
(1968) 10 OHC CK 0011

In the Orissa High Court

Case No : O.J.C. No's. 215, 218, 219, 221, 222, 232, 233 and 234 of 1967

M. Abdul Hassan and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 25-10-1968

Acts Referred:

Bihar and Orissa Excise Act, 1915 — Section 27
Constitution of India, 1950 — Article 226
Limitation Act, 1908 — Article 96

Citation : AIR 1969 Ori 180

Hon'ble Judges : S. Barman, C.J;S. Acharya, J

Bench : Division Bench

Advocate : Ranjit Mohanty and R. Kar, in Nos. 215, 218, 219, 221, 232, 233 of 1967, R.K. Kar, in No. 222 of 1967, Ranjit Mohanty and R. Sharma, in No. 234 of 1967, for the Appellant;

Final Decision : Allowed

Judgement

Barman, C.J.—The petitioners in these writ petitions are dealers in excisable commodities inter alia foreign liquor. The point which arises in these writ petitions is whether a writ of mandamus can be issued for refund of countervailing duty illegally -- by mistake -- collected by a notification u/s 27 of the Bihar and Orissa Excise Act (Act 2 of 1915 hereinafter referred to as the Act) dated March 31, 1961.

2. These cases arise out of the decision of the Supreme Court in Kalyani Stores Vs. The State of Orissa and Others, decided on September 21, 1965 where their Lordships of the Supreme Court, on an interpretation of the relevant provisions of the Bihar and Orissa Excise Act, declared that the said notification enhancing the duty on foreign liquor by Rs. 30-00 per L.P. gallon was unenforceable. These writ petitions were filed in the month of August 1967 for refund of the countervailing duty illegally collected from the petitioners obviously under a mistake.

3. The first question is: Is the petitioners' claim for refund barred by limitation? Article 96 of the Limitation Act, 1908 corresponding to Section 17 of the present Limitation Act prescribes as period of limitation of three years for relief on the ground of mistake when the mistake became known to the plaintiff. On the question as to when the petitioners came to know of the mistake in the present case, it is stated that they came to know of the mistake when the decision of the Supreme Court in *Kalyani Stores Vs. The State of Orissa and Others*, was pronounced by the Supreme Court on September 21, 1965. The present petitions were filed on various dates in the month of August 1967, that is within three years from the date of knowledge and therefore they are clearly within time as prescribed under the Limitation Act. This view is supported by the decision in *K.S. Venkataraman and Co. Vs. State of Madras*,

4. It was urged on behalf of the opposite parties that the applications for refund are not maintainable; that the writ jurisdiction cannot be invoked as under the Act there is no duty to refund; that there is no case for grant of ancillary relief. Their point is that simple money claims cannot be enforced in writ jurisdiction, and that there is no provision in the Act for refund of tax. It was argued that the petitioners should have filed a suit in the Civil Court for recovery of the money stated to have been illegally retained by the State.

5. These arguments lose their force in view of the settled position in law as laid down in by the Supreme Court in *State of Kerala v. Aluminium Industries Ltd.* (1965) 16 STC 689 (SC) and in the *State of Madhya Pradesh v. Bhailal Bhai* AIR 1984 SC 1006. The question arose whether the relief of repayment has to be sought by the tax-payer by action in a Civil Court or whether such an order can be made by the High Court in exercise of its jurisdiction under Article 226 of the Constitution. What their Lordships held was this:

"The jurisdiction conferred by Article 226 is in very wide terms. This Article empowers the High Court to give relief by way of enforcement of fundamental rights and other rights by issuing directions, orders or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari. According to the petitioners a writ in the nature of mandamus can be appropriately used where money has been paid to Government by a mistake, to give relief by commanding repayment of the same. That in a number of cases the High Courts have used the writ of mandamus to enforce repayments is not disputed."

For the reasons as discussed in their judgment, the Supreme Court expressed the opinion that the High Courts have the power for the enforcement of statutory rights and fundamental rights under the Constitution, to give consequential relief by ordering repayment of money realised by the Government without the authority of law.

6. The same view was also reiterated by the Supreme Court in a very recent case *Gill and Co. (P) Ltd. v. Commercial Tax Officer*, (Civil Appeals Nos. 1580 to 1595

of 1967 D/- 9-2-1968.) (See 1968 SC 80). There, it has been held that where tax is levied by mistake of law it is ordinarily the duty of the State, subject to any provision of the law relating to sales tax to refund the tax. If refund is not made, remedy through court is open, subject to the same restrictions and also to the period of limitation, namely three years from the date when the mistake had become known to the person who has made the payment by mistake.

7. In this view of the cases, the petitions are allowed. The opposite parties are directed to refund the countervailing duty illegally collected from the petitioners. The appropriate authorities are directed to assess the amount and refund the same to the petitioners accordingly, within one month from the receipt of the orders passed herein. The petitioners are entitled to consolidated set of costs. Hearing fee Rs. 100/- (Rupees one hundred only). 8.

Acharya, J.

8. I agree.