

(1979) 02 MAD CK 0018

In the Madras High Court

Case No : Writ Petition No. 3258 etc. of 1974

Mohan Meakin Breweries Ltd.

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 18-02-1979

Acts Referred:

Constitution of India, 1950 — Article 141, 226

Citation : (1979) 4 ELT 646

Hon'ble Judges : Natarajan, J;Ismail, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Ismail, J.—These writ petitions raise a common question and they pray for the issue of a writ of Mandamus directing the

respondent/respondents in the writ petitions to refund the duty paid by the petitioners under Rules 1960 hereinafter referred to as the Rules. In

W.P. No. 3258 of 1974 and W.P. No. 236 of 1975 the prayer is a composite one, namely, for the issue of a writ of Mandamus directing the

respondents therein to permit the petitioners to export their stocks of Indian manufactured foreign liquor and beer, after refunding to the petitioners

that duty paid in respect of the existing stocks as on 31-8-1974. The learned counsel for the petitioners in these two writ petitions have

represented to us that that portion of the prayer regarding permission to export the stock no longer survives and that only the latter portion of the

prayer regarding refund of the duty survives. We are considering all these writ petitions together and disposing of them by a common judgment, in

view of the controversy being the same.

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13. We are of the opinion that the payment made by the petitioners in these cases cannot be said to be payment made under a mistake of law. As we have pointed out already, the decision of the Supreme Court in *Kalyani Stores Vs. The State of Orissa and Others*, , was rendered on 21-9-1965 and the petitioners themselves did not state as to why they did not know that decision earlier and that they came to know the same only for the first time just before the filing of the writ petitions. In fact, in paragraph 7 of the affidavit in W.P. No. 3259 of 1974, it is stated that the petitioner therein was paying the excise duty without examining the validity of such levy. In paragraph 9 of the affidavit it is pointed out that for the first time the petitioner was advised by the counsel that the levy and collection of excise duty on Indian made foreign liquor and beer imported into the State in the past was wholly unauthorised and illegal and that there was a duty upon the respondents to refund the amounts collected as excise duty. We may point out in this context that the period with reference to which the duty was paid and for which refund is claimed in all these cases is subsequent to the decision of the Supreme Court in *Kalyani Stores Vs. The State of Orissa and Others*, , referred to already. When the payment has been made subsequent to the decision of the Supreme Court, can it be said that such payment has been made under a mistake of law? All the decided cases that were brought to our notice where claim for refund of tax which was said to have been paid under a mistake of law was made were cases concerned with the payment of tax before a law was declared to be ultra vires or unconstitutional. But here are cases where the period is from 1-9-1971, and in some cases where the period is still later. Whether it is from 1-9-1971 or from 1-10-1971, it is clear that the payments which are the subject matter of these writ petitions were payments made very much later than the decision of the Supreme Court referred to already. Under Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India. Consequently, the moment the judgment was pronounced by the Supreme Court in the cases referred to above, the law was declared and on the ordinary presumption that every one is supposed to know the law, the petitioners in the""e cases must be deemed to have known that when

the judgment of the Supreme Court was delivered in the case referred to above, the State of Tamil Nadu had no power to tax or right to levy the

countervailing duty. In fact, this derives support from an observation of the Supreme Court in *D. Cawasji and Co. and Others Vs. State of Mysore*

and *Another*, . In paragraph 8 of this judgment, the Supreme Court observes : --

Therefore, where a suit will lie to recover moneys paid under a mistake of law, a writ petition for refund of tax within the period of limitation

prescribed i.e., within 3 years of the knowledge of the mistake, would also lie. For filing a writ petition to recover the money paid under a mistake

of law, this court has said that the starting point of limitation is from the date on which the judgment declaring as void the particular law underwhich

the tax was paid was rendered, as that would normally be the date on which the mistake becomes known to the party. (*Italics are ours*).

14. Even assuming that for any purpose the date of the judgment cannot be taken to be the date when a party comes to know of it, at least the

date when the judgment is reported in the recognised law journals will constitute the date when he is deemed to have become aware of the

decision of the Supreme Court. The decision of the Supreme Court in *Kalyani Stores Vs. The State of Orissa and Others*, , had been reported in

1966 itself and the period with reference to which the relief has been claimed in the present case is from 1971. Thus it will be seen that the

payment has been made in the present case with the full knowledge of the decision of the Supreme Court referred to above in *Kalyani Stores Vs.*

The State of Orissa and Others, and therefore such payment cannot be claimed or characterised as payment made under a mistake of law. Both

sides agree before us that their has not been a single decision of our court where the claim for refund has been allowed by the issue of a writ of

Mandamus when the payment had been made after the law had been declared by the court as unconstitutional or invalid. That being the case, we

are clearly of the opinion that the payment made by the petitioners in all these cases cannot be said to be payment made under a mistake of law in

order to enable them to claim a refund of the same.

15. Assuming that we are not correct in the above conclusion, still we are of the opinion that there are several factors present in these cases which

have to be taken into account by this court in the exercise of its discretion. As we

have pointed out already, the duty was being levied by the Government even before the promulgation of the Tamil Nadu Prohibition Act, that is, under the Abkari Act itself and that levy was being continued ever since and the persons like the petitioners have been paying the duty in consideration of their obtaining a permit to import Indian made foreign liquor into the State for the purpose of their trade. In the present cases all the petitioners have paid the amounts in return for their obtaining a permit for importing Indian made foreign liquor into the State for the purpose of trade and they have derived considerable advantage as a result of such trade. The question for consideration, in such a context, is, can this court exercise its discretion in favour of the petitioners ?

16. We are clearly of the opinion that this Court in the exercise of its jurisdiction under Art 226 of the Constitution of India cannot exercise its

discretion in favour of the petitioners. The decision of the Supreme Court in *Dhanyalakshmi Rice Mills and Others Vs. The Commissioner of Civil*

Supplies and Another, is in support of this conclusion of ours. In that case also the appellants before the Supreme Court applied for and obtained

permits under the Andhra Pradesh Rice and Paddy (Restriction on Movement) Order, 1965, and the Andhra Pradesh Rice Procurement (Levy

and Restriction on Sale) Order, 1967. In paragraph 16 of its judgment, the Supreme Court refers to the following as the grounds on which the

High Court declined to exercise its discretion in favour of the appellants before the Supreme Court --

The High Court however held that the appellants were not entitled to any relief on three grounds. First, the administrative surcharges were paid

voluntarily by the appellants. The appellants themselves represented for issue of permits. The appellants obtained the permits. They exported rice

under the permits. The High Court, therefore, held that the appellants cannot claim refund of the entire amount without giving due credit for the

expenses or charges incurred by the Government for the issue of permits and for the supervision of export, transport and other administrative

charges. The second reason given by the High Court was that the court would not be justified in exercising discretion in favour of the appellants

who voluntarily paid the administrative charges, obtained the permits and derived considerable profits therefrom. The third reason given by the

High Court was that there was undue delay in claiming the refund"".

The Supreme Court upheld the exercise of discretion by the High Court, pointing out --

The High Court. in exercise of its discretion refused to grant a Mandamus on a consideration of facts and circumstances of the case. The principal

matters which weighed with the High Court are these. First, the appellants voluntarily paid the amounts and derived full advantage and benefit by

utilising the permits. Second there is undue delay in claiming refund. Where the High Court has in exercise of discretion refused to grant a writ of

Mandamus, this court does not ordinarily interfere"".

17. In the present cases also, as we have pointed out already, the petitioners paid the duty, obtained permits and imported into the State Indian

made foreign liquor and beer manufactured outside the State and derived considerable profit in trading therein. Under these circumstances, we are

clearly of the opinion that the petitioners herein are not entitled to the discretionary remedy of a writ of Mandamus.

18. The second consideration which also we take into account is the fact that the petitioners herein had passed on the excise duty, which they had

paid, to their customers and that factor has necessarily to be taken into account in considering the question whether we should exercise our

discretion in favour of the petitioners or not.

19. In this context, Mr. Manivannau, learned counsel for some of the petitioners, relied on the following passage in the decision of the Supreme

Court in D. Cawasji and Co. and Others Vs. State of Mysore and Another, , and contended that, that ought not to be the consideration for

denying relief to the petitioners herein : --

A tax is intended for immediate expenditure for the common good and it would be unjust to require its repayment after it has been in whole or in

part expended, which would often be the case, if the suit or application could be brought at any time within 3 years of a court declaring the law

under which it was paid to be invalid, be it a hundred years after the date of payment. Nor is there any provision under which the court could deny

refund of tax even if the person who paid it has collected it from his customers and has no subsisting liability or intention to refund it to them, or, for

any reason, it is impracticable to do so.

We are not concerned in the present cases with any suit claiming refund of the excise duty paid by the petitioners and we are concerned only with the question as to whether we should exercise our discretion in favour of the petitioners, in view of the fact that the petitioners have passed on the duty paid by them to their customers. Consequently the above observation of the Supreme Court will have no bearing on the exercise of discretion by the High Court under Article 226 of the Constitution of India.

20. Mr. Manivannan, learned counsel for the petitioners, repeatedly contended before us that according to the decisions of the Supreme Court, once it is found that there has been no undue delay on the part of the petitioners in approaching the court and there are no controverted facts to be investigated by means of evidence, the court is bound to grant relief under Article 226 of the Constitution of India, by the issue of a writ of Mandamus and for this purpose relied on the well known decision of the Supreme Court in State of Madhya Pradesh Vs. Bhailal Bhai and Others,

. In paragraph 17 of its judgment, the Supreme Court pointed out --

At the same time we cannot lose sight of the fact that the special remedy provided in Article 226 is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defences legitimately open in such actions. It has been made clear more than once

that the power to give relief under Article 226 is a discretionary power. This is specially true in the case of power to issue writs in the nature Of

Mandamus. Among the several matters which the High Courts rightly take into consideration in the exercise of that discretion is the delay made by

the aggrieved party in seeking this special remedy and what excuse there is for it. Another is the nature of controversy of facts and law that may

have to be decided as regards the availability of consequential relief. Thus, where, as in these cases, a person comes to the Court for relief under

Article 226 on the allegation that he has been assessed to tax under a void legislation and having paid it under a mistake is entitled to get it back,

the court, if it finds that the assessment was void, being made under a void provision of law, and the payment was made by mistake, is still not

bound to exercise its discretion directing repayment. Whether repayment should be ordered in the exercise of this discretion will depend in each

case on its own facts and circumstances. It is not easy nor is it desirable to lay

down any rule for universal application. It may however be stated as a general rule that if there has been unreasonable delay the court ought not ordinarily to lend its aid to a party by this extraordinary remedy of Mandamus". Again, where even if there is no such delay the Government or the statutory authority against whom the consequential relief is prayed for raises a prima facie triable issue as regards the availability of such relief on the merits on the grounds like limitation the court should ordinarily refuse to issue the writ of Mandamus for such payment. In both these kinds of cases, it will be sound use of discretion to leave the party to seek his remedy by the ordinary mode of action in a civil court and to refuse to exercise in his favour the extraordinary remedy under Article 226 of the Constitution.

21. This was followed by the Supreme Court in the State of Kerala v. Aluminium Industries Ltd., 16 S.T.C. 689. Both these decisions were again referred to by the Supreme Court in D. Cawasji and Co. and Others Vs. State of Mysore and Another, , referred to already. Consequently, we are of the opinion that the unexplained delay and controversy of facts are not the only circumstances which will compel a High Court to refer a party to a suit and make the court decline to exercise its discretion in favour of such party. In fact, the Supreme Court in State of Madhya Pradesh Vs. Bhailal Bhai and Others, itself has stated --

Among the several matters which the High Courts rightly take into consideration in the exercise of that discretion is the delay made by the aggrieved party in seeking this special remedy and what excuse there is for it. Another is the nature of controversy of facts and law that may have to be decided as regards the availability of consequential relief.

Therefore these two circumstances do not exhaust all the circumstances or matters which the High Court can take into account for the exercise of the discretion, that too, with reference to the grant of a writ of Mandamus in favour of the petitioners.

22. Under these circumstances, we are clearly of the opinion that the circumstances referred to above can certainly be taken into account by this court in declining to issue a writ of Mandamus in favour of the petitioners herein. .

23. It may be pointed out that in these cases the petitioners had been paying the excise duty voluntarily without any threat or force, from the State

and they had been so doing merely for the purpose of carrying on the business of selling Indian made foreign liquor and beer in the State after the

prohibition was suspended and they came forward with the present claim only when prohibition was reintroduced and it had become difficult for

them to carry on the business in the same manner in which and to the same extent to which they had been doing in the past.

24. Under these circumstances, we are clearly of the opinion that the petitioners herein are not entitled to the discretionary relief of a writ of

Mandamus for refund of the excise duty said to have been paid by them, even though they might have had the remedy by way of filing a suit in a

civil court Hence these writ petitions are dismissed. There will be no order as to costs.