

(1989) 02 AHC CK 0023

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 1293 of 1988

Prestige Cops Private Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 24-02-1989

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 11B, 3, 35
Constitution of India, 1950 — Article 226, 265

Citation : (1991) 36 ECR 441

Hon'ble Judges : R.K. Gulati, J;Om Prakash, J

Bench : Division Bench

Judgement

R.K. Gulati, J.—M/s. Prestige Cops Pvt. Limited, hereinafter referred to as "the petitioner", in the relevant period was engaged, inter alia, in the business of manufacturing plastic bottom & top adopters and plastic sleeves, from duty paid ABS moulding powder which as per the petitioner were plastic goods covered by the entry "articles made of plastic all sorts" under tariff item 15A(2) of the Schedule to the Central Excises and Salt Act, 1944 (for short the Act). It was also the claim of the petitioner that the aforesaid goods were entitled to exemption from excise duty in view of the notification No. 68/71 dated 25th May, 1971 as amended by notification No. 198/78 dated 25th Nov., 1978. The classification list submitted by the petitioners was, however, not accepted by the respondent No. 2, the Assistant Collector, NOIDA, who held that goods manufactured by the petitioner were components of cops classifiable under tariff item No. 68 and were dutiable accordingly. In view of the decision of the Assistant Collector, during the period 25th July, 1981 to 28th January, 1982 the petitioner deposited excise duty amounting to Rs. 65,749.20 on plastic bottom & top adopters and Rs. 87,953.12 on plastic sleeves.

2. As the petitioner had cleared certain quantity of plastic sleeves in the month of May and June, 1981 before the approval of its classification list and without payment of excise duty, the petitioner was called upon by an order dated 11th October, 1984, passed by the Deputy Collector to pay Rs. 21,371.00 as excise

duty under Rule 9(2) read with Section 11A of the Act and Rs. 1,000.00 as penalty under Rule 173 of the Central Excise Rules, 1944. The amount of Rs. 22,371.00 was deposited by the petitioner on 7th November, 1985 under protest.

3. Being aggrieved, the petitioner filed two appeals, one against the decision about the classification and the other against the order dated 11th October, 1984. The appeal in respect of classification was allowed by the Collector (Appeals) relying upon a decision of the Gujarat High Court vide his order dated 5th March, 1985 with the following directions:?

In the result, the appeals succeed and accordingly allowed. The order of the Asstt. Collector, appealed against are set aside with the direction for the grant of relief to the appellants by way of concession under Notification No. 68/71 as amended to plastic bottom & top adopters and sleeves and the benefit under Notification No. 105/80 if the clearance is worked out after excluding those adopters fell below Rs. 30 lakhs....

4. It may be observed that a further appeal against the order of the Collector (Appeals) is pending before the Tribunal at the instance of the department.

5. With the view to avail the relief granted by the Collector (Appeals), the petitioner moved two applications before the Asstt. Collector. By the application dated 1st May, 1985 the petitioner asked for refund of Rs. 1,53,700.32 which consisted of two amounts, namely, Rs. 65,739.20 and Rs. 87,953.12 being the amounts paid as duty on bottom & top adopters and sleeves respectively. On 28th Jan., 1986 the petitioner filed another application for the refund of Rs. 22,371.80 which had been paid earlier in pursuance of the order of the Deputy Collector. The first of these two applications was allowed in part by the Asstt. Collector vide his order dated 12th March, 1988 by which he sanctioned the refund of Rs. 65,739.20 being the amount of excise duty paid by the petitioner on the clearances of bottom & top adopters. The petitioner's claim for the refund of Rs. 87,953.00 paid as duty on sleeves was, however, rejected by that very order with the following findings:?

I have gone through the facts of the case available on record. 1 find that the "plastic sleeves" has been included at a later stage in order-in-appeal of Collector (Appeals), Central Excise, New Delhi and in fact it did not form part of the original order-in-appeal. The party also failed to submit the "certified copy of the order" till date, in support of their defence. The duty paid on ABS Sleeves (Rs. 87,953.12) is inadmissible and liable for rejection.

6. Against the partial rejection aforesaid, the petitioner moved this Court through a writ petition which was disposed of at the admission stage without requiring the respondents to file any counter affidavit on the ground that the petitioner had an alternative statutory remedy u/s 35 of the Act to approach the Central Excise Collector (Appeals) against the impugned order passed by the Assistant Collector. However, a direction was issued by this Court that the appellate authority shall decide the appeal within 15 days from the date of filing a certified

copy of order passed by this Court, after hearing the parties and in accordance with law on the question that may be raised by the petitioner in the appeal including the question as to whether the petitioner was entitled to any interest on the amount which the petitioner may be found entitled to in the appeal.

7. At this stage, it may be stated that the application about the refund of Rs. 22,371.90 was also rejected by the Assistant Collector by an ex pane order dated 14th January, 1988. Observing as under:?

I have gone through the facts of the case and the material available on record. It is clear that the order in original of the learned Deputy Collector has not been set aside by any order in appeal and therefore there is absolutely no basis of a claim of refund. It may be stated that the orders of Collector (Appeals) are in persona in nature and cannot be said to be interim and thus in the absence of any specific order of the Collector (Appeals) setting aside the order in original dated 2.10.1984 party's refund claim cannot be entertained. In view of the above, I reject the refund claim amounting to Rs. 22,371.80 filed by M/s. Prestige Cops (P) Ltd., NOIDA on 24.1.1986 which was received in the department on 30.1.1986.

8. Against the two orders refusing refund on sleeves, the petitioner preferred two appeals before the Collector (Appeals), which were allowed by a common order dated 23rd May, 1988. As no refund was allowed in spite of the last mentioned appellate order the petitioner made representation to the Assistant Collector by its letter dated 21st May, 1988 and thereafter it sent three reminders, the last being on 14th July, 1988. It is also asserted that the Asstt. Collector was also approached personally on several occasions with the request to give effect to the orders passed by the Appellate authority but it brought no result as on each occasion the Asstt. Collector showed his helplessness to grant the refund as in his opinion there was no specific direction to allow the refund in the order dated 23rd May, 1988 passed by the Collector (Appeals). It is in these circumstances the present writ petition is filed seeking a direction and a writ of mandamus commanding the Asstt. Collector, Central Excise, NOIDA, respondent No. 2 to give effect to the orders passed by the Appellate authorities and to refund the disputed amounts. A further direction has also been sought for payment of interest including interest on the amount of Rs. 65,739.20 which has already been refunded to the petitioner.

9. At the admission stage the parties have exchanged their respective affidavits. The petition is ripe for hearing with the consent of the parties and in accordance with the Rules of this Court, we propose to decide this petition finally.

10. It is contended by Mr. Sunil Gupta, learned Counsel for the petitioner, that the respondent had no right to realise any amount on account of excise duty and the entire realisation was unauthorised. It is also urged that the realisation of duties from the petitioner was in contravention of Article 265 of the Constitution and the charging provisions contained in Section 3 of the Act. The submission is

that the respondents are bound to refund the disputed amount illegally collected from the petitioner and they have no jurisdiction to retain the money wrongfully realised from the petitioner.

11. On the other hand, the learned standing counsel appearing for the respondents urged that this Court has no jurisdiction to direct the refund of amounts claimed by the petitioner as it has statutory alternative remedy open to him under the Act. On merit it was urged that though the orders passed by the Assistant Collector withholding the relief have been set aside by the appellate authority, yet in the absence of any specific direction in the appellate order, the Asstt. Collector was well within his limit in refusing to grant the refund of duty paid by the petitioner on plastic sleeves. It was also urged that the typed copy of the appellate order dated 5th March, 1985 which was produced before the Asstt. Collector the word "plastic sleeves" was added by handwriting and the additions made were not initialled and signed by the authority concerned who had passed that order. In these circumstances, the refund was rightly refused to the petitioner in absence of the certified copy of the order dated 5th March, 1985 which the petitioner was required to file but it failed to do so.

12. Having given our careful consideration to the matter, we are of the opinion that none of the arguments raised for the respondents are liable to be sustained. The petitioners' appeal about classification was decided, as far back as 5th March, 1985 by the Appellate authority. Since then the petitioner made several representations before the Asstt. Collector, it also filed a writ petition earlier in this Court when it was relegated to alternative statutory remedy under the Act. In spite of the second round of litigation by way of appeal before the Collector (Appeals), where the petitioner succeeded, the matter has not progressed and the petitioner has been denied the relief on one pretext or the other. It appears to us somewhat unjust to expose the petitioner to a fresh round of litigation. It is by now well settled that no tax can be levied or collected except by an authority of law because of Article 265 of the Constitution. In a given case where any tax is levied or collected in contravention of the provision of Article 265, the writ court can direct the refund of tax or duty so collected. In the present case, the appellate authority has already held that the goods subjected to duty are classifiable under tariff item 15A(2) and further the petitioner was entitled to exemption from the excise duty under notification No. 68/71. The legality of that order is not a subject matter of consideration in the present writ petition. The limited question for consideration is whether the petitioners' claim for refund of duty on Plastic sleeves is being denied to it for good and sufficient grounds and whether such an action could be sustained in law.

13. Section 11B of the Acts deal with claim for refund of duty. Sub-section 3 of that section reads as under:

(3) Where as a result of any order passed in appeal or revision under this Act refund of any duty of excise becomes due to any person, the Assistant Collector of Central Excise may refund the amount to such person without his having to

make any claim in that behalf.

14. On a plain reading of the above provision it is evident that a statutory obligation has been cast on the Assistant Collector to refund the excise duty resulting from any order passed by the appellate or revisional authority. On the failure of the Assistant Collector to discharge his obligation as required by Section 11B(3) of the Act, the person affected thereby is entitled to seek redress from the appropriate forum including from the court of writ jurisdiction.

15. In *Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others*, the Supreme Court observed that Article 226 of the Constitution 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. It was further observed that where public bodies under colour of public laws recover people's money later discovered to be erroneous levies, the dharma, of the situation admits of no equivocation. There is no law of limitation especially for public bodies. On the virtue of returning what was wrongly recovered to whom it belongs: Nor is it palatable to our jurisprudence to turn down the prayer for high prerogative writs, on the negative plea of alternative remedy, since the root principle of law married to justice, is *ubi jus ibi remedium*.

16. In the particular and special circumstances of the case, we do not feel justified to reject this petition on the ground of alternative remedy. We are satisfied, this is a case which warrants our sympathetic consideration. Consequently, the first submission of the respondents based on the plea of alternative plea is rejected. On merits, as already noticed, two fold arguments were advanced. The contention that in absence of positive directions in the appellate order dated 23rd May, 1988 the petitioner is not entitled to the refund is misconceived and without any merit. The refund of the amounts flow to the petitioner as a direct result of the first order passed by the appellate authority, namely, the order dated 5th May, 1985 (sic). This position is beyond dispute as the Asstt. Collector in pursuance to that order had himself allowed the refund of Rs. 65,739.20 in respect of the duty collected on bottom & top adopters. The refund of duty on "plastic sleeves" was denied because of the doubts entertained by the Asstt. Collector to the effect that words "plastic sleeves" did not form part of the original order-in-appellate order dated 23rd May, 1988 where it was held that the view entertained by the Asstt. Collector was wholly unsustainable and in fact it was not a bona fide one. After these findings it was the plain duty of the Assistant Collector to give effect to the first appellate order in respect of "plastic sleeves" also.

17. During the course of hearing it was brought to our notice that against the order dated 23rd May, 1988 the department has gone in appeal before the Tribunal; where it has also moved an application praying for stay of the operation of the order appealed against and refund of the two amounts under our consideration. The stay application was rejected by the Tribunal with the

observation that it did not find any justification in the grant of stay. A certified copy of the order passed by the Tribunal on the stay application was filed before us which has been placed on record.

18. It is surprising that despite the Tribunal's order rejecting stay of refund, the Asstt. Collector should have withheld the relief to the petitioner. What is more surprising is that the said action of the Asstt. Commissioner (sic) is sought to be justified in these proceedings. Generally speaking, in Society Ruled by Law, taxes should be paid by the tax payers when they are due in accordance with law. Equally, as a corollary of the said proposition, it must follow that where moneys are paid to the State which the State has no legal right to receive, subject to any special provision of particular statute or facts or circumstances, the money so collected from the tax-payers should be refunded because no State has the right to receive or retain taxes or moneys realised from the tax-payers without the authority of law. The call of justice demands that in the matter of making refunds due to the subject, the public officers should act in similar alacrity and promptness as is often shown in collecting and recovering states. No acceptable justification was brought to our notice by the learned Standing Counsel for withholding the relief to the petitioner and the refund of amounts due to it under the appellate orders referred to earlier. The justification now pleaded that the refund could not be given in absence of specific directions in the second appellate order, is a make believe suggestion. Our feeling is that the petitioner has been deprived of the refund without any justification whatsoever. The petitioner has unnecessarily been made to run from one authority to another and to approach this Court. All this could have been avoided if the Asstt. Collector had seen reason and a little sense of responsibility in giving effect to the appellate orders which he was duty bound to do u/s 11B(3) of the Act. We accordingly, hold that the respondent No. 2 is not justified in withholding the refund due to petitioner on "plastic sleeves" on the ground that the same cannot be sanctioned as there is no direction to that effect in the second appellate order.

19. The second submission of the Standing Counsel, which has already been noticed, in not sanctioning the refund, is equally untenable. In paragraph 34 of the counter affidavit, it is averred, that the answering respondent is ready to refund the amount claimed by the petitioner or as directed by the Collector (Appeals) provided the petitioner files a certified copy of the order dated 5th March, 1985 passed by the Collector (Appeals) to establish that the Appellate Authority did actually pass the order granting exemption on plastic sleeves also. It is not disputed that the Department had gone in further appeal to the Tribunal against the order of Collector (Appeals). In the reliefs claimed before the Tribunal, it has specifically been mentioned that the Collector (Appeals)'s findings that A.B.S. Sleeves are classifiable under Tariff Item 15A(2) and exempt from duty under Notification No. 68/71, is unsustainable and the correct classification of those goods is under Tariff Item 68. It is for this reason that in the order dated 23rd May, 1988, the Collector (Appeals) has held that the doubts raised by the Asstt. Collector about addition of words "plastic sleeves", as not a

part of the order-in-appeal, do not have any basis and in fact the said doubts are not bonafide. After the findings in the order dated 23rd May, 1988, the persistence of the respondents not to sanction the refund unless a certified copy of the order dated 3rd May, 1985 is filed by the petitioner is totally unwarranted and cannot be sustained.

20. Apart from the two grounds discussed above no other ground or reason was placed before us which may justify the non-grant of refunds to the petitioner. As the grounds on which the disputed refunds were not sanctioned have not been upheld by us, we direct the Asstt. Collector, NOIDA, respondent No. 2 to sanction and refund the amounts paid as excise duty by the petitioner on the clearances on "plastic sleeves" in pursuance to the order of the Collector (Appeals) dated 5th March, 1985 and 23rd May, 1988.

21. This leads us to examine the question whether the petitioner is entitled to payment of any interest. In this connection, it is pertinent to note that there is no provision in the Act, and none was brought to our notice, providing for payment of interest when the tax or duty is recovered illegally or where as a result of an order made in appeal or revision, a refund becomes due to the Assessee or any other person on account of tax or duty found to have been paid in excess. Equally, no statutory provision was shown to us authorising an excise authority to withhold the refund during the pendency of further appeal against the order of the First Appellate Authority, granting relief.

22. It was contended that the petitioner is entitled to the payment of interest as the petitioner has been deprived of the use and utilisation of the amounts which were illegally and unauthorized realised from the petitioner as excise duty. Further the Deptt. was under a legal obligation to refund the disputed amounts which have been detained without any justification whatsoever and this conduct of the department entitles the petitioner for grant of interest by this Court in these proceedings. In support of this submission, the Ld. counsel for the petitioner brought to our notice several decisions of various High Courts. The ratio decidendi of these cases is that where the collection made by the Revenue is unauthorised, without an authority of law, on the refund thereof, the payment of interest is a necessary consequence to the person entitled to the refund. The principle underlying in such decisions is that the payment of interest is a compensation for the use or retention of another's money. To put it differently, interest is a sort of compensation which is paid to the other party because the latter was deprived of the legitimate use of the amount which rightfully belonged to him. Explaining the distinction between tax, penalty, and interest in *Associated Cement Company Limited Vs. Commercial Tax Officer, Kota and Others*, the Supreme Court observed as under:?

we are concerned in this case with liability of the assessee to pay interest on the amount of tax which had remained unpaid. Taxes become payable by an assessee by virtue of charging provision in a taxing statute. Penalty ordinarily becomes payable when it is found that an assessee has willfully violated any of

the provisions of taxing statute. Interest is ordinarily claimed from an assessee who has withheld payment of any tax payable by him and it is always calculated at the prescribed rate on the basis of actual amount of tax withheld and the extent of delay in paying it. It may not be wrong to say that such interest is compensatory in character and not penal.

Thus, liability to pay interest arises if the amount is withheld or not paid back illegally and in violation of any law. Bearing in mind what has been said above, we may now proceed to decide the question of interest in the instant case.

23. The petitioner was subjected to excise duty because its classification list was modified by the Asstt. Collector and in pursuance thereto, the amounts of duties of which the refund is claimed, were paid by the petitioner. The collection, therefore, was not bad initially. Where the question of liability is not free from difficulty and is dependent on the construction of any provision or entry it cannot be said that the Revenue withheld the amount without any authority of law or mala fide. With the coming into being of the order of the appellate authority the original order of the Asstt. Collector disappeared and lost its identity. The order of the Asstt. Collector merged in the order of the First Appellate Authority. In civil law where a decree is confirmed, varied or reversed in appeal, the original decree gets merged in the appellate decree and it is the appellate decree that subsists and is operative and capable of enforcement. In our opinion, the same principle should govern the proceedings under the taxation law. The appellate order having superseded the original order of the Asstt. Collector, the notice of demand under that order became ineffective and the amount paid in pursuance of the original order which was set aside or cancelled became refundable. Such refund due under the appellate order can be withheld if any appellate or revisional authority stays the operation of the appellate order in appropriate proceedings. Such refund can also be withheld if there is statutory provision enabling the initial authority to do so. Thus, on the facts of the present case, the refund if any became due to the petitioner for the first time when the appellate order did. 5th March, 1985 was passed by the appellate Controller (sic) so far the amounts of Rs. 65,793.20 p. and 87,953.12 p. are concerned. The question of payment of any interest from the date of deposit of those amounts to the date of the appellate order does not arise.

24. The next question is whether the petitioner is entitled to any interest for the period subsequent to the passing of the appellate order dated 5th March, 1985. As already observed, Section 11B(3) of the Act places a statutory obligation on the Asstt. Collector to refund any duty of excise resulting from the appellate order without making of any claim in that behalf by the person concerned. Refund of such duty cannot be refused without sufficient and valid justification acceptable in a Court of law. Whether such justification exists or not would depend on the facts of each case. In such cases it is the bonafide of the authority entrusted to make refund which shall have to be examined in deciding the question for grant of interest.

25. In paragraph 32 of the writ petition a pointed assertion had been made that the amount of Rs. 65,739.20 p. was refunded only as late as 20th April, 1988 and the remaining two amounts of Rs. 87,953/- & 22,371/- have not been refunded in spite of the Collector (Appeals)'s order. It is also averred that the petitioner needed the aforesaid amount of investment in its business and these amounts were retained illegally without justification. In paragraphs 33 and 34 it is further averred that the aforesaid three amounts belonged to the petitioner for the last several years and the petitioner has been deprived of opportunity of making profit by utilising the same to its own benefit, and therefore, the petitioner is entitled to payment of interest In the counter affidavit with regard to paragraph 32 all that has been said, is:

that contents of paragraph 32 of the writ petition needs no reply.

To paragraph 33 and 34 the reply given is that the appellate order has been complied with to the extent that part of the refund claimed has already been given to the petitioner and the other refunds claimed by the petitioner were not sanctioned because of the doubts regarding word "plastic sleeves" added by handwriting in the appellate order did. 5th March, 1985, which was not initialled. Further there is no provision for payment of interest in the Act on the refunds claimed.

26. The application for the refund of the first two amounts was made by the petitioner on 1st May, 1985. No justification has been given in the counter affidavit for withholding the refund of Rs. 65,739.20 for a period of nearly three years when it was refunded on 20th April, 1988. The justification pleaded for not refunding the amount of Rs. 87,953/- is not acceptable because of the finding of the appellate authority in its order did. 23rd May, 1985, namely, that the Asstt. Collector had no basis for his doubts, about the relief pertaining to "plastic sleeves" and the doubts entertained by the Asstt. Collector were not bona fide.

27. In the face of the findings of non-bonafide and in the face of the conduct of the Department in not returning the refunds to which the petitioner was entitled within a reasonable time, we are of the opinion that the petitioner is entitled to grant of interest on the aforesaid two amounts. The petitioner was entitled to refund of the aforesaid two amounts as a result of the order did. 5th March, 1985, allowing a margin for the period to give effect to the appellate order, we direct that the petitioner shall be entitled to simple interest on the amounts of Rs. 65,735.10 from 1st May, 1986 to 20th April, 1988 at the rate of 10% per annum and to simple interest on the same rate on the amount of Rs. 87,953/- or such other amount which is found refundable in pursuance to the appellate order dated 5th March, 1985 from 1st May, 1986 to the date, the said refund is made.

28. So far as the amount of Rs. 22,371.50p. is concerned, it was deposited in consequence to the order of the Deputy Collector, dated 12th October, 1984 against which petitioner's appeal is still pending. The application for refund was rejected by the Asstt. Collector vide his order dated 14th of January, 1988 taking

that as one of the grounds. He held that unless the order of the Deputy Collector is set aside, the claim for refund cannot be entertained. It is true that against the order rejecting refund an appeal filed by the petitioner was allowed by the order dated 23rd May, 1988 but in the above circumstances, it is not possible for us to hold that the Asstt. Collector had no reasonable ground to withhold the refund of the amount of Rs. 22,371.80 p. till the order in appeal was made. The petitioner, is therefore not entitled to any interest on the amount of Rs. 22,371.80 p.

29. In the result, the writ petition succeeds in part. The Asstt. Collector, NOIDA (Respondent No. 2) is directed to refund the amounts of Rs. 87,953.12p. and Rs. 22,371.80 or such other amounts as the petitioner may be found entitled in pursuance to the two appellate orders passed by the Collector (Appeals). The petitioner shall also be entitled to the interest as indicated earlier in this order. These amounts shall be paid to the petitioner within a period of six weeks from the date a certified copy of this order is filed before the respondent No. 2.

30. A copy of this order shall be handed over to the parties on payment of usual charges within a period of ten days.