

(1990) 03 OHC CK 0003
In the Orissa High Court
Case No : O.J.C. No. 1107 of 1983

Mamata Drinks and Industries Ltd. and Another	APPELLANT
Vs	
Union of India (UOI) and Another	RESPONDENT

Date of Decision : 14-03-1990

Acts Referred:

Coinage Act, 1906 — Section 11, 17
Constitution of India, 1950 — Article 113, 226, 265, 38

Citation : (1990) 29 ECC 372

Hon'ble Judges : R.C. Patnaik, J; B.L. Hansaria, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

B.L. Hansaria, C.J.—Petitioner No. 3 is a Company carrying on the business of manufacture of aerated soft drinks, namely, Gold Spot, Limca and Kismat. These products were liable to excise duty " 20% ad valorem as aerated water under Tariff Item No. I D of the First Schedule to the Central Excise and Salt Act, 1944 (shortly stated "the Act").

2. On 17.3.1972, a notification was issued by the Central Government under Rule 8(1) of the Central Excise Rules, 1944 (shortly stated "the Rules") exempting aerated water other than those in which blended flavouring concentrates have been used from so much of excise duty as is in excess of 10% ad valorem. The result of the notification is that aerated water in which blended flavouring concentrates are not used are liable to excise duty " 10% ad valorem and not 20% ad valorem. It is the case of the petitioners that being under the erroneous impression that Gold Spot, Limca and Kismat contained blended flavouring concentrates, excise duty " 20% ad valorem was paid during the period from 23.4.1973 to-19.9.1975. A decision was, however, rendered by the Government of India in the Ministry of Finance, Department of Revenue, that the aforesaid products did not contain blended flavouring concentrate. This order was passed on a review petition filed by M/s. Chennai Bottling Company, Madras, on

26.9.1980. This led the petitioners to approach the Assistant Collector of Central Excise and Customs, Rourkela Division, by filing a petition on 2.1.1981 claiming refund of Rs. 1,98,084.32. This claim has been rejected by the Assistant Collector on the ground of limitation. Hence this petition under Article 226 of the Constitution of India praying for quashing the order of the Assistant Collector and to issue a writ of mandamus to direct refund.

3. A perusal of the impugned order shows that the Assistant Collector rejected the prayer of the petitioners first by stating that the claim having been preferred after six months from the date of payment was time-barred inasmuch as Section 11-B (1) of the Act permits a person to claim refund before expiry of six months from the relevant date. As regards the contention of the petitioners that Section 11-B of the Act did not apply as the present was a case of mistake of law attracting Section 72 of the Contract Act because of which the claim for refund could be preferred within three years under the general law of limitation, the view taken by the Assistant Collector was that the mistake must have come to the knowledge of the petitioners from the date of the Bombay High Court's judgement in *Duke & Sons (P) Ltd v. Superintendent of Central Excise* (Misc. Petition No.944 of 1973 disposed of on 8.10.1976) inasmuch as in that case it was held that aerated waters manufactured by M/s. Duke & Sons did not contain blended flavouring concentrates because of which excise duty was payable at the rate of 10% ad valorem.

4. Let it be first seen whether the provisions contained in Section 11-B of the Act could have stood in the way of the petitioners in claiming refund with the aid of Section 72 of the Contract Act and whether order of refund can be passed in a petition under Article 226 of the Constitution. As there is no direct decision of this Court on these aspects, it would be in fitness of things to examine the point in some detail. To substantiate his contention, learned Senior Standing Counsel had referred to Sub-sections (4) and (5) of Section 11-B of the Act, which are in the following language:-

(4) Save as otherwise provided by or under this Act, no claim for refund of any duty of excise shall be entertained.

(5) Notwithstanding anything contained in any other law, the provisions of this section shall also apply to a claim for refund of any amount collected as duty of excise made on the ground that the goods in respect of which such amount was collected were not excisable or were entitled to exemption from duty and no court shall have any jurisdiction in respect of such claim.

5. To meet the contention of the learned Senior Standing Counsel, Mr. Patnaik has referred to *Dulichand Shreelal Vs. Collector of Central Excise and Others*, , and *Guru Charan Industrial Works Vs. Union of India (UOI) and Others*, . In these decisions, it has been held that in spite of Section 11-B (5), refund can be claimed under the general law and even under Article 226 of the Constitution. Judgment rendered in *Raman Kantilal Bhandari Vs. Union of India and others*, ,

also supports this view.

6. Insofar as the question whether refund, can be granted in a proceeding under Article 226 of the Constitution, we may refer to *Newabganj Sugar Mills Co. Ltd. v. Union of India* AIR 1976 SC 1153 , *Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others*, ; and *Shri Vallabh Glass Works Ltd. and Another Vs. Union of India (UOI) and Others*, where refunds were ordered in a proceeding under Article 226 of the Constitution. In *Salonah Tea Company v. Superintendent of Taxes : 1988(33)ELT249(SC)* , it was held that in an application under Article 226, the Court has power to direct refund unless there has been avoidable laches on, the part of the petitioner.

7. Learned Senior Standing Counsel has, however, referred to *Tilokchand and Motichand and Others Vs. H.B. Munshi and Another*, , and to *Mahabir Kishore and others Vs. State of Madhya Pradesh*, , to contend that in a case not covered by Section 11-B of the Act, it is only by way of suit that refund can be claimed. Reference to these two decisions, however, shows that the point whether refund can be granted in exercise of powers under Article 226 did not come up for consideration and so they cannot be regarded to be authorities for the proposition advanced by the learned Senior Standing Counsel. On the other hand, Mr. Patnaik referred in this connection to a Bench decision of this Court in *Union of India v. Straw Products 1989 (II) OLR 356*, where it was held that in a case of the present nature a suit is not maintainable.

8. The next question is if the case is not covered by Section 11-B of the Act, under what provision of law refund can be claimed? Mr. Patnaik states that Section 72 of the Indian Contract Act would take care of refunds claimed on account of mistake. Section 72 says:-

A person to whom money has been paid or anything delivered, by mistake or under coercion, must repay or return it.

Strong reliance has been placed in this context on the recent decision in *Mahabir Kishore (supra)*. This proposition is not seriously disputed by the learned Senior Standing Counsel. His submission, rather, is that the mistake in the present case must be said to have been discovered when the decision of the Bombay High Court was pronounced in the case of *Duke & Sons*, which was on 8.10.1976, because of which the claim for refund in the present case is beyond the period of limitation. Before expressing any opinion on this aspect of the case, it may be pointed out that it has been held by different High Courts of the country that when duty is collected without authority of law, the assessee is entitled to refund even though the petition is filed beyond the period of limitation prescribed by the relevant statutory provision. Indeed this was the view taken by this Court itself in *Straw Products Limited Vs. Factory Officer, Central Excise and Others*, . The same view was expressed by the Andhra Pradesh High Court in *Hyderabad Bottling v. Union of India 1989 (27) ELT 408*, and by the Bombay High Court in *Finolex Cables v. Union of India [1990] 25 SCC 37 (Bom) (App)*.

9. In view of the aforesaid decisions we hold that refund can be allowed in a petition under Article 226 of the Constitution and that Section 72 of the Indian Contract Act would provide the basis to claim refund of tax paid under mistake and that in such a case the general law of limitation would apply. Let us now see as to whether the claim of refund in the present case was made within the period of limitation. It is contended by Mr. Patnaik that limitation in the present case cannot be counted from the date of decision of the Bombay High Court (8.10.1976) inasmuch as that case had not dealt with products like Gold Spot, Limca and Kismat, but was concerned with some other aerated water products. It is strenuously urged by the learned counsel that limitation in the present case is to run only from 26.9.1980, on which date the decision of the Government of India was rendered relating to Gold Spot, Kismat and Limca. Though it is contended by the learned Senior Standing Counsel in this context that the decision of the Government of India in the aforesaid case could not apply to the present assessee inasmuch as that decision was arrived at on the basis of the materials on record relating to the products of M/s. Chennai Bottling company which was before the Government, whereas the products of the present petitioners, though branded as Gold Spot, Kismat and Limca, may contain blended flavouring concentrates, we are not impressed by this argument inasmuch as the decision of the Government of India was arrived at in the aforesaid case on the basis of the testing report and documentary evidence supplied by M/s. Parle (Exports) Pvt. Ltd., who were their raw material suppliers. We are of the view that the benefit of the aforesaid decision has to be made available to the petitioners also, as in their case as well raw material is supplied by M/s. Parle (Exports) Pvt. Ltd. May it be pointed out that the Government of India itself in the aforesaid case had referred to the relief granted in similar circumstances to M/s. Spencer & Co., Madras, in which case the testing of samples had revealed that the manufacturers were using only "synthetic essences", which was taken to be synonymous with "blended flavouring concentrates".

10. As the Bombay High Court's decision had dealt with some other aerated water products, we are of the view that the period of limitation cannot be counted from the date of decision of that High Court. A reference to Mahabir Kishore (supra) shows that for the purpose of counting the limitation, which is 3 years as prescribed by Article 113 of the Limitation Act, 1963, the period would begin to run from the date of knowledge relating to the mistake. Section 17(1) (c) of this Act would reinforce this aspect inasmuch as this section provides that in the case of a suit for relief on the ground of mistake, the period of limitation does not begin to run until the plaintiff had discovered the mistake or could, with reasonable diligence, have discovered it. We are, therefore, of the view that the prayer for refund having been made on 2.1.1981, the same was within the period of limitation and so the refund could not have been denied as being time barred.

11. The all important question is whether the doctrine of unjust enrichment

would prevent granting of refund in a case of the present nature. Mr. Patnaik has submitted that a Division Bench of this Court in O.J.C. Nos. 1920, 1831-33 of 1982 (Tripathy Drinks (P) Ltd. v. Assistant Collector of Central Excise and Customs) disposed of on 28.7.1988, took the view that the refund should not be refused on the ground that it would be a fortuitous benefit to the petitioner. As to this decision, it may be stated that the point of unjust enrichment had really not been gone into in view of the fact that the order of refund had been allowed by the appellate authority. This decision, therefore, cannot assist the petitioners. So too Bizi Industries v. Superintendent of Central Excise, Cuttack 1982 ELT 109 and Straw Products Limited Vs. Factory Officer, Central Excise and Others, , to which our attention was drawn by Mr. Patnaik, cannot be called in aid by the petitioners in this context because the question of unjust enrichment had not been gone into in those cases.

12. Mr. Patnaik has strenuously contended that as the payment of excess excise has to be regarded as illegal, the levy is hit by Article 265 of the Constitution and the State should not be allowed to retain the money illegally realised by it. In this connection, strong reliance has been placed on Dulichand Shreelal Vs. Collector of Central Excise and Others, , and Guru Charan Industrial Works Vs. Union of India (UOI) and Others, . In the former case it was stated that if the collection or levy is in violation of Article 265 of the Constitution, the authorities cannot retain the money illegally realised. This was said to be the consistent view of all the Courts. In the latter Case, in paragraph 6 of the judgment, the following observations were made on this aspect of the matter:-

Undue enrichment is often advanced to resist acceptance of claim for refund. Roots of this plea is embedded in morality, the very foundation of our social structure. All actions, individual or State, must conform to honesty and fairness. Levy of tax or duty illegally robs the consumer. Refund to him, however, is illusory. Therefore, undue enrichment is there either of the manufacturer or dealer or trader or the State. Amongst two who is more morally justified? That can be resolved if genesis of Article 265 is properly comprehended. It is a constitutional limitation on State. The *raison d'être* is obvious. The Constitution visualised a society based on rule of law. Therefore, any State action which contravenes it cannot be upheld. If theory of undue enrichment is pressed into service in favour of State it shall encourage compulsive exactions, erode the rule of law and shake the moral fibre. To keep this in check and maintain the balance between individual and State even the illegal levy or collection has been prohibited by the Constitution. Although refund due to declaration of law as *ultravires* results in a bonanza or windfall to the trader but the statutory compulsion of payment of tax or duty whether realised or not tilts the balance against State;....

13. To meet the above, learned Senior Standing Counsel has first drawn our attention to Mahabir Kishore (supra) wherein it has been stated that one of the principles of unjust enrichment is that the enrichment of the defendant must

have been "at the expenses of the plaintiff. It is stated by the learned counsel that in the present case the enrichment by the State was not at the cost of the petitioners inasmuch as the excise duty had not been paid by the petitioners but had been passed off. Mr. Patnaik contends that even in Mahabir Kishore refund of money was not denied on the ground of unjust enrichment of the plaintiff who had filed the suit claiming refund. As to this, it may be pointed out that this aspect of the matter had really not been gone into in Mahabir Kishore though it was noted in paragraph 16 that the question of unjust enrichment in cases u/s 72 of the Indian Contract Act had been referred by the Court in the cases mentioned in that paragraph. The three cases referred in that paragraph as well as many decisions of different High Courts were noted in detail in Roplas (India) Limited and Another Vs. Union of India and Another, , on which strong reliance has been placed by the learned Senior Standing Counsel to contend that the doctrine of. unjust enrichment, itself would stand in the way of the petitioners to claim refund of the duty in question.

14. A perusal of the aforesaid decision shows that though in The Newabganj Sugar Mills Co. Ltd. and Others Vs. The Union of India (UOI) and Others, , refund allowed by that High Court was affirmed, but a scheme was evolved for the refund of the amount to the ultimate consumers and it was observed that the money in question should go to the consumers who had ultimately paid the same. In Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others, , the Supreme Court instead of directing disbursement of the amount to the dealers directed the amount to be paid to the consumers from whom the excess amount had been recovered by the dealers. It was also observed that granting or withholding of relief of the present nature would properly depend, inter alia, upon considerations of public interest, and that while exercising flexible power under Article 226 such order should be passed as would public interest dictate and equity project. In U.P. State Electricity Board Lucknow Vs. City Board, Mussoorie and Others, , having noted that there was little, or no possibility of refunding the excess amount collected from the ultimate consumer and the granting of the relief to the petitioner would result in his unjust enrichment, it was observed that the High Court should not ordinarily direct any refund in exercise of its discretion under Article 226 of the Constitution. In State of Madhya Pradesh Vs. Vyankatlal and Another, , it was stated that there was no question of refunding the amount to the respondents who had not eventually paid the amount because doing so would virtually amount to allow the respondents unjust enrichment.

15. After noting the aforesaid decisions, it was observed in paragraph 7 of the judgement that in cases of the present nature it is necessary to find out from whose pocket ultimately the money for such payment had come or who had ultimately borne its brunt. It was further observed, and rightly, that it would be travesty of the judicial process if it was allowed to be abused for patently illegal and unjust recoveries by those who had not paid the amounts inasmuch as the judicial process could not lend its assistance for collection of illegal booty. In

paragraph 8 of the judgment, a large number of decisions of different High Courts were noted which had taken the same view.

16. We have duly applied our mind to this important aspect of the matter and we are of the considered opinion that allowing of refund to the petitioners in the case of the present nature would definitely lead to their unjust enrichment and we cannot be a party to the same. Though in this connection Mr. Patnaik stated, by referring us to additional affidavit filed on behalf of the petitioners on 2.3.1990, that part of the money would be used to generate cash for the purpose of staff welfare fund and part of it would be used to revive the petitioners' industry which has become a sick industrial unit enabling it to run its business smoothly, we are not persuaded to allow the doctrine of unjust enrichment to be diluted by these factors. We are conscious that allowing the State to retain the money which was really not due to it would amount to permit the State to retain the collection. But then in between the illegal gain to the State and illegal gain to the petitioners, we would choose the former as it would be in larger public interest to allow the money to remain with the State so that the same can be used for various welfare activities which in a socialistic State like ours it is called upon to undertake. The balance in this regard tilts not against the State as was observed in *Guru Charan Industrial Works v. Union of India*, (supra) but in favour of the State, according to us. The obligation of the State to secure a social order for the promotion of the welfare of the people of which Article 38 of the Constitution speaks requires mobilisation of large resources by it.

17. Before closing, reference may be made to *Assistant Collector of Central Excise, Guntur Vs. Andhra Fertilizer Ltd.*, , (to which my attention was fairly invited by my learned brother, Patnaik, J.) in which a Division Bench of the "Andhra Pradesh High Court has held that the theory of unjust enrichment will have no application where tax-payer seeks refund of illegally collected tax, although the tax-payer might have passed on burden of the tax to the consumer. While taking this view, reliance was placed on *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, , in paragraph 10 of which it was stated that there was no provision under which Court could deny refund of a tax even to the person who had collected it from the customers and had no subsisting liability or intention to refund it to them. The Bench also noted the decision of the Supreme Court in *State of Madhya Pradesh Vs. Vyankatlal and Another*, , which has laid a proposition contrary to the one expressed in Cawasji's case. The Bench, however, preferred to follow Cawasji's case being of the view that the theory of unjust enrichment will have no application where the citizen seeks enforcement of the constitutional limitations under Article 265. Another factor which weighed with the Bench in allowing the relief of refund to the petitioner before the Court was that the levy was regarded as naked and wholly arbitrary in character without any semblance of legal authority. This apart, the department had allowed the judgment declaring the levy in question as illegal to become final because of which a large number of fertiliser manufacturers were found entitled to refund. It was then observed that there was no sound reason as to why one manufacture

alone out of several should be compelled to pay an impost or tax which could not be illegally collected from others.

18. As to the aforesaid decision, we would like to observe that the judgment in Cawasji's case was rendered by a Division Bench of two Judges and Vyankatlal is also a decision of a Division Bench of two Judges. For the reasons given above, we would like to follow the view taken in Vyankatlal. This apart, the Andhra Pradesh High Court had not noted the decision rendered by a Division Bench of three Judges in U.P. State Electricity Board Lucknow Vs. City Board, Mussoorie and Others, . Finally, the facts of the case dealt by the Andhra Pradesh High Court are different from those which are before us in the case in hand. We would, therefore, respectfully refuse to follow the view taken by the Andhra Pradesh High Court.

19. All told, though refund could have been claimed by the petitioners in this writ petition, we would refuse to exercise our discretionary power to order refund because the same would amount to unjust enrichment of the petitioners. The petition is, therefore, dismissed. There shall, however, be no order as to costs.

20. We have a parting thought. It is a matter for consideration whether for application of the doctrine of unjust enrichment the unconstitutionality of the taxing statute making the impost violative of Article 265 of the Constitution and payment of money under mistake would make any difference. May we state that the present was a case of payment of duty under mistake of facts and not even mistake of law.