

(1988) 07 BOM CK 0049

In the Bombay High Court

Case No : Writ Petition No. 2204 of 1988

Roplas (India) Limited and Another

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 06-07-1988

Acts Referred:

Constitution of India, 1950 — Article 226
Contract Act, 1872 — Section 72

Citation : AIR 1989 Bom 183 : (1989) 2 BomCR 237 : (1988) 90 BOMLR 570 : (1989) MhLj 920

Hon'ble Judges : Sawant, J;Kantharia, J

Bench : Division Bench

Advocate : F.H. Talyarkhan, instructed by Little and Co, for the Appellant; R.V. Desai and C.K. Jaisinghani, for the Respondent

Judgement

Sawant, J.—the 1st Petitioners are a company engaged, inter alia, in the manufacture of Fibreglass Reinforced Plastic (F.R.P.) bodies for motor vehicles,. According to them, the said F.R.P. bodies did not fall within any of the specific entries in the First Schedule to the Central excises and Salt Act , 1944 (hereinafter referred as the Act) and therefore fell for classification under the residuary entry, namely, Item No. 68 of the Schedule which provides for all other goods.

By Notification No. 118/75 dt. April 30, 1975, the 1st Respondent-Union of India exempted goods fallings under the said item No. 68 manufactured in the factory and intended for use in the factory in which they were manufactured, from the whole of the duty of excise leviabale thereon. Since the F.R.P. bodies manufactured by the Petitioners were fitted to motor vehicles within the premises of the Petitioners factory, although according to the Petitioners the said F.R.P. bodies fell under item 68,they paid excise duty thereon all the full rate of duty payable under that entry and did not avail of the exemption under the aforesaid Notification because they were under the bona fide belief that the notification applied only to goods which were used up in their factory.

2. However, by a judgment dt. Dec. 10, 1985 in Writ Petition No. 382 of 1981 Indian Hume Pipe co. Ltd v. Union of India a learned single Judge of this Court held that the exemption under the Notification would apply to all goods manufactured in a factory when they are intended to be used in the factory in which they are manufactured and that there was nothing in the Notification to indicate that the use must be such as could not be repeated or that it must be such as results in the loss of further utility of the article. According to the Petitioners they learnt of the judgment in July 1986 when it was reported in 19860 ECC 14 Bom. The Petitioners therefore discovered that they had paid excise duty the said bodies by mistake during the period 1st March 1983 to 20th February 1986. By their application of Dec. 10, 1986, they therefore applied to the 2nd Respondent for refund of an amount of Rs. 22.15.894.68 being the excise duty erroneously paid during the aforesaid period.

3. While the said proceedings were pending the Petitioners also submitted another application dt. 23rd Feb. 1987 to the 2nd Respondent claiming refund of an amount of Rs. 8,15,312.08 being the excise duty erroneously paid during the period 1st Jan. 1980 to 28th Feb. 1983. Yet another application dated June 22, 1987 was filed by them to claim refund of Rs. 1,90,313 being the excise duty erroneously paid during the period 1st March 1979 to 31st Dec. 1979.

4. By his three eparate orders one of July 22, 1987 and two of July 30, 1987 the 2nd Respondent rejected all the three claims for refund on the ground, firstly, that the payment were not made under protest or provisionally and they were not recovered without the authority of law; and secondly, on the ground that the claim for refund was made beyond six months of the payment which is the period of limitation under the Act ,. It is against these decisions that the Petitioners have approached this Court by this petition under Art. 226 of the Constitution.

5. It is fairly conceded on behalf of the petitioners that they have recovered from their customers the whole of the excise duty involved in all the three claims. It is not therefore necessary for us to go into the question of limitation. We will proceed on the basis that the payment of excise duty was made under a mistake of law and that all the claims are within time. We are of the view that since the Petitioners have already recovered from their customers the whole of the duty, they are not entitled to its refund. Their claim for such refund amounts to a fraud on consumers, and the society. Any indulgence in their favour will amount to helping them to enrich themselves unjustly. They are not entitled to claim the refund even under s. 72 of the Contract Act . much less can they therefore invite this Court to exercise its extra ordinary, equitable and discretionary writ jurisdiction under Art. 226 of the Constitution in their favour. The law laid down by the Supreme Court on this subject is very clear and has been reiterated from time to time.

In The Newabganj Sugar Mills Co. Ltd. and Others Vs. The Union of India (UOI) and Others, , the facts were that the State Government had reduced the prices of levy and the sugar mill owners challenged the validity of the said order by

filing writ petitions before the Allahabad High Court. The High Court had admitted the petitions and granted stay to the operation of the order, on the mills giving bank guarantees for the excess prices that they would recover because of the stay order. As expected the mills sold the levy sugar at free market rates because of the stay order. The High Court subsequently upheld the State Government's order controlling the prices and directed its Registrar to encash the bank guarantees and pay the amount to the State Government. The State Government was also directed to keep the amount in a separate account and the mill owners were ordered to furnish to the State Government a list of all such persons to whom they had sold the sugar together with the quantum of sugar sold to and the amount of the excess price charged to, them. The State Government was further directed to refund to the persons concerned the excess amounts from whom they were realised by the mills. Against this order, the mills preferred an appeal to the Supreme Court and the Court while confirming the direction given by the High Court evolved its own scheme for the refund of the amount to the ultimate consumers and observed that the money charged in excess should go to the consumers who had ultimately paid the same.

In *Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others*, the Petitioners were dealers in various goods and had paid market fees to the Market Committee at the increased rate of 3 per cent. The original rate being 2 per cent under the Haryana Act 22 of 1977. Earlier, the Supreme Court, had in another petition declared the said excess levy of 1 per cent as ultra vires. However, at that time the Market Committees were not directed by the Court to refund the excess levy. Therefore the Petitioner-dealers applied to the Supreme Court for a direction to the Market committees to refund the excess amount recovered. After referring to its earlier decision in *Nawabganj Sugar Mills case* (supra), the Supreme Court instead of directing the disbursement of the amount to the dealers, directed the said amount to be paid to the consumers from whom ultimately the excess amount was recovered by the dealers. While doing so, the Supreme Court observed as follows;

"Another point. In our jurisdiction, social justice is a pervasive presence; and so, save in special situations it is fair to be guided by the strategy of equity by making those who claim the service of the judicial process to embrace the basic rule of distributive justice while moulding the relief, by consenting to restore little sums, taken in little transactions, from little persons, to whom they belong.

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 such as public interest dictates and equity projects.

Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go where only private interests are involved. Accordingly, the granting or withholding of relief may properly be dependent upon considerations as of public

interest....."

In *Amar Nath Om Prakash and Others Vs. State of Punjab and Others*, the appellants before the Supreme Court were traders engaged in the purchase and sale of agricultural produce. They had challenged s.23A of the Punjab Agricultural Produce Market Act which had directed that those dealers who had already passed on the burden of the excess fee (where was earlier held invalid) would not be entitled to recover the same. While upholding the validity of S.23A, the Court observed that all the said S.23A did was to prevent unjust enrichment by those dealers who has already passed on the burden of the excess fee to the next purchasers and so had reimbursed themselves. While observing so, the Court referred to its earlier decisions in *The Orient Paper Mills Ltd. Vs. The State of Orissa and Others*, and *R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another*, . The Court also pointed out that observations to the contrary made in the case of *Ashoka Marketing Ltd. Vs. State of Bihar and Another*, were expressly dissented from in *R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another*, .

In *U.P. State Electricity Board Lucknow Vs. City Board, Mussoorie and Others*, the issue related to the validity of the levy of 7 1/2 % as an additional charge made by the Electricity Board under the impugned notifications dt. April 24, 1962 and Sept, 30, 1967. The City Board in addition to the challenging of the validity of the said charge had also claimed its refund from the Electricity Board. While dealing with this demand for the refund of the additional charge, the Supreme Court has observed in para. 10 a follows:

" The contention relating to the validity of the levy of additional charges could not be raised by the City Bosrd under Art 226 of the Constitution in respect of the period prior to the filing of the writ petition. The above additional charge of 71/2% was levied in 1962 and the City Board did not question it before the court March 23, 1968 when it filed the writ petition. It is further seen that it has not stated that it had not collected charges from the consumers of electric supplied by at the rates which would cover the additional 71/2%/ . The learned counsel for the City Board had was not able to state that the City Board had not recouped itself by collecting the charges from the consumers. In this sitution we have to presume that the City Board had not suffered any less by the levy of 71/2% by way of additional charges. We are of the view that in case of this nature where there is little or no possibility of refunding the exceess amount collected from the ultimate consumer to him and the grating of the relief to the petitioner would result in his unjust enrichment, the court should not ordinarily direct any refund in exericise of its discreation under Art, 226 of the constitutions" .

In *State of Madhya Pradesh v, Vyankatlal AIR 1985 SC* decisions in *The Orient Paper Mills Ltd. Vs. The State of Orissa and Others*, , *Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others*, , *Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf*, and *Amar Nath Om Prakash and Others Vs. State of Punjab and Others*, in para, 14 of the judgment observed as follows:

" The principles laid down in the aforesaid cases were based on the specific provisions in those Acts but the same principles can safely be applied to the facts of the present case inasmuch as in the present case also the respondents had not to apy the amount from their coffers. The burden of paying the amount oin question was transferred by the respondents to the punchasers and therefore, they were not entitled to get a refund. Only the persons on whom lay the ulimate burden to pay the amount would be entitled to get a refund of the same. The amount deposited towards the Fund was to be untiled for the development of sugarcane. If it is not possible to identily the persons on whom had the burden been placed for payment towads the Fund. The amount of the fund can be untiled by the Goverenment for the purpose for which the fund was created, namely development of sugarcane. There is no question of refunding the amount to the respondents who had not eneventually paid the amount towards the Fund, Doing so would virtually amount to allow the respondent unjust enrichment."

The Court then set aside the decision of the High Court of Madhya Pradesh which had directed the refund of the amount to the Traders.

6. In addition to the above Supreme Court decisions , we have a decision of the Division Bench of this court in Ogale Glass Works Ltd. Vs. The Union of India, where the learned judges by two separate but concurring judgments considered the question as to whether the Petitioners in that case who had already collected from their customers the excess excise duty were entitled to recover the same from the Government, and by referring to the decisions of the Supreme Court D. Cawasji and Co. and Others Vs. State of Mysore and Another, : State of Madhya Pradesh Vs. Bhailal Bhai and Others, and two earlier decisions of the court reported in The State of Bombay Vs. Morarji Cooverji, , Paygonda Survgonda Patil and Others Vs. Jingonda Surgonda Patil and Others, Pavganda v. aJingonda held that the Petitioners were not entitled to the refund of the said duty the Petitioners who had already recovered the said excess duty from their customers had no right to the same. The Court therefore rejected the claim for the refund of the duty. This decision of the Division Bench has so far not been overruled either by a Full Bench of this Court or by the Supreme Court . On the other hand , as stated earlier , the Supreme Court with respect, has taken a consistent view that those who have recovered the duty, tax ,cess, levy, etc, from others have no right to claim its refund from the authorities. For in such cases, the excess amount paid whether under a mistake of law or fact, does not come from the pockets of those who have first paid it or from whom it is first recovered by the authorities, It comes from the pockets of others and is paid by the ultimate consumers .It is they alone who are entitled to recover it and the refund of it to the manufactures/traders who pay it in to first instance amounts to their unjust enrichment.

7. The relief of the refund of the money paid under a mistake., is based on the provisions of S. 72 of the Contract Act . The said Section states that "a person to whom money has been paid, or anything delivered, by mistake or under coercion

must repay or return it" . In all cases such as the present, it is not the manufacture or the trader as the case may be who pays the amount but ultimately it is the consumer who does so. For, even if he pays it in the first instance , he recovers it from his buyers and ultimately it is the last purchaser, namely , the consumer who pays it or from whom it is recovered. It matters not at what stage the consumers pay it whether in the first instance or at the last stage. It also matters not by whose hands they pay it in the first instance whether at the hands of the manufactures or traders. That is necessary in all such is to find out from whose pocket ultimately the money for such payment has come or who has ultimately borne its brunt. It will be a travesty of the judicial process if it is allowed to be abused for patently illegal and unjust recoveries by those who have not paid the amounts. The judicial process cannot lend its assistance for collection of illegal booty.

8. Several High Courts in the country have also taken the same view. To mention a few of the said decisions., they are as follows: (1972) 30 STC 120; 1972Tax LR 2027 CurramSreeramulu Gavalpati: Anjaneyely and Co. v. State of Andhra Pradesh: 1978 20 ELT 84 (Cal) Electric Lamp (India) Pvt Ltd. v. Collector of Central Excise Calcutta and Orissa: 1978 ELT 229 (Cal) Hindustan Pilkington Glass WorkLtd.v. Supdt. Central Excise As an sole : 1980 ELT 478 (Delh) Hyderabad Asbestos Cement Products Ltd. V. Union of India: 1981 ELT 478 (Mad) Madras Aluminum Co.Ltd.v. union of India:1983 96 ELT 1763: 1984 Tax LR 52 , Union of India v. New India Industries Ltd, Baroda: 1983 ELT 920 : 1983 Tax LR 2648 jaswant Sugar Mills v. Union of India : (8) Godavari Plywood Ltd. Vs. Union of India and Others, , Union of India v. Ahmedabad Manufacturing and Calico Painting Co.Ltd Tamil Nadu Betelnut Packers Vs. Union of India, : (11) N.V. Ramaiah Vs. State of Andhra Pradesh and Others, , Assistant Collector of Central Excise v. Madras Coats Ltd.

9. As against this, we are pointed out of decisions of this Court reported in Rapidur (India) Ltd. Vs. Union of India and another, , Assistant Collector of Central Excise, Kalyan Division and another Vs. Dipsi Chemicals Pvt. Ltd. and another, : Miranda Limited and Another Vs. Union of India (UOI) and Others, associated Bearing Co.Ltd . v. Union of India and 1983 (35) ELT 343 (Bom) Finolex Cables Ltd v. Union of India . With utmost respect to the learned Judges .who have decided the aforesaid cases, we cannot follow these decision since we are of the view that they decisions since we are of the view that they are contrary to the law laid down by the Supreme Court. they are also contrary to the earlier decision of the Division Bench of the Court in Ogale Glass Works Ltd. Vs. The Union of India, which has not been overruled as yet.

10. In the Result, we reject the petition.

11. Petition rejected.