is placed on Section 17(1) of the Limitation Act, 1963.

13. We are afraid, such contention cannot be accepted. In the case of *State of Madhya Pradesh Vs. Bhailal Bhai and Others*, , a Constitution Bench of the Apex Court held that where sales tax, assessed and paid by the dealer, is declared by the competent Court to be invalid in law, the payment of tax already made is one under a mistake within the meaning of Section 72 of the Contract Act and, therefore, the Government to whom the payment was made by mistake must be repaid. The Court further held that in that respect the High Court, in exercise of its jurisdiction under Article 226 of the Constitution of India, has power for the purpose of enforcement of fundamental rights and statutory rights to give consequential relief by ordering repayment of money realised by the Government without the authority of law. The Apex Court further observed that such remedy is discretionary in nature and though the provisions of Limitation Act do not apply to the granting of relief under Article 226, however, 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.

14. In yet another Constitution Bench judgment of the Apex Court in the case of *Tilokchand and Motichand and Others Vs. H.B. Munshi and Another*, , the Apex Court in the majority view expressed through Hon''ble Chief Justice Hidayatullah, held that the petitioner could not take advantage of the Supreme Court's decision in case of another litigant after a lapse of number of years. The petitioner's contention that the ground on which the statute was struck down was not within his knowledge and, therefore, he could not pursue his case before the Supreme Court, would not stand since a law will presume that he knew the exact ground of unconstitutionality. It was held that it was a duty of the petitioner to have brought the matter before the Supreme Court for consideration. It is of course true that in such decision, the petitioner had earlier questioned the levy but failed before the High Court and had, thereafter, sought refund on the ground that in another case, the Supreme Court had declared the statute under which such duty was collected as unconstitutional.

15. Quite apart from the above two significant decisions of the Constitutional Benches of the Supreme Court, the entire issue is now well settled by the later decision of a Larger Bench of nine judges in the case of *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, . The Larger Bench was constituted in view of the correctness of the Constitution Bench in the case of *Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf*, , being doubted. The Apex Court examined various aspects touching the refund claims arising out of indirect tax laws such as Central Excise and Customs Acts. The Hon''ble Justice B.P. Jeevan Reddy, speaking through the majority in Paragraph-108 summed up the conclusion, relevant portion of which reads as

under:

(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 of a suit or by way of a writ petition. This principle is, however, subject to an exception. Whereas 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 be 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.

Such a claim is maintainable both by virtue of the declaration contained in Article 265 of the Constitution of India and also by virtue of Section 72 of the Contract Act. In such cases, period of limitation would naturally be calculated taking into account the principle underlying clause (c) of subsection (1) of Section 17 of the Limitation Act, 1963. A refund claim in such a situation cannot be governed by the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be, since the enactments do not contemplate any of their provisions being struck down and a refund claim arising on that account. In other words, a claim of this nature is not contemplated by the said enactments and is outside their purview.

(iv) It is not open to any person to make a refund claim on the basis of a decision of a court or tribunal rendered in the case of another person. He cannot also claim that the decision of the court/tribunal in another person's case has led him to discover the mistake of law under which he has paid the tax nor can he claim that he is entitled to prefer a writ petition or to institute a suit within three years of such alleged discovery of mistake of law. A person, whether a manufacturer or importer, must fight his own battle and must succeed or fail in such proceedings. Once the assessment or levy has become final in his case, he cannot seek to reopen it nor can he claim refund without reopening such assessment/order on the ground of a decision in another person's case. Any proposition to the contrary not only results in substantial prejudice to public interest but is offensive to several well-established principles of law. It also leads to grave public mischief. Section 72 of the Contract Act, or for that matter Section 17(1)(c) of the Limitation Act, 1963 has no application to such a claim for refund.

16. The contention of the petitioners that, therefore, in view of Section 17(1)(c) of the Limitation Act, 1963, such refund claim made within three years from the detection of the mistake should be entertained, must be rejected.

17. Undisputedly, the collection of the duty was not only illegal but wholly unauthorised. The question is to what extent the refund claim can be maintained.

18. The Coal Mines Act was enacted to provide for the conservation of coal and development of coal mines and for matters connected therewith and incidence thereto. Section 6 of the Coal Mines Act pertains to imposition of Excise duties and reads as under:

Section 6:

(1) With effect from the appointed day, there shall be levied and collected on all coal raised and dispatched, and on all coke manufactured and dispatched, from the collieries in India, such duty of excise, not exceeding rupees ten per tonne, as may be fixed from time to time by the Central Government by notification, and different rates of duty may be levied on different grades or description of coal or coke:

Provided that the Central Government may, by general or special order, exempt any special grade or grades or description of coal or coke from the levy of such duty of excise.

(2) For the purposes of sub-section (1), coal shall be graded by the Central Government in accordance with such specifications as may be laid down by that Government from time to time.

(3) All notifications issued under this section shall be laid, as soon as may be, before both Houses of Parliament.

Section 7 of the Coal Mines Act pertains to imposition of Customs duty and reads as under:

Section 7:

During the period in which any duty of excise is being levied u/s 6, the Central Government may, by notification, impose on all coal (including soft and hard coke), imported or brought into India from any place outside India, a duty of customs (which shall be in addition to any duty of customs for the time being leviable under any other law), at the rates equivalent to the rates of duty of excise levied u/s 6.

Section 9 of the Coal Mines Act provides inter alia that in each financial year, a sum not exceeding the net proceeds (determined in such manner as may be prescribed) of the duties of excise and customs levied and collected under Sections 6 and 7, respectively, during the preceding financial year or years shall be disbursed by the Central Government in accordance with such procedure as may be prescribed, to the owners, agents or managers of coal mines or to any other person for any of the following purpose, namely:-

- (a) conservation of coal and development of coal mines;
- (b) grant of stowing materials and other assistance for stowing operations;
- (c) execution of stowing and other operations for the safety in coal mines or conservations of coal;



(d) prosecution of research work connected with conservation and utilisation of coal; and

(e) any other purpose connected with the conservation of coal or development of coal mines, or transportation, distribution or utilisation of coal.

Section 10(1) of the Coal Mines Act provides that the owner of coal mine, to whom money is disbursed u/s 9, shall open a separate account to be known as the "Coal Mine Conservation and Development Account" and shall credit to the said account all sums so disbursed.

Sub-section (2) of Section 10 provides that the money standing to the credit of the Coal Mine Conservation and Development Account, shall be applied to the following purpose;

(a) the furtherance of the object of this Act;

(b) the acquisition of stowing or other materials needed for stowing operations in coal mines;

(c) the execution of stowing and other operations in furtherance of the objects of this Act;

(d) the prosecution of research work connected with the conservation, development and utilisation of coal and safety in coal mines;

(e) the planning and development of coal mines in a scientific manner; and

(f) any other expenditure which the Central Government may direct to be defrayed out of the money standing to the credit of the Account.

19. From the above, it can be seen that the Coal Mines Act is enacted for the purpose of conservation of coal and development of coal mines. For such purpose, Sections 6 and 7 envisaged collection of duties of Excise and Customs respectively. Such amounts, so collected are to be disbursed to owners of coal mines and other such persons u/s 9 of the Act. Section 10 prescribed the manner, in which such amount disbursed, shall be utilized.

20. Under the circumstances, it would appear that what is envisaged u/s 7 of the Coal Mines Act is a cess on import of goods computed in terms of additional excise duty prescribed u/s 6 of the Act. It is thus an additional duty of customs in the nature of cess.

21. Section 2(15) of the Customs Act, 1962 defines duty to mean a duty of customs leviable under the Act. Section 12(1) of the Customs Act provides that duties of customs shall be revised at such rates as may be specified under the Customs Tariff Act, 1975 or any other law for the time being in force on goods imported into, or exported from, India. On the basis of such provision, it may be open to the Department to contend that machinery provisions contained in the Customs Act can be applied for collection of such cess if it was otherwise lawful to do so.

22. Despite this prima facie conclusion we have reached, there is a reason why we are inclined to hold that what is collected by the respondents from the petitioners can never be described as a Customs duty. We say so because the very levy has been declared to be unauthorized by the Supreme Court in the case of *Commissioner of Central Excise & Customs, Bhubaneswar-I v. Tata Iron & Steel Co. Ltd.* (supra). The Apex Court held that in absence of any notification u/s 7 of the Coal Mines Act, the Customs Department could not levy any duty from the importers relying solely on the notification issued u/s 6 of the Coal Mines Act. Such notification could authorize only collection of additional duty of excise. That being so, the collection of the amount from the petitioners could not take the colour of additional duty of customs either mistakenly or illegally collected. It is a case where the duty was collected without any authority of law. Such collection of duty is not illegal or unlawful or irregularly collected Customs duty under the Customs Act, but a duty collected without authority of law and therefore opposed to Article 265 of the Constitution of India and is thus unconstitutional. In that view of the matter, the petitioners cannot be bound by the limitation prescribed in the Customs Act, 1962 for claiming refund of excess duty or duty collected illegally. The period of limitation prescribed under the Limitation Act would apply.

23. The last question that remains is with respect to unjust enrichment. The principles of unjust enrichment though have been statutorily included in Customs and Central Excise Acts, even in absence of such statutory provisions, the constitutional courts in India have been applying such principles in case of collection of indirect tax where such burden may have been passed on to the ultimate consumer. It is not necessary to refer to large number of decisions in this respect. The Apex Court in the case of *Mafatlal Industries & Ors. v. Union of India & Ors.* (supra) having taken note of such decisions, has held that in every case of refund of duty even if the same is on the ground of the provisions under which such duty was collected having been declared unconstitutional, the duty would be on the person, claiming refund, to establish that the incidence of such duty was not passed on to any other person. In *Mafatlal Industries* case (supra) the Apex Court in Para 108 held and observed as under.

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 established 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 any 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 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.

Even learned counsel for the petitioners did not seriously contend that without examining the question of unjust enrichment, the refund claims should be passed. This aspect, however, in our opinion, cannot be gone into in a writ petition at least at the first instance. Such issue must be left to the authorities to examine on the basis of the material that the petitioners may produce before them.

24. In the result, the petition is allowed in part. The collection of the duty described as additional duty of customs in purported exercise of powers u/s 7 of the Coal Mines Act, is held unlawful. The petitioners shall be entitled to refund of such duty paid only within three years immediately preceding the date of filing of the petition, which happens to be 18-8-2006. Such refund shall be granted to the petitioners with simple interest at the rate of 9% per annum from the date of payment till actual refund, however, only after ascertaining that the burden of such duty was not passed on to consumer or any other person. With the above directions, the petition is disposed of. Rule is made absolute to the aforesaid extent.