

(1980) 02 KAR CK 0005
In the Karnataka High Court
Case No : Writ Petition No. 11792 of 1978

I.T.C. Ltd. and Others

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 04-02-1980

Acts Referred:

Central Excise Act, 1944 — Section 4 (a)
Central Excise Rules, 1944 — Rule 11
Constitution of India, 1950 — Article 226, 265

Citation : (1981) 8 ELT 690 : (1980) 2 KarLJ 39

Hon'ble Judges : M.P. Chandrakantaraj Urs, J

Bench : Single Bench

Advocate : Ashok H. Desai, A. Hidayatullah and U. L. Narayana Rao, for the Appellant; H.L. Narayana Rao, Sr. Central Government Advocate, for the Respondent

Judgement

1. This Writ Petition is filed by India Tobacco Company Limited (a company duly incorporated and registered under the Indian Companies Act, 1956), and by one of its shareholders. The Petitioners herein shall be referred to as the Company in the course of this order for convenience. The respondents are the Union of India represented by the Ministry of Finance (Department of Revenue and Insurance) (hereinafter referred to as the Revenue), the Superintendent of Central Excise, Concurrent Assessment and Inspection Group having his office in the Company's factory at Bangalore, the Assistant Collector of Central Excise, III Division, having his office at Bangalore City and the Appellate Collector of Central Excise at Madras having his office at Madras.

2. The Company is a manufacturer of tobacco products. The company has several factories in different parts of India. One of its factories is situated at Bangalore and tobacco products like cigarettes, tobacco and other tobacco products manufactured at Bangalore factory are subjected to excise duty under the Central Excises and Salt Act, 1944 (hereinafter referred to as the Act) within the jurisdiction of respondents 2 and 3.

3. The Company opted for what is known as "self-removal procedure" after the same was introduced in or about 1968. By this procedure, the Company is permitted to remove its manufactured goods outside the factory premises after the 2nd respondent has approved the price-list submitted by the Company and the duty on the sum total of such price-list has been worked out and paid by the Company. Prior to February 27, 1973, the Company on the basis of the self removal procedure was paying to the respondents, on the formula that the whole-sale price which is subjected to excise duty u/s 4(a) of the Act was inclusive of not only the cost of raw-materials, cost of manufacture, manufacturer's profits and the price charged to the wholesaler; but also the commission paid by the first wholesale dealer to his secondary wholesaler. However, it has been asserted in the pleadings, in this Writ Petition, that the transaction of the Company is only with the wholesalers on a principal to principal basis and that the secondary wholesalers and the other retail out-lets both of whom number several thousands spread over the country do not have any privity of contact with the Company.

4. The earlier impression which they had regarding as to what constituted the wholesale price was entirely dependent on the Division Bench ruling of this Court in the case of Messrs Amco Batteries (P) Ltd., Bangalore vs. Assistant Collector, Central Excise, Bangalore and Another AIR 1963 Mys 216 : 1979 ELT 451 in which it had been held that the wholesale ruling price at Bangalore Market which undoubtedly is the nearest wholesale market to the factory site, could be taken into consideration, giving such deductions as to the over-heads and other costs of the wholesale distributors of Amco Batteries at Bangalore. In other words, the price at which the first wholesaler sold the products of the Amco Batteries Limited to the other distributors in Bangalore formed the wholesale price, though in that case it was asserted for the petitioners therein that the contract of wholesale distributors' right was only in favour of the two named concerns who were carrying on business as its distributors in the State of Karnataka. It may be mentioned, this was by and large the view taken by the other High Courts about the relevant time.

5. However, in or about the year 1970, the High Court of Judicature at Bombay decided in the Writ Petition files by Messrs. Voltas Limited that the wholesale price can only be the price that was charged to such buyer at the gates of the factory and not the price charged at a later stage. This view came to be known to those who were liable to excise duty about the time the judgment was delivered in the State of Maharashtra. The matter did not rest there. The matter went up to Supreme Court on Appeal by Revenue. In A.K. Roy and Another Vs. Voltas Limited, and the Supreme Court affirmed the view taken by the High Court of Judicature at Bombay and held that the wholesale cash price had to be ascertained only on the basis of transactions at arms length except in the case of special or favoured buyer, arms length price being equated to a sale at the gates of the factory. Having regard to this ruling which was rendered towards the end of December 1972, the Company came to realise that inclusion of commission of the secondary wholesale dealer in the wholesale price was a mistake made by

them in calculating the excise duties at the relevant times. In these circumstances, on 27-2-1973 and on other dates, the petitioners wrote letters to the 3rd Respondent claiming refund in different sums totaling Rs. 1,17,86,357.04. After the above request was made in the form of letters, considerable correspondence took place between the company and 3rd respondents. In fact, the Company was permitted to file the written arguments in support of their claims for refund and also to address oral arguments. Thereafter, the various applications for refund came to be rejected by a composite order by respondent 3 in respect of all the five claims in the following terms :

"Taking into consideration the pros and cons of their refund claims, I see no justification to accept them and therefore order that their claims are rejected."

6. The reasoning given in the said order or rejection is to be found in the paragraphs preceding the operative portion of the order as extracted above. It is significant to notice that the main reason given by the 3rd respondent has been that to undertake a review of the claims right from the beginning to find out what the different relationships were between the manufacturers, the distributors and the wholesalers and as to what the terms and conditions in the agreement of contracts as they stood at their relevant time, for such a long time, would be a tremendous task and that the benefit of the decision in Voltas case could not be given where respective payments were involved. This order was passed on 19-1-1976. Aggrieved by the said order, the Company took the matter in appeal. The 4th respondent by his order dated 13-7-1976 allowed the appeal by a composite order. But, however, directed the refund in respect of those claims which were made within one year from the date of payment under Rule 11 of the Central Excise Rules (hereinafter referred to as the Rules). The appeal was allowed on 14-7-1976.

7. It is significant to notice that while the Company challenged the appellate order also in revision the Revenue did not. It came to accept the appellate order of the 4th Respondent.

8. However, the 1st respondent in exercise of its revisional jurisdiction did not accede to the plea of the company that it was entitled to refund of sums paid in excess of what was legitimately due as excise duty three years prior to the date of application. Having regard to the knowledge of the Company as to what was the correct position in law, (it was about in January 1973) when the Voltas case referred to earlier was reported by the Law Reports) the 1st respondent-Union of India, took the view that the excess payment claimed would fall within the ambit of the expressions "inadvertence, error or misconstruction" occurring in Rule 11 of the Rules, as it was at the relevant time before its amendment subsequently. It further took the view that those expressions included the mistaken interpretation of the law and on strict application of Rule 11 of the Rules, and the period of prescription therein read with Rule 173-J of the Rules as it then existed the revision applications came to be rejected by a common order. Aggrieved by the same, the Company has preferred this Writ Petition under Art. 226 of the

Constitution.

9. A joint statement has been filed on behalf of the Revenue. In the said statement of objections, the Revenue has denied that all the transactions between the Company and its wholesalers was at arms length in the usual course of business. The Revenue has further denied that all relevant times the Company paid excess duty under a mistake of law. On the other hand, the Revenue has asserted that those payments made before the Voltas decision was rendered by the Supreme Court were paid voluntarily. The Revenue has further denied that the Company paid the excess duty either under a mistake or misconstruction or account of the erroneous interpretation of Section 4(a) of the Act. In fact, it has been asserted for the Revenue that the position that followed after the decision in Voltas case by the Supreme Court was already existing on 14-8-1970 when the High Court of Judicature at Bombay had declared the law and therefore the knowledge of mistake of law was traceable to January, 1973, has been denied. It is further asserted that all refunds can only be made in terms of Rules 11 and 173-J of the Rules as they existed at the relevant time. Therefore, the authorities viz., respondents 1, 2, 3 and 4 correctly rejected those claims which did not confirm to the period of limitation prescribed under Rule 11 of the Rules. It is further asserted for the Revenue that a writ petition under Art. 226 of the Constitution cannot be maintained for reason that the proceedings before this Court involve disputed mixed questions of fact and law which can only be gone into by a Civil Court of competent jurisdiction and examined in detail. It is contended for the Revenue that the High Court of Judicature at Bombay took this view in the case of the Company and the Assistant Collector of Central Excise and others, Bombay, in Miscellaneous Petition No. 1151/1975.

10. This is the summary of the pleadings on both sides and other facts are not in dispute. From the above, the questions that fall for determination in this writ petition are as follows :

1. Whether the impugned order of the 1st respondent is liable to be interfered with by this Court in exercise of its jurisdiction under Art. 226 of the Constitution of India and appropriate Writ or writs issued quashing the orders impugned directing refund of the amounts claimed ?

2. Whether the contention of the Revenue that the case of the rejected claims of the Company was strictly governed by the period of limitation prescribed under Rule 11 of the Rules is correct and the impugned orders made in accordance with the jurisdiction vested in the concerned Officers of the Revenue being made in proper exercise jurisdiction vested in them is not liable to be interfered with under Art. 226 of the Constitution ?

11. However, one more minor question also arises for consideration i.e., whether there exist on the fact of this case any mixed questions of law and facts which require to be decided only in a properly framed suit in a Civil Court of competent jurisdiction.

12. It is convenient to take up the last question first for being dealt with. While the Company has set out in detail the payments made by them as excess duty over a period of three years from the date of knowledge of the decision in Voltas case by the Supreme Court, there is bald denial of the same by the Revenue in its statements of objections. There is nothing to indicate that the claim is disputed on any question of fact. It is, on the other hand, admitted from the Bar by the Senior Standing Counsel for the Central Government appearing for respondents that payments have been made in excess for the relevant years in question, having regard to the decision of the Supreme Court in Voltas case. If that is not disputed, it is not now open to the respondents to take a contention that the case involves mixed questions of law and facts which are required to be decided only by a competent Civil Court. None of the orders made by the Revenue in regard to the claims of the Company have dealt with this aspect which is now sought to be made for the first time in this court. In spite of the decision in Miscellaneous Petition No. 1151/1975 in the High Court of Judicature at Bombay, I am inclined to take the view respectfully disagreeing with that judgment that the question raised in this writ petition can be decided in proceedings under Art. 226 of the Constitution and it is unnecessary to relegate the parties for adjudication in a Civil Court. There is one other reason to reject this contention. Admittedly, the 2nd and 3rd respondents without finding any difficulty in either fixing the point of time of limitation in accordance with Rule 11 of the Rules or in quantifying the accounts refundable, for the three claims allowed by the 4th Respondent.

13. Shri Ashok H. Desai, learned counsel appearing for the Company, has contended that collection and retention of revenue without the authority of law in violation of Art. 265 of the Constitution cannot be permitted for the respondents and that this Court while exercising its jurisdiction under Art. 226 of the Constitution can and ought to interfere when such illegal retention of money is made by the Revenue. He has also contended that Rule 11 of the Rules has no application to the facts of the case, as the claims made by the Company were claims merely for refund of amount paid by which really could not be called excess excise duty having the authority of law and therefore such amount were bound to be refunded to the Company as that collection did not have the sanction of Art. 265 of the Constitution. He has, in the alternative, contended that if this Court were to come to the conclusion that Rule 11 of the Rules governs the transactions in dispute, then that Rule should be struck down as violative of Arts. 14 and 19 of the Constitution inasmuch as it is highly discriminatory and violative of the fundamental rights guaranteed under Art 19 of the Constitution.

14. The learned Counsel in support of his first contention has placed very strong reliance on the decided case of Patel India Private Limited Vs. Union of India and Others, . He has also drawn my attention to several other recent decisions of the High Courts of Madras, Delhi and Andhra Pradesh to which reference will be made in the course of this order.

15. In Patel India's case, the High Court was concerned with the Sea Customs Act of 1878 (since repealed and replaced by Customs Act of 1962). Patel India-appellant therein was carrying on the business was an importer of view-master stereoscopes, reels, etc. manufactured by an American Company all along, his imports of those items were brought to levy of import duty on the invoice prices. However, in the year 1954-55 the customs authorities did not accept the invoice prices as they held that the items of articles imported were of a higher value than were disclosed in the invoices. On the said basis the authorities levied import duty fixing the value at a higher price than the invoice value. Aggrieved by the procedure adopted by the authorities, the aggrieved Company [Patel India (P) Ltd.] appealed to the Collector without success and thereafter lodged a revision application with the Government of India under the provisions of that Act. The Government of India accepted the appellant's contention and directed the re-assessment of import duty on two of the items on the basis of their invoice price and also directed the refund to the appellant. Company the excess import duty charges on such items, because the revision petition was pending in respect of the two disputed items. The Appellant-company therein did not file separate appeals or revision regarding other items which were similarly subjected to higher customs duty while the revision petition was pending, assuming that the department would follow the decision rendered in the revision petition. Thus, the customs authorities granted refund on some of the items in whose case the invoice value had not been accepted and declined to refund the excess duty in respect of some other items on the sole grant that refund in respect of those items had not been claimed within the time prescribed by Section 40 of that Act. The appellant Patel India (P) Ltd., thereupon filed a writ petition in the High Court of Punjab at Delhi under Art. 226 of the Constitution pleading that Section 40 of that Act had no application that the Union of India was not entitled to appropriate or retain the said excess duty, the Appellant-Company had the legal right to the return of the said excess duty and that there was an apparent error on the fact of the record in the orders refusing to return the excess duty.

16. A single Judge of that High Court while agreeing with the contention that Section 40 of the earlier Customs Act did not apply to the case, rejected the petition of the ground that the Appellant-Company therein had not filed an appeal u/s 188 of the earlier Sea Customs Act. On a Letter's Patent Appeal by Patel India (P) Ltd. the appeal came to be dismissed. Aggrieved by those orders of the High Court, Patel India (P) Ltd., preferred Civil Appeal to the Supreme Court.

17. On a combined reading of paragraphs 12, 13, 14 and 15 of the decision of the Supreme Court in Patel India's Case, I am of the view that the following propositions of law were decided :

1. That levy of excise duty in excess of the invoice value was in excess of the jurisdiction conferred on the Customs authorities.

2. That such duty had been imposed on Patel India (P) Ltd. without the authority of law and therefore without jurisdiction.

3. That the words "inadvertence, error and misconstruction" cannot be equated with mistake of law and therefore the claim for refund would not fall u/s 40 of the Old Sea Customs Act which corresponds to Rule 11 of Rules in the instant case.

18. I have set out in detail the facts in Patel India's case and the ratio decided as I have understood the facts of that case, because the facts in the case of the Company, in this petition are almost identical in the circumstances. If the ratio decided set out by me above is the correct ratio of that case and the facts are similar, then the Company in this writ petition is liable to succeed merely on that score.

19. However, Shri U. L. Narayana Rao, Senior Standing Counsel for Central Government appearing for the respondents, has very ably argued the opposite. He has contended that the facts of Patel India's case and the facts of the Company's case are different. I am unable to agree with the same on a proper analysis and on comparison of the facts of the two cases.

20. He has placed strong reliance on the specific ruling of the Supreme Court in the case of Suganmal Vs. State of Madhya Pradesh and Others, . In that case speaking through Regular Dayal, J., the Court held to the effect that the Court did not find any good reason to extend the principle and hold that no petition for the issue of a writ of mandamus would be normally entertained for the purpose of merely ordering a refund of money to the return of which the petitioner claimed a right. In fact there is no dispute that the case was so decided. But the learned Counsel has overlooked the use of the term "normally" in the decision. In other words, if properly understood, it cannot be said that in all cases that a mandamus will not issue for a mere refund of illegally collected taxes or other kind of compulsory levies. What the decision really laid down was that as far as possible the machinery provided under the Act must be made use of for obtaining the refund and nothing more. But, if, as in the instant case, on the basis of the ruling of the Supreme Court in Patel India's case rule 11 of the Rules has no application, then there is no provision under the Act for claiming refund of excise duty which had been levied and collected contrary to law. In such a position, the trend of subsequent decisions of the Supreme Court has been to give relief to the petitioner on the facts of each case and has not laid any broad propositions of law for bidding the same.

21. It is relevant to observe in this behalf that still the leading case on the subject is the case of Tilokchand and Motichand and Others Vs. H.B. Munshi and Another, . After reviewing the earlier decisions, the Supreme Court by majority decided that its power under Art. 32 of the Constitution while enforcing fundamental rights of citizens would not be fettered by any technicalities except as a policy the Court itself would impose on itself, having regard to the general

policy of law of limitation, in cases where illegally collected tax is to be returned by resorting to a writ of mandamus. On the facts of that case, no doubt, the Supreme Court refused to give relief to the petitioner mainly on the ground that he was guilty of laches in not prosecuting his own appeal from the judgment of the High Court many years earlier and also on the ground that the petitioner therein wanted to take advantage of the adventurism of some other litigant. In fact, even the dissenting judgment in that case while not disagreeing with the general principle laid down by the majority, dissented only to the extent of not even imposing on itself i.e. the Supreme Court, the law laid down in the law of limitation in the country. In other words, the dissenting view was to the effect that where there had been illegal levy of collection of taxes, the court's discretion under Art. 32 would not be fettered at all and no limitation should be read (per Hedge, J.). Therefore, what really emerged from the discussion of the decision by the Supreme Court in the two leading cases is that the Revenue has no right to retain illegally levied and collected taxes of any kind, if they are not authorised by law and persons claiming refund cannot be denied the remedy under Art. 32 or under Art. 226 of the Constitution if the circumstances so warrant.

22. Shri U. L. Narayana Rao, the learned counsel for the respondents, has drawn my attention to the decision of the Supreme Court in the case of D. Cawasji and Co. and Others Vs. State of Mysore and Another, in which the Supreme Court declined to interfere with the order of the High Court refusing to grant a writ of mandamus for refund of cesses collected by the State of Mysore from the petitioner therein solely on the ground that it was highly belated and that for a mere refund, the petitioner could not maintain a writ of mandamus. But in that case also all the earlier cases have been reviewed by the Supreme Court, but distinguished only on the facts of that particular case. That cannot be of much assistance to the Revenue on the facts of this case. In this case, it is not disputed that claim for refunds were made on various dates soon after the Voltas case was decided by the Supreme Court. On the extent of failure the Company perused the remedy under the provisions of the Act itself and it was only on failing to secure the appropriate relief in revision by the 1st respondent - Union of India that they have invoked the jurisdiction of this Court under Art. 226 of the Constitution. If this is borne in mind, then it cannot be held that this is a petition which is maintained only for purpose of refund and for no other purposes. On the other hand, it is clear from the pleadings and the prayer in the petition that the impugned order of the 1st respondent - Union of India in revision is sought to be set aside on the ground that there has been failure to exercise jurisdiction vested in it and the prayer for mandamus is only a consequential relief in the light of the success of the 1st prayer.

23. It will be useful to refer to some of the recently decided cases of the High Courts of Madras, Delhi and Andhra Pradesh which are somewhat similar and dealt with the same question under Art. 226 of the Constitution and directed refund of illegally levied and collected taxes or duties.

24. In Premraj and Ganpatraj and Co. (P) Ltd. (now known as Madras Electrical Conductors (P) Ltd. Vs. The Assistant Collector of Customs, Madras and Others, , the learned single Judge of Madras High Court took the view that there could not be any fetter in the exercise of power under Art. 226 of the Constitution when it is manifest that the imposition and collection of customs duty was contrary to the relevant notification which was in force at the relevant point of time. On appeal by the Revenue, the Division Bench of that High Court took the view that once the imposition of customs duty was contrary to the mandate contained in Art. 265 of the Constitution, the Court should not inhibit itself in exercising the jurisdiction to give relief to the person who was aggrieved by such illegal levy of customs duty. Similarly, in Civil Miscellaneous Petition No. 147/1979, M/s. Chemicals and Plastics India Ltd. and another v. Union of India and others, the High Court of Delhi had taken identical view and has given the relief to the petitioners therein for a writ of mandamus directing refund of the excess duty collected from them. It is relevant to notice that the case also arose under the Customs Act. Similarly, in Durga Shankar Industries v. The Government of India, the Madras High Court has reiterated its earlier view and that case also arose under the Customs Act. The decision rendered by Raghuvir. (1980 Excise Law Times, 16) of Andhra Pradesh High Court is directly on Rule 11 of the Rules arising out of levy and collection of excise duty contrary to law or without the authority of law under the Central Excise and Salts Act. After discussing several decisions of the Supreme Court, to some of which I have also referred, he has come to the same conclusion as the other High Courts to the decisions of which reference has been made earlier. It is worthwhile to cite a paragraph from that decision with which I am in respectful agreement, and it is as follows :

"10. The facts in the instant case are : The Company before the revenue authorities registered the duty when it was demanded by the Revenue Authorities and finally paid Rs. 3,59,113.68 ps., "under protest" for clearance of fertilisers under Rule 52. The payment, the company represented in unequivocal terms, was made as a measure in business expediency under the compulsion of circumstance. The payment in such circumstances it can be lost sight of the fact was never made under item 14HH or under any other provision of the Central Excises and Salt Act, 1944 : The... "Payment was made under force of authority and in that sense under "mistake" or under "coercion" no doubt in a question headed in unusual difficulty and intermixed with legal niceties and capable of no easy answer. In the instant case, it is not necessary to unravel the knot for the claim is made under the jurisdiction of Article 226 of the Constitution of India. There is power within that jurisdiction to exercise the powers of discretion of this Court as held in State of Madhya Pradesh Vs. Bhailal Bhai and Others, and as exercised by three of the Judges in the case of (4) (above) even if the claim is barred under the Status of Limitation."

25. Shri U. L. Narayana Rao, learned Counsel appearing for the respondents, has tried to distinguish all these decisions referred to above on the sole ground that in the case of the Company the payment was voluntary and not under coercion,

and that the payment was made by inadvertence, error or misconstruction and that Rule 11 of the Rules as it was then at the relevant time was specific provision for refund and as such the ratio of the decisions would not be attracted to the facts of the Company's case. Elaborating this argument, he has attempted to derive sustenance by the observation made by Shah J. (as he then was in *Burmah Construction Co. Vs. The State of Orissa and Others*, . In the said case, it has been stated that the High Courts ought not to exercise jurisdiction under Art. 226 of the Constitution unless the aggrieved person has exhausted the procedure available for refund under the relevant statute which entitles him for refund of tax paid by the assessee which was otherwise illegal. But even then the care has been taken by the learned Judge to point out that it is normally the case and not the absolute rule.

26. Having earlier held, that Rule 11 of the Rules is not applicable to the facts of the case of the petitioners and regard being had to the decisions of the Supreme Court in *Patel India's case*, I do not see how the decision of the Supreme Court in *Burmah Construction Company's case* can assist the respondents. I may on this question point out, in the *Andhra Pradesh* decision referred to earlier, the learned Judge has ordered refund of excess duty collected without the authority of law for a period of eight years preceding the date of application for refund. In the instant case, the Company has been rightly advised to restrict its claim to a period of three years from the respective dates on which the claims for refund were made.

27. In this writ petition we are concerned with the applications made on 27th February 1973. The applications were for the sums of Rs. 29,72,544.80 and Rs. 36,08,190.00.

28. Before parting with this case, it is necessary to notice the decision of the Supreme Court in *Shiv Shankar Dal Mills and Others v. The State of Haryana and Others* (Special Leave Petitions 892/1979 and connected matters) Krishna Iyer J., speaking for the Bench has observed as follows :

"There is no law of limitation, especially for public bodies, on the virtues of the returning what was wrongly recovered to whom it belongs. Nor is it palatable to our jurisprudence to turn down the prayer for high-prerogative writs, on the negative pleas of "alternative remedy" since the root principle of law married to justice, is *ubi jus ibi remedium*."

29. I have extracted the above passage only to emphasis the trend of the decisions continuously in the Supreme Court of India and the High Courts has been to use Art. 32 or Art. 226 of the Constitution, as the case may be, to further the ends of justice and not to deny the same on technicalities of law. In this view of the matter, the petitioners succeed, a writ in the nature of certiorari will issue quashing, Annexure "J" the order in revision made by the 1st respondent Union of India and also that portion of the order of the 4th respondent (annexure "F") which limits the refund of the excess amount by the

Company to a period of one year from the date of application. As I have held that Rule 11 of the Rules has no application and the limitation prescribed therein read with Rule 173-J of the Rules as it was then have no application to the facts of the case, a writ in the nature of mandamus will issue to the respondents 2 and 3 to refund the amounts in respect of the claims made by the Company on February 27, 1973, after due clarification of the books relating to the accuracy of the claim and no more. The mandamus will be complied with by the respondents within six months from today.

30. Number of other decisions cited by the Counsel on either side has not been referred to as unnecessary for purpose of disposing of this writ petition.

31. In the circumstances of the case, the parties are directed to bear their own costs.