

(1991) 08 OHC CK 0034
In the Orissa High Court
Case No : O.J.C. No. 761 of 1991

Orissa Cement Ltd.

APPELLANT

Vs

Collector of Central Excise

RESPONDENT

Date of Decision : 20-08-1991

Acts Referred:

Central Excise Rules, 1944 — Rule 173C
Central Excises and Salt Act, 1944 — Section 11B, 11B(2), 4
Constitution of India, 1950 — Article 226, 32
Contract Act, 1872 — Section 72
Orissa Sales Tax Act, 1947 — Section 14A

Citation : (1992) 73 CLT 153 : (1992) 38 ECC 148 : (1995) 75 ELT 486 : (1992) 1 OLR 75

Hon'ble Judges : G.B. Patnaik, J; D.M. Patnaik, J

Bench : Division Bench

Advocate : G. Rath, for the Appellant; Ashok Mohanty for the Central Government, for the Respondent

Final Decision : Allowed

Judgement

G.B. Patnaik, J.—An interesting question of law that arises for consideration in this writ application is whether a statutory authority exercising his powers under the provisions of a statute can refuse relief to an applicant who is otherwise entitled to the same by invoking the principle of "unjust enrichment". It is necessary to briefly state facts to indicate as to how the aforesaid question crops up for consideration.

2. The petitioner No. 1 is a manufacturer of cement and has its licensed factory at Rajgangpur in the district of Sundergarh where it manufactures cement. During the relevant period, the petitioner had a valid licence for manufacture of "special cement". When the petitioner submitted the price list for approval of the Assistant Collector of Central Excise, Rourkela, as required under Rule 173C of the Central Excise Rules, 1944 (hereinafter referred to as the "Rules"), it was contended that the cost of packing in respect of special cement should be

excluded from the assessable value u/s 4 of the Central Excises and Salt Act, 1944 (hereinafter referred to as the "Act"). The Assistant Collector, Central Excise & Customs (opp. party No. 2), rejected the petitioner's contention and included the cost of packing in the assessable value and approved the price list. Against the said order of opp. party No. 2, the petitioner carried appeals to the Collector (Appeals), who is the appellate authority under the Act. The said appellate authority (opp. party No. 1) upheld the contention of the petitioner and held that the cost of packing in respect of special cement was not includible in the assessable value of the cement. In coming to the aforesaid conclusion, the appellate authority took into consideration the Tariff Advice No. 46/79 dated 28-9-1979 and the Government of India's decision in the case of Birla Cement Works. Against this decision of the appellate authority, opp. party No. 1, the Assistant Collector preferred second appeals before the Customs, Excise & Gold (Control) Appellate Tribunal (for short, C.E.G.A.T.). The said second appeals were dismissed and the conclusion of the appellate authority was confirmed and thus the conclusion of the Collector (Appeals) that the value of the packing cannot be included in the assessable value of the special cement has become final. Since the petitioner had paid the duty in accordance with the price list approved by the Assistant Collector, subsequent to the decision of the Collector (Appeals), an application u/s 11B of the Act was filed for refund of the duty. On receipt of the said application, the Assistant Collector issued a notice to the petitioner to show cause as to why the petitioner's application for refund [should] not be rejected on the ground of unjust enrichment, which has been annexed as Annexure-1. The petitioners, therefore, have approached this Court in this writ application.

3. It is undisputed that the application for refund u/s 11B of the Act has been filed in time. In view of the conclusion of the appellate authority, it is also undisputed that the duty in respect of which the refund has been claimed by the petitioner was collected illegally. In the premises, as aforesaid, the only question that arises for consideration is whether the Assistant Collector who is otherwise bound to refund the duty illegally collected can refuse the prayer of the petitioner on the ground that allowing such refund would result in unjust enrichment of the petitioner.

4. Mr. Rath appearing for the petitioners contends that the Assistant Collector while exercising his power u/s 11B of the Act cannot take recourse to application of principle of unjust enrichment and refuse an application on that basis, as Section 11B in terms does not authorise the authority to reject the application on such ground. In other words, according to Mr. Rath, the powers of the authority under a statute being circumscribed by the provisions contained therein, he cannot go beyond those provisions and reject an application on any other ground. He further submits that the High Court and Supreme Court while exercising their discretionary, equitable jurisdiction under Articles 226 and 32 of the Constitution respectively could refuse the prayer for refund on the ground of unjust enrichment, but the power cannot be exercised by a statutory authority.

The learned Standing Counsel for the Central Government, Mr. Mohanty, on the other hand, contends that the burden of duty having been passed on to the consumer, an assessee cannot claim refund even if the levy is illegally collected and, therefore, the Assistant Collector would be within his jurisdiction to refuse the prayer for refund on applying the principle of unjust enrichment. Quite a number of authorities were cited by counsel for both sides which we shall discuss later, but we find sufficient force in Mr. Rath's contention that the theory of unjust enrichment has no place in dealing with a claim for refund of duty u/s 11B of the Act and the Assistant Collector is not authorised to exercise that power which a High Court or the Supreme Court exercises under Article 226 or Article 32 of the Constitution.

5. The Bombay High Court in the case of *Bombay Burmah Trading Corpn. Ltd. Vs. Union of India*, , considered this question in relation to an application for refund filed u/s 11B of the Central Excises and Salt Act, 1944, and held that in view of the Full Bench decision of the said High Court in the case of *New India Industries Ltd. v. Union of India* 1990 (46) ELT 23 overruling the case of *Roplas (India) Ltd. and another Vs. Union of India* and another, , the Department could not refuse to make a refund to the petitioner because the duty sought to be recovered back by the petitioner was paid under protest and further an assessee is entitled to refund as a matter of right when the decision of the lower authority is set aside by the higher authorities under the Act. Applying the aforesaid ratio to the present case, in view of the fact that the order of the Assistant Collector was reversed by the Collector (Appeals) and was confirmed by the C.E.G.A.T., the petitioner is entitled to refund of the duty illegally collected from it and the Assistant Collector is not entitled to reject that application on the principle of unjust enrichment. The said Bombay High Court in yet another case of *Amar Dye Chem Ltd. Vs. Union of India*, , reiterated the aforesaid position and held that the Department was duty bound to refund the amount to the petitioner in accordance with the refund application and could not have refused such relief by applying the principle of unjust enrichment.

The Andhra Pradesh High Court in the case of *Kesoram Cements, Basantnagar Vs. Union of India and Others*, considered the question as to whether an authority under the Central Excises Act can refuse the prayer for refund by applying the principle of unjust enrichment and held that the excise authorities had no jurisdiction to levy excise duty except in conformity with and as empowered by the provisions of the Central Excises Act and the rules made thereunder. Any duty collected otherwise was without authority of law and was liable to be refunded to the assessee. The Union of India had no right to retain the duty so illegally levied and collected. It was further held that even if the assessee passed on to its consumers the duty illegally recovered from him, it was a matter between the assessee and the consumers and the High Court cannot deny refund of the duty illegally levied and collected to the assessee even if it results in unjust enrichment of the assessee.

The Madhya Pradesh High Court in the case of Birla Jute Manufacturing Company Limited Vs. Union of India (UOI) and Others, considered the self-same question and the Division Bench of the said High Court held that the cost of packing of cement in gunny bags was not includible in the assessable value of cement under the provisions of the Central Excises and Salt Act, 1944, as in the present case and directed refund of the duty paid.

In the case of Orient Paper and Industries Ltd. Vs. Union of India (UOI) and Others, , the Calcutta High Court considered a similar question and held that the Assistant Collector had no jurisdiction to restrict the operative part of the order passed by the Appellate Collector and refuse to grant consequential relief on the ground that the appellant had in turn realised the entire amount of duty from its consumers. It was further held that if the excise authority refuses to refund the amount which was unlawfully realised by the petitioner, it would be unlawful enrichment on the part of the Government which cannot be permitted.

The Supreme Court in the case of Salonah Tea Company Ltd. etc. v. Superintendent of Taxes, Nowgong and Ors. etc. , considered a similar question and held :-

"...Normally speaking in a society governed by rule of law taxes should be paid by citizens as soon as they are due in accordance with law. Equally, as a corollary of the said statement of law it follows that taxes collected without the authority of law as in this case from a citizen should be refunded because no State has the right to receive or to retain taxes or monies realised from citizens without the authority of law."

In view of the aforesaid enunciation of law, we have no hesitation to hold that an authority like the Assistant Collector under the Act has no jurisdiction to refuse refund of excise duty illegally collected from an assessee by invoking the theory of Unjust Unrichment.

6. We would now advert to the decisions referred to in Annexure-1. But before that we also fail to find out under what provision such a notice has been issued by the Assistant Collector. An application for refund has been provided u/s 11B of the Act and under Sub-section (2) of Section 11B, on receipt of such an application, the Assistant Collector, if satisfied that whole or any part of duty paid by the applicant to be refunded, he may make an order accordingly. Sub-section (4) of Section 11B indicates that save as otherwise provided by or under the Act, no claim for refund of duty of excise shall be entertained. There is no provision contained in Section 11B requiring the Assistant Collector to issue a show cause notice to an assessee. The learned Standing Counsel appearing for the Central Government, however, submits that the notice issued under Annexure-1 is merely to give an opportunity to the petitioner to explain as to why its application should not be rejected, though there is no such specific provision under the Act itself. We are unable to appreciate this submission of the learned Standing Counsel, inasmuch as the procedure for refund has also been provided

in the said section and a statutory authority cannot transgress the powers conferred on him under the statute. In our considered opinion, the Assistant Collector had no authority to issue a notice like Annexure-1 within the four corners of Section 11B of the Act.

Even assuming that it was merely to put the assessee to prior notice, let us now examine the authorities on the basis of which the said Assistant Collector purports to have issued the notice. The first case referred to in the notice is the case of *The Newabganj Sugar Mills Co. Ltd. and Others Vs. The Union of India (UOI) and Others*, . In that case, the mill owners assailed the validity of the price fixed by the State Government for Levy Sugar, and obtained an order of stay, subject to the condition of the mill-owners furnishing bank guarantee for the excess price. Under the cover of the order of stay, the mill-owners sold the sugar at the enhanced free-market rate. Ultimately the High Court upheld the controlled price of levy sugar and directed that the bank guarantee furnished should be encashed and be distributed amongst the consumers. Against the said order, the sugar mills had approached the Supreme Court. Their Lordships of the Supreme Court formulated a scheme as to how the needs of both the sugar mills as well as the buyers from whom the higher price had been charged would be met. We fail to understand how this decision is of any application authorising the Assistant Collector to refuse an application for refund otherwise maintainable u/s 11B of the Act.

The next case relied upon by the Assistant Collector under the notice is the case of *Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others*, . In that case market fees having been increased under the provisions of the Haryana Act No. 22 of 1977 from 2% to 3%, the validity of the provision had been challenged. The Supreme Court declared that the charge of excess one per cent was ultra vires and, therefore, the extra one per cent collected from the dealers became refundable. But as the refund was not paid, the dealers filed an application under Article 32 of the Constitution. Their Lordships of the Supreme Court in that connection observed that Article 226 grants an extraordinary remedy which is essentially discretionary, although founded on legal injury. It is perfectly open for the Court exercising this flexible power to pass such order as public interest dictates and equity projects. With these observations, the Court issued certain guidelines and directions as to how and in what manner this excess amount illegally collected would be repaid back to the consumers. We fail to understand how this decision helps the revenue. We would also observe that the Assistant Collector exercising power u/s 11B of the Act is not entitled to equate himself with the superior Courts of the land exercising power under Articles 226 and 32 of the Constitution.

The next case referred to in the notice is the case of *U.P. State Electricity Board Lucknow Vs. City Board, Mussoorie and Others*, . In this case, the City Board, as a licensee under the Indian Electricity Act, used to get supply of electric energy from the Electricity Board. When notification was issued by the Board u/s 46 of

the Act and tariff payable by the City Board was fixed, the licensee-City Board challenged the said notification on the ground that it was not in conformity with Section 46 of the Act. The Division Bench of the High Court held in favour of the City Board and declared the notification to be invalid. The Electricity Board went up in Special Leave to the Supreme Court. The Supreme Court came to the conclusion that the validity of the levy of additional charges could not be raised by the City Board under Article 226 of the Constitution in respect of the period prior to the filing of the writ petition. Therefore, between the period 1962 and March 23, 1968, when the writ petition was filed, no application could be filed under Article 226. Though the Supreme Court upheld the decision of the Division Bench in respect of the period subsequent to the filing of the writ petition, but so far as the period prior to the filing of the writ application, their Lordships of the Supreme Court held :-

"... We are of the view that in cases of this nature where there is little or no possibility of refunding the excess amount collected from the ultimate consumer to him and the granting of the relief to the petitioner would result in his unjust enrichment, the Court should not ordinarily direct any refund in exercise of its discretion under Article 226 of the Constitution...."

This observation of the Supreme Court in relation to the exercise of discretionary power under Article 226 of the Constitution will certainly not apply to the power of the Assistant Collector u/s 11B of the Act and, therefore, this decision is of no assistance to the revenue.

The next decision relied upon in the notice, Annexure-1, is the case of Amar Nath Om Prakash and Others Vs. State of Punjab and Others, . In that case the validity of Section 23A of the Punjab Agricultural Produce Markets Act, was assailed on the ground that the levy having been held to be invalid, the provision merely validates the levy. That contention was repelled by their Lordships of the Supreme Court on a finding that the said provision does not validate an illegal levy to be legal but merely prevents unjust enrichment of dealers who had already passed on the burden of fee to the next purchaser. We really fail to understand how this decision is of any assistance to the Assistant Collector, inasmuch as there has been no provision in the Act corresponding to Section 23A of the Punjab Agricultural Produce Markets Act authorising the Assistant Collector to refuse an application for refund. This decision, in our opinion, has absolutely no application to the facts and circumstances of the present case.

The other decision in the case of The Orient Paper Mills Ltd. Vs. The State of Orissa and Others, , deals with the validity of the amended provision of Section 14A of the Orissa Sales Tax Act. By the said amended provision, the legislature authorised refusal of refund and while upholding the validity of the amended provision, their Lordships of the Supreme Court applied the theory of unjust enrichment. In the absence of any such similar provision in the Customs Act, we fail to understand how the Assistant Collector can refuse an application for refund while exercising his power u/s 11B by taking recourse to the policy of unjust

enrichment.

7. Thus in our considered opinion none of the decisions referred to in the notice under Annexure-1 assists the revenue nor does it authorise the Assistant Collector, an authority under the statute, to refuse an application for refund while exercising power u/s 11B of the Act by invoking the principle of unjust enrichment. The learned Standing Counsel for the Central Government apart from the aforesaid decisions very much relies upon a Bench decision of this Court in the case of Mamta Drinks & Industries Ltd. and Anr. v. Union of India and Anr. 70 (1990) 70 CLT 423. In the said case, an application for refund filed u/s 11B of the Act was held to be barred by limitation. This Court held that the provision of Section 11B of the Act would not apply, but as the amount in question was paid under a mistake of law, provision of Section 72 of the Contract Act would apply and, therefore, an application for refund could be made within three years of the payment. Having held so, the Court refused to direct payment by way of refund by invoking the principle of unjust enrichment. It was held by their Lordships that in striking a balance between the illegal gain to the State and the illegal gain to the petitioners, the balance tilts in favour of the State as it would be in larger public interest to allow the money to remain with the State so that the same could be used in various welfare activities which the State undertakes. The observations of this Court in the aforesaid case no doubt will have full force when an assessee makes an application for refund in any superior Court like the High Court or the Supreme Court under Article 226 or Article 32 of the Constitution of India. But a distinction has to be borne in mind between the powers of the Assistant Collector when he exercises the said power under the framework of the statute, namely Section 11B of the Act and the powers of the higher Courts under Articles 226 and 32 of the Constitution. When the higher Court's jurisdiction is invoked under Article 226 or Article 32 of the Constitution, the said jurisdiction, is an equitable, discretionary jurisdiction. Therefore, a Court would be fully justified in refusing to exercise its jurisdiction by applying the principle of unjust enrichment of an assessee. But we are unable to persuade ourselves to agree with the submission of the learned Standing Counsel for the Central Government that a statutory authority whose powers are circumscribed by the provisions of a statute can also apply the said principle of unjust enrichment and refuse an application for refund, which is otherwise the necessary consequence of a levy being held to be illegal by the appellate or second appellate forum under the statute. It is too well settled that when authorities exercise their powers under the provisions of a statute, they can so exercise in accordance with the law and the limitations prescribed in the statute itself. They cannot go beyond the provisions of the statute and exercise a power which they do not possess under the statute. In our considered opinion, an Assistant Collector while exercising his power under Sub-section (2) of Section 11B of the Act cannot refuse to allow refund of an illegally collected levy by invoking the principle of unjust enrichment. We further hold that the issuance of a notice under Annexure-1 is wholly misconceived and without jurisdiction.

8. In the premises, as aforesaid, we quash Annexure-1 and direct the Assistant Collector to dispose of the petitioner's application filed u/s 11B of the Act within two months from the date of receipt of our order in accordance with law. The writ application is accordingly allowed. There will, however, be no order as to costs.

D.M. Patnaik, J.

I agree.