

(1991) 12 DEL CK 0034

In the Delhi High Court

Case No : Civil Writ Appeal No. 417 of 1980

Foremost Dairies Ltd. and Another

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 18-12-1991

Acts Referred:

Central Excises and Salt Act, 1944 — Section 12A
Constitution of India, 1950 — Article 226

Citation : (1992) 46 DLT 254 : (1992) 38 ECC 130 : (1992) 40 ECR 164

Hon'ble Judges : B.N. Kirpal, J;Arun Kumar, J

Bench : Division Bench

Advocate : B. Mohan, S.C. Verma, Shashi Saxena, Sudhir Kumar and C. Vani,
for the Appellant;

Judgement

B.N. Kirpal, J.

(1) By this writ petition, the petitioner really seeks unjust enrichment to the extent of Rs. 1, 17, 01, 275.71.

(2) Briefly stated, the facts are that the petitioner is the manufacturer of Skimmed Milk Powder. It sold Skimmed Milk Powder during the period 7th March, 1970 to 8th April, 1977 and on the said Powder it paid Excise Duty of Rs. 1, 17, 01, 275.71. Various assessments were made and no objection was taken by the Petitioner to the levy of Excise Duty.

(3) On 9th April, 1977 a Notification was issued whereby Excise Duty was specifically leviable on Skimmed Milk Powder. The case of the petitioner is that one of its employees on 28th January, 1980 informed the petitioner that prior to 9th April, 1977 no Excise Duty on Skimmed Milk Powder was payable. Thereupon a notice of demand was sent by the petitioner on 21st March, 1980 followed by the filing of the present writ petition.

(4) During the pendency of the writ petition the petitioner amended the same and an affidavit in reply was also filed by the Union of India. It was, inter alia,

alleged that the petitioner had realised from its customers the Excise Duty which had been paid by the petitioner. To this averment there was no specific denial by the petitioner.

(5) Proceeding on the assumption that Excise Duty on Skimmed Milk Powder was not livable between the period 1st March, 1970 and 8th April, 1977, the question which arises for consideration is whether this Court should exercise its jurisdiction under Article 226 of the Constitution and order refund of the aforesaid amount of Excise Duty which had been paid by the petitioner.

(6) As is evident from the facts enumerated above, the aforesaid amount of Excise Duty was no doubt paid by the petitioner but, as is normally the case, it is ultimately the consumer who bears the brunt of the Excise Duty. It is the petitioner's customers from whom Excise Duty was recovered by the petitioner even though initially, at the time of clearance, the payment was made by the petitioner. There is no record as to who are the customers to whom Skimmed Milk Powder was sold by the petitioner and, Therefore, it is not known as to who are the people who ultimately "bore the brunt of the Excise Duty. Ultimately the money which was paid to the Excise authorities did not come out of the pockets of the petitioner company but it is the ultimate consumers who" paid the same. The refund which is now sought for will obviously go into the coffers of the company. This would thereto" e, be a clear case of unjust enrichment by the petitioner.

(7) It is vehemently contended by Shri Mohan that realisation of illegal Excise Duty is contrary to the provisions of Article 265 of the Constitution. The State also, it was submitted, could not unjustly enrich itself. It is possibly precisely for this reason that there has been an amendment in the law with the enactment of Central Excise and Customs Laws (Amendment) Act. 1991, where by Chapter II-A has been inserted in the Central Excise Act. Sections 12-A to 12-D deal with a situation regarding the refund of Excise Duty Section 12-A requires the price of the goods to indicate the amount of duty which is paid thereon. According to Section 12-B there is a presumption, which is rebuttable that the incidence of duty has been passed on to the buyer. The amount of refund which becomes due is to be credited to a Consumer Welfare Fund which is constituted u/s 12-C of the said Act. Section 12-D requires the Government to utilise the money credited in the said Fund for the welfare of the consumers in accordance with such Rules as Government may make in this behalf.

(8) There has been a catena of authorities of the Supreme Court dealing with the question of unjust enrichment. In *The Newabganj Sugar Mills Co. Ltd. and Others Vs. The Union of India (UOI) and Others*, , the High Court of Allahabad had directed the Registrar to disburse refunds to the consumers instead of ordering the refund to the sugar mills. The sugar mills filed an appeal but the Supreme Court did not allow unjust enrichment to the sugar mills and, while dismissing the appeal of the sugar mills, gave directions with regard to the manner in which the excess amount collected was to be refunded. Similar was the view of the

Supreme Court in the case of State of Madhya Pradesh Vs. Vyankatlal and Another, . In this case the Supreme Court came to the conclusion that levy of sugar fund on sugar factories was, illegal and discriminatory but it then directed that there could be no question of refunding the excess amount collected to the owners of the sugar mills, who had not eventually, paid the amount towards the fund, It was concluded by the Supreme Court that, by allowing them to get the refund "would virtually amount to allowing the respondents unjust enrichment."

(9) Following the aforesaid two decisions of the Supreme Court a Division Bench of Bombay High Court in Roplas (India) Ltd. and another Vs. Union of India and another, came to conclusion that if Excise Duty had been paid under the mistake of law but the Duty had been recovered from the consumers, then the High Court would be, reluctant to exercise extraordinary jurisdiction under Article 226 of the Constitution in favor of the assesses which had made payment of the Excise Duty.

(10) Mr. Mohan has strongly relied upon the decision of the Full Bench of the Bombay High Court in New India Industries Ltd. v Union of India, 1990 (46) E.L.T.23 also dealing with the question of unjust enrichment. Though the Full Bench did notice "the aforesaid two decisions of the Supreme Court in Nawabganj Sugar Mills case and State of M.P.s case, we do not find in the judgment as to how the said decisions were distinguished. "However, the Full Bench came to the conclusion that if the Court was satisfied that the burden of tax had been passed on to the ultimate consumer then there could be no uniform formula for moulding the consequential relief for benefiting those who had borne the burden. It held that in such a case the form of consequential relief must vary according to the facts of each case.

(11) Be that as it may, it was not held by the Full Bench that refund must be given to the assessed even though the burden of tax had been passed on to the consumers. We are in respectful agreement with the "observations of the Division Bench of the Bombay High Court in Roplas (India's) case (supra) and, in our opinion, no refund can be directed to be paid to the petitioner because any such order would result in unjust enrichment of the petitioner.

(12) We may also take notice of two decisions of this Court where "unjust enrichment was not allowed. In Hyderabad Asbestons Cement Products Ltd. v Union of India & Ors. 1980 6 ELT 730, it was observed by this Court that the benefit, if any, the refund of illegally levied excise Duty should belong to the consumers and in such a case the petitioners therein could not be allowed to unjustly enrich themselves by obtaining refund of Excise Duty which amount they had already recovered from the consumers. In C.W. 2028/83, P.N. Monga Bottlers (P) Ltd. v. Union of India etc., refund was sought by the petitioner of the Excise Duty which it had paid at higher than the prescribed rate. Dismissing the writ petition it was observed as follows :

"It will be noticed that for the relevant years, the petitioners had already

collected lacs and lacs of rupees from the consumers. They are at no loss whatsoever. They cannot now apply for refund. Under Article 226 of the Constitution of India, we are not inclined to entertain this petition at this late stage. The petition is accordingly dismissed."

(13) Following the aforesaid two decisions of this Court, it must follow that it will be inequitable for us to allow the petitioner to get any refund of the Excise Duty.

(14) The writ petition must fail for another two reasons: Admittedly assessments were made between the years 1970 and 1977. Against the assessments made, the petitioner had adequate alternative remedy available to it. The petitioner chose not to avail of the said remedy. Having allowed time within which appeals could be filed to lapse, the petitioner cannot now be permitted to seek relief by filing the petition under Article 226 of the Constitution.

(15) The third reason why the petition must fail is on the ground of laches. The petitioner had filed this writ petition in 1980 seeking refund of the Excise Duty paid by it between the years 1970 and April, 1977. The Explanation for the delay is that the petitioner did not know the correct position in law viz., that Excise Duty on Skimmed Milk Powder was not payable. The petitioner claims to have acquired this knowledge only when an employee of its in January, 1980 informs the petitioner about this on the basis of a Supreme Court judgment. In our opinion this is not a satisfactory Explanation. Ignorance of law is no excuse and we see no reason as to why the petitioner should be allowed to claim benefit because of the ignorance of law. The petitioner is trying to explain away the delay by submitting that it was ignorant of the true position in law with regard to taxability of Skimmed Milk Powder. The petition under Article 226 of the Constitution is an extra-ordinary remedy which should be availed of by an aggrieved party as expeditiously as possible. It is true that there is no period of limitation prescribed for approaching the Court under Article 226 and it is precisely for this reason that the petitioner must show that it has been acting diligently in pursuing this remedy. Merely because period of limitation is not prescribed does not mean that a petition under Article 226 can be filed a number of years after the cause of action had arisen. It was sought to be contended by Mr. Mohan that it is only when a Notification of 9th April, 1977 was issued making Skimmed Milk Powder expressly taxable that the petitioner got the cause of action because the mistake was discovered by the petitioner. We are unable to agree with this. The cause of action arose when the petitioner made the payment of Excise Duty between March 1970 and 8th April, 1977. At best it arose when the assessments were made. If the petitioner had to file a writ petition under Article 226 of the Constitution it should have done so more expeditiously then waiting till 1980 before filing the present writ petition.

(16) For the aforesaid reasons this writ petition is dismissed? There will, however, be no order as to costs since there is no appearance on behalf of the respondents.