
(1992) 02 GUJ CK 0033

In the Gujarat High Court

Case No : Special Civil Application No. 3479 of 1990

H.T. Power Structure Pvt. Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 25-02-1992

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B, 2

Citation : (1992) 40 ECC 321 : (1992) 60 ELT 565

Hon'ble Judges : D.G. Karia, J;A.P. Ravani, J

Bench : Division Bench

Advocate : Kamal Trivedi and U.M. Joshi, for the Appellant; H.M. Mehta and B.B. Naik, for the Respondent

Judgement

Ravani, J.—The petitioner company is engaged in the business of making of parts of transmission power structure, fabricated steel structure for Railways Electric sub-stations etc. which according to the petitioner is covered under Chapter 73 of the Schedule to the Central Excise Tariff Act, 1985. According to the petitioner, the goods manufactured by it are not liable to excise duty at all because the process of cutting and straightening of the parts of iron and steel is not covered by the definition of manufacture contained in Section 2(f) of the Central Excises & Salt Act, 1944.

2. It is the case of the petitioner that CEGAT decided in the case of Collector of Central Excise v. Dodsai Private Limited, Baroda reported in 1987 (38) E.L.T. 352 that the aforesaid process did not amount to manufacture. Thereupon the petitioner filed application for refund of excise duty to the tune of Rs. 18,78,434.39 for the period commencing from January 1987 to June 1987 and also claimed an amount of Rs. 40,18,031.33 ps. for the period commencing from July 1987 to February 1988. The refund claims were partially allowed, i.e. an amount of Rs. 11,99,345.92 and an amount of Rs. 27,42,183.57 ps. was allowed and rest of the claim was rejected on the ground that the petitioner had paid the duty by following the procedure of RG 23 part II and therefore the same could

not be refunded. After the claim was allowed, the petitioner filed application for re-classification of its articles and the same has also been granted by the department.

3. In this petition the claim of the petitioner is that for the period commencing from April 1984 to December 1986, it has paid an amount of Rs. 20,87,886.42 towards excise duty. It is submitted that the claim is restricted to the amount paid through personal ledger account procedure only. The petitioner has approached this court on the ground that it would be futile to approach before the departmental authority because the department is bound by the period of limitation prescribed under the statute. The provisions of Section 11B of the Act provide that the application for refund can be filed for a period of six months from the relevant date. As held by the Supreme Court in the case of *Miles India v. Assistant Collector of Customs* [1987 (30) E.L.T. 641] and in the case of *Collector of Central Excise, Chandigarh Vs. Doaba Co-operative Sugar Mills Ltd., Jalandhar*, : *Collector of Central Excise, Chandigarh Vs. Doaba Co-operative Sugar Mills Ltd., Jalandhar*, the departmental authority cannot go beyond the provisions of the statute. In view of this position, the learned counsel for the petitioner submits that this court should exercise its power under Article 226 of the Constitution of India and direct the respondents to refund the excise duty erroneously paid under mistake of law.

4. In this petition, the petitioner has also contended that the provisions of Section 11B of the Act be held to be unconstitutional as it provides shorter period of limitation. This very question has come up for consideration before a Division Bench of this court in the case of *Wigman Electrical Engineering (Pvt.) Ltd. v. Union of India* reported in 1991 (2) G.L.H. 269. We are in agreement with the reasons given and conclusion arrived at in the aforesaid judgment. For the reasons stated therein, the challenge to the constitutional validity of Section 11B of the Act cannot be sustained. No new ground is urged which would require us to reconsider the aforesaid decision and refer the matter to the Larger Bench. Therefore, petition based on the alleged constitutional invalidity of Section 11B of the Act must fail.

5. As far as the question of exercise of power under Article 226 of the Constitution of India is concerned, the power cannot be exercised for the simple reason that the petitioner has not even made out a case for entitlement to the refund. The question of exercise of discretion under Article 226 of the Constitution of India would arise only after the petitioner establishes the entitlement to the claim. The court would be empowered to exercise its discretion only if the petitioner establishes the entitlement. A petition under Article 226 of the Constitution of India can be filed for enforcement of fundamental right and for "any other purpose" meaning thereby for enforcement of legal right and seeking performance of legal duty. In the instant case, the petitioner has not even averred in the petition that the petitioner has suffered any loss or injury. In view of this position, the petitioner has suffered any loss or

injury. In view of this position, the petitioner has not made out a case u/s 72 of the Contract Act, 1872. Section 72 of the Contract Act requires the petitioner/plaintiff to prove the following three ingredients :

(1) that the amount was paid under a mistake to the defendant and that at the time of payment, both the plaintiff as well as the defendant were labouring under mutual mistake;

(2) that the amount was paid by the plaintiff under coercion, compulsion or pressure from the defendant; and

(3) that if restitution is not granted to the plaintiff the plaintiff would suffer legal injury or prejudice.

The aforesaid view is taken by this court in the case of Dhrangadhra Municipality Vs. Dhrangadhra Chemical Works Ltd., and in the case of Union of India v. M/s. Wood Polymers Ltd. - 30 (2) G.L.R. 1323. In Special Civil Application No. 3082 of 1981, after referring to the aforesaid decisions, this court observed as follows :-

"If one reads the observations made by the Division Bench of this court in the case of Dhrangadhra Municipality (supra) instead of plaintiff if one reads petitioner, the propositions laid down therein squarely apply to the facts and circumstances of this case also. In view of the aforesaid proposition laid down by the Division Bench of this Court, the petitioner in order to succeed to sustain the claim u/s 72 of the Contract Act, 1872 must prove that the petitioner had made payment under mistake of law or that under coercion, compulsion or pressure. The petitioner is also required to prove that if restitution is not granted, the petitioner would suffer legal injury or prejudice. As far as the legal injury is concerned, no such case is made out in the petition itself. This is bound to be so, because duty of excise is an indirect tax. Economists call it to be a commodity tax. It is the commodity which bears the burden of tax. It goes with the commodity and ultimately the consumer of the commodity suffers the burden of the tax. Only an unwise businessman would suffer the burden of such taxes. This is the reason why it is not even averred in the petition that the petitioner has suffered legal injury or has been prejudiced on account of the payment of duty under the mistake of law. Thus it is not only on account of the equitable doctrine of unjust enrichment that the petitioner may be denied the relief. But it is also on account of the failure to fulfil the conditions to succeed while making claim u/s 72 of the Contract Act."

Same is the factual position in this also.

6. Reference may also be made to a decision of the Supreme Court in the case of U.P. State Electricity Board Lucknow Vs. City Board, Mussoorie and Others, . In that case, the question arose as regards the legality and validity of the 7 1/2 per cent additional charge on the tariff fixed. The learned counsel appearing for the City Board was not able to state before the Supreme Court that it had not recouped itself by collecting the charges from the consumers. In this view of the

matter, the Supreme Court has observed as follows :-

"In this situation we have to presume that the City Board had not suffered any loss by the levy of 7 1/2% by way of additional charges. We are of the view that in cases of this nature where there is little or no possibility of refunding the excess amount collected from the ultimate consumer to him and the granting of the relief to the petitioner would result in his unjust enrichment, the Court should not ordinarily direct any refund in exercise of its discretion under Article 226 of the Constitution."

Similar question arose before the Supreme Court in the case of *State of M.P. v. Vyankatlal*, AIR 1985 Supreme Court 901. Therein in para 14 of the judgment, the Supreme Court has observed as follows :

"The burden of paying the amount in question was transferred by the respondents to the purchasers and, therefore, they were not entitled to get a refund. Only the persons on whom lay the ultimate burden to pay the amount would be entitled to get a refund of the same. The amount deposited towards the Fund was to be utilised for the development of sugarcane. If it is not possible to identify the persons on whom had the burden been placed for payment towards the Fund, the amount of the Fund can be utilised by the Government for the purpose for which the Fund was created, namely, development of sugarcane. There is no question of refunding the amount to the respondents who had not eventually paid the amount towards the Fund. Doing so would virtually amount to allow the respondents unjust enrichment."

7. In view of the fact that the petitioner has not been able to show that the petitioner has suffered the loss or injury on account of the alleged mistake of law, the petitioner cannot be said to have established its claim for refund. Therefore, since the petitioner has not established its claim, the question of exercising the discretion of the court does not arise at all.

8. Recently in the case of *M/s. Orissa Cement Ltd. and Others Vs. State of Orissa and others*, , the Supreme Court has observed as follows :

"One of the commonest issues that arose in the context of the situation we are concerned with is where a person affected by an illegal exaction files an application for refund under the provisions of the relevant statute or files a suit to recover the taxes as paid under a mistake of law. In such case, the Court can grant relief only to the extent permissible under the relevant rules of limitation. Even if he files an application for refund or a suit for recovery of the taxes paid for several years, the relief will be limited only to the period in regard to which the application or suit is not barred by limitation. If even this instance is sought to be distinguished as a case where the Court's hands are tied by limitations inherent in the form or forum in which the relief is sought, let us consider the very case where a petitioner seeks relief against an illegal exaction in a writ petition filed under Article 226. In this situation, the question has often arisen whether a petitioner's prayer for refund of taxes collected over an indefinite

period of years should be granted once the levy is found to be illegal. To answer the question in the affirmative would result in discrimination between persons based on their choice of the forum for relief, a classification which, prima facie, is too fragile to be considered a relevant criterion for the resulting discrimination. This is one of the reasons why there has been an understandable hesitation on the part of Courts in answering the above question in the affirmative."

9. In above view of the matter, on each of the grounds stated hereinabove, it would not be proper to grant relief under Article 226 of the Constitution of India and direct the department to refund the amount of tax collected.

10. No other contention is raised.

11. There is no substance in the petition. Hence rejected. Rule discharged.