

**(2017) 03 AHC CK 0158**  
**In the Allahabad High Court**  
**Case No : 66 of 2013**

KISAN SAHAKARI CHINI MILLS LTD

APPELLANT

Vs

COMMISSIONER OF CENTRAL EXCISE

RESPONDENT

**Date of Decision :** 03-03-2017

**Acts Referred:**

**Citation :** (2017) 03 AHC CK 0158

**Hon'ble Judges :** Bharati Sapru, Saumitra Dayal Singh

**Bench :** Division Bench

**Advocate :** Shakeel Ahmad, Krishna Agarwal

**Final Decision :** Dismissed

## **Judgement**

1. Heard Sri Shakeel Ahmad, learned Counsel for the appellant and Sri Krishna Agarwal, learned Counsel for the department.

2. This Central Excise Appeal has been filed by the assessee being aggrieved by the order of the Customs Excise & Service Tax Appellate Tribunal dated 26.09.2012 by which the Tribunal has dismissed the appeal filed by the assessee and confirmed the rejection of claim of refund made by the assessee before the lower authorities. The questions of law sought to be answered are hereunder:-

"(i) Whether upon the facts and circumstances of the case, the Tribunal was justified in holding that irrespective of the purpose for which the duty has been granted under notification no.132/82-CE dated 21.04.1982 in respect of the excess production of sugar during the lean period from May 1982 to September 1982, refund on account of the exemption of notification would be subject to the principle of unjust enrichment ?

(ii) Whether upon the facts and circumstances of the case, the Tribunal has rightly applied the decision of Apex Court in Sahkari Khand Udyog Vs. CCE reported in 2005 (181) ELT 328 which was for a different notification no.108/78-CE?

(iii) Whether upon the facts and circumstances of the case, the Tribunal has committed an error of law while holding that Sub-Section (3), read with Sub-Section (2) of Section 11B introduced w.e.f. 20.09.1991, no refund can be made as rebate in respect of excess production of sugar during lean season in terms of notification no.132/82-CE is not mentioned amongst the exception?

(iv) Whether upon the facts and circumstances of the case, the Tribunal was justified in rejecting the claim of the appellant observing that the appellant has not proved that the incidence of duty whose refund has been claimed has been borne by him and had not been passed on to any other person and the refund claim made during period w.e.f. 20.09.1991 would be subject to the principle of unjust enrichment?"

3. The period of dispute is 1st of May, 1982 to 30th September, 1982. During that period by virtue of Notification No.132/82- CE dated 21.04.1982 an exemption had been granted on the duty of excise and especially duty of excise leviable on sugar in respect of sugar produced in the factory during the period commencing on 1st day of May, 1982 and ending with 30th day of September, 1982.

4. Admittedly, the assessee manufactured and sold certain quantities of sugar during the period of dispute, which is the period covered by the aforesaid Notification. However, instead of giving effect to the exemption notification, the assessee charged and also paid into the government account excise duty on sales of sugar manufactured during the period in question.

5. Subsequently, the assessee raised a claim for refund of the said amount. According to the assessee it was entitled to the said refund as the Notification dated 21st April, 1982 granted benefit in the shape of concession to the assessee.

6. The Tribunal has rejected the claim of the assessee by applying the principle of unjust enrichment by reasoning that the assessee having charged and having thus, passed on the liability of excise duty on the purchaser, it was not entitled to claim refund of such amounts. Amongst others the Tribunal further held in paragraph no.6 of its order, which is quoted hereunder:-

"6.....In view of the non-obstante clause of sub-section (3) of Section 11B, all the refund claims made during the period w.e.f. 20.9.1991 would be subject to the principle of unjust enrichment. We find that the same view has been taken by the Apex Court in the decision of Sahkari Khand Udyog Vs. CCE reported in 2005 (181) ELT 328 (SC), wherein the Apex Court with regard to the grant of rebate in respect of excess production of sugar in terms of the notification no.108/78-CE held that the same would be subject to the principle of unjust enrichment. In view of this, judgement of the Apex Court in respect of the refund, irrespective of the purpose for which the duty exemption had been granted under notification no.132/82-CE in respect of the excess production of sugar during the lean period from May, 1982 to September, 1982, the refund on account of this exemption notification would be subject to the principles of unjust

enrichment. In view of this, the impugned order is not correct. The same is set aside. The Revenue's appeal is allowed."

7. In paragraph no.4 of the affidavit dated 03.03.2017 filed by the appellant in pursuance of an earlier order, the appellant specifically admitted as under:-

"4. That the factory collects the Excise duty from the purchasers of sugar and deposits the government account as in the case of sales tax."

8. Thus, there is no dispute to the fact that the assessee appellant has passed on the liability of central excise duty to the purchasers.

9. In view of the admitted position of fact and the clear position in law that the manufacturer cannot be entitled to claim refund of duty that has not been borne by him or has been passed on to the purchaser, we do not find any error in the findings recorded by the Tribunal.

10. In a similar controversy in the case of Sahakari Khand Udyog Mandal Ltd. v. Commissioner of C. EX. & CUS. reported in 2005 (181) E.L.T. 328 (S.C.) the Hon"ble Apex Court has held as under:-

"The doctrine of "unjust enrichment", therefore, is that no person can be allowed to enrich inequitably at the expense of another. A right of recovery under the doctrine of "unjust enrichment" arises where retention of a benefit is considered contrary to justice or against equity.

The juristic basis of the obligation is not founded upon any contract or tort but upon a third category of law, namely, quasi-contract or the doctrine of restitution.

In the leading case of Fibrosa v. Fairbairn, [1942] 2 All ER 122, Lord Wright stated the principle thus :

"....(A)ny civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution."

Lord Denning also stated in Nelson v. Larholt, [1947] 2 All ER 751;

"It is no longer appropriate, however, to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution if the justice of the case so requires."

The above principle has been accepted in India. This Court in several cases has

applied the doctrine of unjust enrichment.

In *Orient Paper Mills Ltd. v. State of Orissa*, [1962] 1 SCR 549, this Court did not grant refund to a dealer since he had already passed on the burden to the purchaser. It was observed that it was open to the Legislature to make a provision that an amount of illegal tax paid by the persons could be claimed only by them and not by the dealer and such restriction on the right of the dealer to obtain refund could lawfully be imposed in the interests of general public."

11. In the case of *Commissioner of Central Excise, Lucknow v. Kesar Enterprises Ltd.* reported in 2006 (197) E.L.T. 317 (S.C.) in respect of a similar exemption notification the Hon"ble Apex Court had again denied the claim of refund on the principle of "unjust enrichment" as has been invoked in the instant case, which is quoted hereunder:-

"3. Against the decision rendered in the former case, i.e., *Sahakari Khand Udyog* (supra), an appeal was filed which has been disposed of by a three-Judge Bench of this Court in *Sahakari Khand Udyog Mandal Ltd. v. Commissioner of Central Excise & Customs*, [2005 (3) SCC 738] whereby this Court has upheld the decision of the Tribunal to the effect that the assessee would not be entitled to the refund of the excess duty paid as the assessee had passed on the burden of the duty charged to the consumers; that the assessee would not be entitled to claim any amount by way of refund as the same results in "unjust enrichment? which cannot be permitted. The point in dispute being squarely covered by a three-Judge Bench of this Court in *Sahakari Khand Udyog*'s case (supra), the order under appeal is set aside. The assessee would not be entitled to the refund of the excess amount of duty paid by it, in terms of the decision of this Court in *Sahakari Khand Udyog Mandal Ltd. v. Commissioner of Central Excise & Customs*, (supra). The impugned order is set aside and the appeals are allowed leaving the parties to bear their own costs."

12. In view of the above, the questions of law raised in the memo of appeal are answered in favour of the revenue and against the assessee.

13. The appeal is, accordingly, dismissed. No costs.