

(1987) 09 BOM CK 0029
In the Bombay High Court
Case No : First Appeal No. 598 of 1982

R. Parthasarathy, Asst. Collector of Central Excise and another	APPELLANT
Vs	
Dipsi Chemicals Pvt. Ltd. and another	RESPONDENT

Date of Decision : 15-09-1987

Acts Referred:

Income Tax Act, 1961 — Section 244

Citation : (1988) 15 ECC 416 : (1988) 173 ITR 497 : (1987) MhLj 900

Hon'ble Judges : S.W. Puranik, J;R.R. Jahagirdar, J

Bench : Division Bench

Judgement

R.A. Jahagirdar, J.—This is an appeal preferred by the Assistant Collector of Central Excise, Kalyan Division, and the Union of India against the decree passed by the learned Civil Judge, Senior Division, Alibag, in Special Civil Suit No. 21 of 1980. They will hereinafter be referred to as "the defendants". The respondents in this appeal were the plaintiffs in the said suit. Plaintiff No. 1 is a limited company, while plaintiff No. 2 is the managing director of the said company.

2. The plaintiffs are engaged in the manufacture of what are called padding solutions. Between July 5, 1972, and March 31, 1974, the defendants called upon the plaintiffs to pay and the plaintiffs did pay a sum of Rs. 1,68,212.78 by way of excise duty on the goods manufactured by them, namely, padding solutions. Subsequently, in April, 1977, the Excise Collectorate issued a trade notice bearing No. 82 of 1977, clarifying that the padding solutions manufactured by the plaintiffs were not subject to excise duty under the Central Excises and Salt Act, 1944. Since the plaintiffs had paid and the defendants had demanded the excise duty, on the basis that the padding solutions manufactured by the plaintiffs were liable to excise duty, it was obvious that the payment had been demanded and made under a mistake of law.

3. The plaintiffs made an application for refunding the amount which they had paid under a mistake. The application was made under rule 11 of the Central Excise Rules, 1944, but the same was rejected by defendant No. 1 on the ground

that it had been made beyond the period of six months which is the period of limitation prescribed for such an application. Thereafter, the plaintiffs gave a notice u/s 80 of the CPC and after the expiry of the period of the said notice, they filed the present suit.

4. The defence to the claim in the suit was that the plaintiffs had not paid the amount under protest and, therefore, they could not claim the amount by way of a suit. It was also contended that if the amount was ordered to be paid to the plaintiffs, then the plaintiffs would be unjustly enriched because, according to the defendants, the plaintiffs themselves had collected the amount which had been paid to the Excise Department and if the amount was ordered to be repaid to the plaintiffs, the latter will retain the same without there being any obligation on them to refund the same to the persons who originally had paid the amount. It was also contended on behalf of the defendants that the refund could not be claimed outside the provisions of the Central Excises and Salt Act, 1944. Therefore, the civil court had no jurisdiction to try the suit and to give relief to the plaintiffs.

5. The learned trial judge framed the necessary issues arising out of the pleadings of the parties. He held, by answering issue No. 1, that the plaintiffs proved that during the period from July 5, 1972, to March 31, 1974, the padding solutions were not liable to excise duty at all. The issue as to whether the plaintiffs had paid the amount was naturally answered in the affirmative because that was the admitted position, but the learned trial judge also held that the payment had been made under a mistake of law which, we think, was also an admitted position. Having held that the plaintiffs had recovered the excise duty from their customers, the learned trial judge also held that despite this position, the defendants are in law bound to refund the amount to the plaintiffs. On the question of bar of limitation raised by the defendants, the issue was answered by holding that the suit was not barred by limitation if one takes into account the period of the notice u/s 80 of the Code of Civil Procedure. The learned trial judge also held that the claim was not barred by rule 11 of the Central Excise Rules. The inevitable result was the passing of the decree for the full amount which the learned trial judge did by his judgment and order dated February 26, 1982. It is this decree that is the subject-matter of challenge in this appeal.

6. Mr. R. V. Desai, learned advocate appearing for the appellants - defendants, has raised a contention, which we would regard as the main contention raised on behalf of the defendants, that the trial court should not have decreed the amount because by doing so, it will lead to unjust enrichment of the plaintiffs who have collected the amount from their customers and who are not under an obligation to return the same to their customers. As far as this Bench is concerned, the denial of the refund of duty collected by the taxing department of the Government cannot be upheld on the ground of what is now known as the doctrine of unjust enrichment. We thought that this is well-settled as far as this court is concerned and as far as this Bench of two judges is concerned. Since the

point has been argued with some persistence and vehemence, it has become necessary to refer to some of the decisions in this regard. In *Parle Products Ltd. and another Vs. Union of India and another*, , by one of us Jahagirdar J., the entire law on the subject till the date of the decision, which was July 21, 1986, has been reviewed. In that judgment, apart from the judgments of this court, the judgments of the Supreme Court on the same question have been noticed and it was held that the amount by way of excise duty, which is collected without the authority of law, must be refunded to the person from whom the same is collected. The doctrine of unjust enrichment cannot be put up as a defence to a claim made on behalf of a citizen or a company against the State which has collected the tax without the authority of law.

7. One recent judgment of the Supreme Court was relied upon by learned counsel for the Union of India in the case of *Parle Products Ltd. and another Vs. Union of India and another*, for the proposition that the doctrine of unjust enrichment has been revived despite the long line of decisions which have been taken note of in the judgment in the case of *Parle Products Ltd. and another Vs. Union of India and another*, . The judgment of the Supreme Court, which was relied upon, was *State of Madhya Pradesh Vs. Vyankatlal and Another*, . That judgment was examined. as this court was naturally bound to examine in details, and, ultimately, it was held in the *Parle Products Ltd. and another Vs. Union of India and another*, as follows ([1988] 15 ECC 353, 369) :

"I am not convinced that the judgment in *State of Madhya Pradesh Vs. Vyankatlal and Another*, , revives the theory of unjust enrichment which has been consistently rejected in all the cases where claims for refund of the amounts paid by way of excise duty under a mistake of law had been upheld both by the Supreme Court and by this court."

8. It is true that the view taken in the case of *Parle Products Ltd. and another Vs. Union of India and another*, was the view of a single judge, but the view taken in that judgment has been subsequently approved by a Division Bench of this court in *Rapidur (India) Ltd. v. Union of India* (Writ Petition No. 161 of 1985) decided on 16th of October, 1986, by Dr. Couto J. sitting with Mehta J., *Rapidur (India) Ltd. Vs. Union of India and another*, . The law laid down by the Supreme Court in *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, , and naturally followed consistently by this court, was noticed and followed by the Division Bench in *Rapidur (India) Ltd. Vs. Union of India and another*, . An argument similar to the one which was advanced before this court in the case of *Parle Products Ltd. and another Vs. Union of India and another*, was advanced before the Division Bench in *Rapidur (India) Ltd. Vs. Union of India and another*, . Indeed, it was argued before the Division Bench that the view taken by this court in the case of *Parle Products Ltd. and another Vs. Union of India and another*, did not seem to be correct. The Division Bench examined this submission carefully and rejected the same. The Division Bench upheld the interpretation of the judgment of the Supreme Court in *State of Madhya Pradesh Vs. Vyankatlal and*

Another, , made by this court in the case of Parle Products Ltd. and another Vs. Union of India and another, , not only on the basis of the reasons given in the judgment in the case of Parle Products Ltd. and another Vs. Union of India and another, but also, as we read the judgment of the Division Bench, on the basis that the distinction between a statute or a statutory order dealing with pricing is on a ground different from the ground on which a statute dealing with taxation stands. In the case of the latter, the doctrine of unjust enrichment could not be invoked.

9. Thus we must take it as settled, as far as this court is concerned or, at least, as far as a Division Bench of this court is concerned, that on the basis of the doctrine of unjust enrichment, the court cannot refuse to direct the Government to refund the amounts which the Government has collected without the authority of law. We are sitting as a Division Bench of two judges. The obvious course for us is to follow the law which has been propounded by another Division Bench of co-ordinate strength. The law of precedents, so far as judges of the High Courts are concerned, has been pointed out with sufficient clarity and precision by the Supreme Court in *Tribhuvandas Purshottamdas Thakkar v. Ratilal Motilal Patel* (70 Bom LR 73). There is nothing in the oath of office which a judge takes that would warrant a judge in ignoring the rule relating to the binding nature of precedents which is uniformly followed. It is only when a Division Bench finds that there are conflicting decisions of the same court or that there are decisions of other High Courts in India which are strongly persuasive and take a view different from the view which prevails in their court or that a question of law of importance arises in the trial of a case, that the Bench may pass an order for placing the papers before the Chief Justice of the High Court with a request to form a Special Bench or a Full Bench to hear and dispose of the case or the questions raised in the case.

10. In *Ram Jivan Vs. Smt. Phoola (Dead) by Lrs. and Others*, , the Supreme Court pointed out the salutary rule, namely, the rule of judicial precedents. That rule was aimed at achieving finality and homogeneity of judgments. In *Ram Jivan Vs. Smt. Phoola (Dead) by Lrs. and Others*, , it was held that whether a Division Bench decision is given in an appeal from an original suit or in a writ petition, the ratio is binding on the subsequent Division Bench and the subsequent Division Bench cannot refuse to follow the same because it was hearing a writ petition and the decision of the earlier Division Bench was given in an appeal from an original suit. This is sufficient authority, if one was needed, that one Division Bench must follow as a rule the decision given by another Division Bench of the same High Court, though the two Division Benches were deciding the question in different capacities. An interpretation (and equally a misinterpretation) of a finding decision of the Supreme Court is itself binding subsequently on co-ordinate courts and can be corrected only by a higher court. This has been pointed out by the Division Bench of this court in *Panjumal Hassomal Advani v. Harpal Singh Abnashi Singh* (76 Bom LR 729). In that case, it was held that a co-ordinate court cannot refuse to follow an earlier decision by opining that in its

view the earlier decision had wrongly understood or improperly applied a decision of a higher court. In other words, an interpretation of a judgment of the Supreme Court made by one Division Bench of a High Court cannot be ignored or brushed aside by another Division Bench on the ground that that interpretation is not correct. Speaking in another context, Mr. Justice Krishna Iyer in *Ambika Prasad v. State of U. P.* : [1980]3SCR1159 , pointed out the importance of following earlier precedents. In his characteristic language, Krishna Iyer J. pointed out as follows (p. 1764) :

"Every new discovery or argumentative novelty cannot undo or compel reconsideration of a binding precedent. In this view, other submissions sparkling with creative ingenuity and presented with high-pressure advocacy, cannot persuade us to reopen what was laid down for the guidance of the nation as a solemn proposition by the epic fundamental rights case."

11. If the precedents which are established are allowed to be too easily reconsidered or disturbed, it "may well be a kind of judicial destabilisation of State action too dangerous to be indulged in save where national crisis of great moment to the life, liberty and safety of this country and its millions are at stake, or the basic direction of the nation itself is in peril of a shake-up. " Referring to Salmond's Jurisprudence (11th Edition), the learned judge reminded that it was wise to remember that fatal flaws silenced by earlier rulings cannot survive after death because a decision does not lose its authority merely because it was badly argued, inadequately considered and fallaciously reasoned.

12. We are, therefore, justified in proceeding on the basis that a decision of a Division Bench of this court, which has not only considered all the earlier judgments of this court but also the judgments of the Supreme Court, is binding upon another Division Bench of this court. In *Union of India (UOI) and Others Vs. Godfrey Philips India Ltd.*, the obligation for a one-Bench to follow a judgment of another Bench of coordinate strength even in the case of the Supreme Court was pointed out in paragraph 12 of the judgment, wherein it has been stated as follows (p. 815 of AIR 1986) :

"We find it difficult to understand how a Bench of two judges in *Jit Ram Shiv Kumar and Others Vs. State of Haryana and Others*, , could possibly overturn or disagree with what was said by another Bench of two judges in *Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others*, ."

13. In parenthesis, it may be stated that in a later judgment of the Supreme Court, namely, in *Gujarat State Financial Corporation Vs. Lotus Hotels Pvt. Ltd.*, , the apparent conflict between *Jit Ram Shiv Kumar and Others Vs. State of Haryana and Others*, and *Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others*, has been reconciled.

14. In an exceptional case, where a Division Bench of a court gives a decision without noticing a very important provision of law which would have affected its decision, or gives a decision failing to follow a binding authority, a subsequent

Division Bench may consider that the earlier decision is not binding upon it. In *Mamleshwar Prasad and Another Vs. Kanhaiya Lal (Dead) through L. Rs.*, it was stated that the importance of certainty of the law, consistency of rulings and comity of courts - all flowering from the same principle - converge to the conclusion that a decision once rendered must later bind like cases. However, in exceptional cases, where, by obvious inadvertency or oversight, a judgment fails to notice a plain statutory provision or obligatory authority running contrary to the reasoning and result reached, it may not have the sway of binding precedents. It should be a glaring case, an obtrusive omission. What was pointed out in *Mamleshwar Prasad and Another Vs. Kanhaiya Lal (Dead) through L. Rs.*, is in effect a case of a judgment delivered per incuriam. The concept of a judgment per incuriam has been explained in *Salmond's Jurisprudence* (12th Edition), page 148, et seq. It is based upon a judgment in *Cassell & Co. Ltd. v. Broome* [1972] 1 All ER 801 .

15. In the judgments in *Parle Products Ltd. and another Vs. Union of India and another*, and *Rapidur (India) Ltd. Vs. Union of India and another*, all the judgments on the question of unjust enrichment have been referred to and examined. Those judgments themselves have been, in turn, referred to and have been examined in detail in one or the other judgments culminating with the judgment of the Division Bench in the case of *Rapidur (India) Ltd. Vs. Union of India and another*. It is, therefore, not possible, as has been suggested, that some judgment of this court or the Supreme Court takes a contrary view and, therefore, this Division Bench is not bound by the judgment of the Division Bench in *Rapidur (India) Ltd. Vs. Union of India and another*.

16. However, a somewhat hesitant argument was advanced on behalf of the appellants on the basis of a difference of opinion between Shah J. and Kolse-Patil J. in their judgments delivered in *Associated Bearing Co. Ltd. v. Union of India and Garware Marine Industries Ltd. v. Union of India* (Writ Petitions Nos. 679 of 1979 and 3007 of 1980). In his judgment delivered between 15th and 19th of December, 1986, a judgment obviously delivered in the open court, Shah J. felt himself bound by the decision given by the Division Bench in the case of *Rapidur (India) Ltd. Vs. Union of India and another*. No doubt, he has examined the arguments on behalf of the Union of India and some of the earlier judgments also.

17. Kolse-Patil J., in his judgment pronounced on June 16, 1987 differed from the view taken by Shah J. He subjected the entire case law to a fresh survey and re-examination. Kolse-Patil J. referred to the judgments of other High Courts and he was of the opinion that the High Court, at any rate, while exercising its extraordinary writ jurisdiction, can refuse to grant any relief to those who had recovered the amounts on account of cess, levy, duty, etc., from others and to mould relief best suited to the circumstances of the particular case. The learned judge also examined the submission which was apparently made, based upon section 72 of the Indian Contract Act, which is as follows :

"A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it." Kolse-Patil J. was of the opinion that the petitioners in Associated Bearing Co.'s case, WP No. 679 of 1979, had not paid the amount to the Union of India from whom they were claiming. It was either the purchasers from them or the ultimate consumers who had paid it. According to Kolse-Patil J., the provisions of section 72 will not apply to cases of claims for refund of amounts collected by the Union of India without the authority of law, though the same have been paid immediately by the manufacturers to the Union of India. After carefully reading the judgment of Kolse-Patil J., we notice that his opinion consists of two parts. He was of the opinion that the judgments of the Supreme Court support the view contrary to the one taken by this court in all the earlier decisions. The other part of his opinion is that several judgments of this court, including the latest one in Rapidur (India) Ltd. Vs. Union of India and another, , "cannot have the effect of setting aside the view of the Division Bench of this court in the earlier case, viz., Ogale Glass Works", (79 Bom LR 37). Proceeding further, Kolse-Patil J. said :

"In fact, the aforesaid decisions unfortunately have not followed the salutary principle that a decision of the Division Bench of this court given earlier is binding. Hence, these decisions will have to be ignored."

18. The difference between Shah J. and Kolse-Patil J. will naturally be resolved in accordance with the provisions of section 98 of the Code of Civil Procedure. But, on the question of law, it should be, however, clearly stated that the judgments of this court, including the judgments of the Division Benches of this court, the last one being the case of Rapidur (India) Ltd. Vs. Union of India and another, , have necessarily examined every judgment of the Supreme Court to which Kolse-Patil J. has made a reference and have taken the view that the doctrine of unjust enrichment cannot be invoked so as to defeat the claim of an assessee from whom the State has collected duty without the authority of law. If this is so, we would think that the view expressed by the Division Bench of this court, after examining and interpreting the judgments of the Supreme Court, would be binding upon another Division Bench like ours. (See Panjumaal Hassomal Advani v. Harpal Singh Abnashi Singh (76 Bom LR 729)).

19. Kolse-Patil J. also thought that the other judgments of the Division Benches of this court have ignored the binding nature of the judgment in the case of Ogale Glass Works (79 Bom LR 37). It is not necessary for us, and, indeed, it is not open to us at this stage, to go into the correctness or otherwise, of the actual effect of the two judgments delivered by two judges constituting the Division Bench in the case, Ogale Glass Works (79 Bom LR 37). It is not necessary because the legal effect of the judgments in Ogale Glass Works (79 Bom LR 37) has been examined by a subsequent Division Bench of this court in Maharashtra Vegetable Products Pvt. Ltd. v. Union of India (special civil Application No. 5106 of 1976, decided on 20th/21st of June 1980 [1981] ELT 468). The Division Bench in the case of Maharashtra Vegetable Products Pvt. Ltd. [1981] ELT 468

examined the judgments of this court in Ogale Glass Works case (79 Bom LR 37), and also the judgment of the Supreme Court in the case of D. Cawasji and Co. and Others Vs. State of Mysore and Another, , and found that certain observations regarding unjust enrichment to be found in the judgment of Mukhi J. in the case of Ogale Glass Works (79 Bom LR 37), were not supportable by what has been said by the Supreme Court in D. Cawasji and Co. and Others Vs. State of Mysore and Another, . The correct legal effect of the judgment of the Supreme Court in D. Cawasji and Co. and Others Vs. State of Mysore and Another, , was pointed out in the case of Maharashtra Vegetable Products Pvt. Ltd. [1981] ELT 468 . It is not in dispute that thereafter, both single judges and Division Benches of this court have followed, as they are bound to follow, the law laid down by the Supreme Court in the case of D. Cawasji and Co. and Others Vs. State of Mysore and Another, , and the law explained in the case of Maharashtra Vegetable Products Pvt. Ltd. [1981] ELT 468, the judgment in the latter case being of a Division Bench.

20. It has also been brought to our notice by Mr. Taraporwalla, appearing for the respondents, that another Division Bench of this court (Bharucha and Tipnis JJ.) have rejected again the doctrine of unjust enrichment in S. S. Miranda Ltd. v. Union of India (Appeal No. 401 of 1985 in Writ Petition No. 1179 of 1980, decided on August, 27, 1987 - [1988] 14 ECR 166). In this judgment, the learned judges referred to the judgment of the Division Bench of this court in the case of Rapidur (India) Ltd. Vs. Union of India and another, . The total effect is, therefore, as far as this court is concerned, or at any rate, as far as the Division Bench is concerned, that the doctrine of unjust enrichment is buried ten fathoms deep.

21. It may not be out of place to briefly mention the underlying principle on which the courts grant relief to persons from whom taxes have been recovered by the State without the authority of law. The State cannot levy any tax without the authority of law. When, however, the State or the Departments of the State make a demand upon a manufacturer asking the latter to pay excise duty on a particular product and, at a particular rate, the latter has two options. If he does not agree with the demand, he can challenge the same by adopting appropriate proceedings. If, however, he has no dispute in the light of the law understood by him about the nature and extent of the demand made on him, he complies with the demand. If it is later discovered that there was a mistake of law in the demand and the payment of the duty, then, naturally he is entitled to ask the person who has collected the duty without the authority of law to refund the same. In such a case, one cannot see how the person or the authority which has collected the duty without the authority of law can contend that the amount will not be refunded to the person from whom the same is collected. It is not as if that the person who has collected from his customers and paid it to the State has done so willingly. He has paid the amount of excise duty to the State because he is under a compulsion to do so. If he refuses, penal consequences would follow. It is, therefore, unintelligible as to how the State can contend that though it has

collected the duty illegally or without the authority of law, it will not refund the same to the person, from whom it has collected, and who has paid under the compulsion of law, on the ground that the amount, if refunded, will be retained by that person.

22. It has been brought quite pertinently to our notice by Mr. Taraporwalla that the question of using the discretion while exercising the jurisdiction under article 226 of the Constitution of India does not arise in the present case, because the plaintiffs have filed a suit and the civil court has no discretion but to pass a decree if the claim of the plaintiffs is founded in law. That the excise duty collected by the defendants was without the authority of law is now clearly established, and, indeed, it is not disputed. If this is so, there could be no justification for the civil court to refuse to pass a decree in favour of the plaintiffs. The plaintiffs are not seeking any equitable relief in this case, nor is the civil court exercising any equitable jurisdiction. The plaintiffs were forced by the defendants to part with monies without the authority of law and, therefore, the defendants are in law bound to return the same to the plaintiffs. This is apart from the clear language of section 72 of the Indian Contract Act.

23. An application for the amendment of the written statement has been presented on behalf of the appellants before us. In this application, it has been stated that through inadvertence the question of jurisdiction of the civil court, namely, the bar provided in section 40 of the Central Excises and Salt Act, 1944, has not been raised in the memo of appeal and in the written statement. It has been, therefore, prayed by this application that "this hon'ble court be pleased to permit the petitioners to amend the memo of appeal as per Schedule annexed to the present Civil Application". The Schedule says, in effect, that in view of the provisions contained in section 40 of the Central Excises and Salt Act, 1944, the civil court had no jurisdiction to entertain the suit or to pass the decree. It has been urged that the remedy, if any, which could have been availed of by the plaintiffs, could have been within the four corners of the Excises Act, which is a code by itself. It is unfortunate that in the year 1987, the appellants should have thought it fit to present such an application. Apart from the questions arising under the Central Excises and Salt Act, if anything is done which is not warranted by law and which is itself without jurisdiction, it can obviously be challenged in the civil court. If authority is needed, it is in *Union of India v. Mansigka Industries Private Ltd.* (77 Bom LR 663), wherein it has been pointed out that section 40 of the Central Excises and Salt Act merely provides for immunity or protection against claims of damages to the Government itself or any of its officers for acts done in good faith under the Act; the section does not deal with the question of collection of illegal duty and/or its recovery or refund. The Act provides for the imposition of duty on excisable goods. Therefore, when an attempt is made to levy duty on excisable goods which are not excisable, then such a levy would fall outside the law and would be illegal. The necessary corollary of this decision is that if a duty is collected without the authority of law, then the amount of duty is naturally recoverable in a civil court.

24. In the result, this appeal must fail and is accordingly dismissed with costs.

25. The decretal amount deposited by the appellants has already been withdrawn by the respondents by furnishing a bank guarantee to refund the same in case the respondents fail. Since, however, they have succeeded here as well as in the court below, the natural order that we would pass is to discharge the bank guarantee. However, Mr. Desai says that the bank guarantee should be kept alive for at least eight weeks. After hearing Mr. Taraporwalla for the respondents, we direct that the bank guarantee given by the respondents shall stand discharged with effect from November 23, 1987.