

(2016) 04 GUJ CK 0113
In the Gujarat High Court
Case No : S.C.A. Nos. 14540-14542 of 2015

Ruchi Soya Industries Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 28-04-2016

Acts Referred:

Citation : (2016) 336 ELT 423

Hon'ble Judges : Akil Kureshi and A.Y. Kogje, JJ.

Bench : Division Bench

Advocate : G.L. Raval, Senior Advocate with Jay Trivedi for Dipen Desai, Advocate, for the Petitioner; R.J. Oza, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Akil Kureshi, J.(Oral)—These petitions arose in the similar background. They have been heard together and would be disposed of by this common judgment. For convenience, we may record facts from Special Civil Application No. 14540 of 2015, which are as under.

2. The petitioner is a public limited company, registered under the Companies Act. The petitioner had imported crude, degummed soyabean oil of edible grade in bulk at Jamnagar and filed bill of entry on 2-9-2002, seeking clearance of the imported goods. The department did not clear the goods on the ground that the petitioner must pay higher customs duty on the basis of tariff value fixed for the goods in question in terms of Section 14(2) of the Customs Act, 1962 (the Act? for short). Case of the petitioner was that at the time of import of the goods by the petitioner, the notification issued by the Government of India, fixing tariff value under Section 14(2) of the Act had not come into effect and that therefore, the petitioner was liable to pay duty only in terms of the provisions contained in provision 14(1) of the Act.

3. Since there was no resolution of the dispute between the parties, the petitioner filed Special Civil Application No. 9308 of 2002, in which, the petitioner

challenged the validity of the notification issued by the Government of India, fixing the tariff value for the commodity in question as also its date of coming into effect. One of the grounds pressed in service by the petitioner was that the notification was not available for sale and was therefore, not in public domain. The High Court by order dated 7-10-2002, while admitting the petition, granted interim relief to the petitioner in following terms :

"2 We have heard the learned Advocates on the question of grant of interim relief and after hearing them, it is directed that for clearance of the goods in question, the petitioners shall furnish a Bank Guarantee for the difference of duty of customs payable under sections 14(1) and 14(2) of the Customs Act. This arrangement would be subject to the order to be made by respondents of final assessment. A copy of the final assessment order shall be produced by the respondents along with the reply-affidavit. Direct service is permitted."

4. Pursuant to such order of the High Court, upon the petitioner furnishing the bank guarantee, the goods were allowed to be cleared by paying customs duty, payable under Section 14(1) of the Act.

5. The writ petition came to be decided by the High Court by judgment dated 13-9-2012 along with other petitions of similar nature. The High Court dismissed all the petitions and vacated the interim relief.

6. Against the judgment of the High Court, the present petitioner and other aggrieved importers filed appeal before the Supreme Court. The Supreme Court by the judgment in case of Union of India v. Param Industries Ltd., reported in 2015 (321) E.L.T. 192 (S.C.), allowed the appeals and reversed the judgment of the High Court, making following observations.

"7. On the facts of these appeals as well, we find that though the notification may have been published on the date when the goods were cleared, it was not offered for sale by the concerned Board, which event took place much thereafter. Therefore, it was not justified and lawful on the part of the Department to claim the differential amount of duty on the basis of said notification. These appeals are, accordingly, allowed only on this ground and it is not necessary to go into other issues at all."

7. After the High Court dismissed the writ petitions under judgment dated 13-9-2012 and vacated the interim relief, the department on or around 28-1-2013 encashed the bank guarantee of the petitioner and recovered sum of Rs. 9,19,801/-. Since the Supreme Court allowed the appeal of the petitioner, such amount of Rs. 9,19,801/- already recovered by the department became refundable. The petitioner therefore, filed refund application before the department on 4-6-2015 and requested that the said sum of Rs. 9,19,801/- be repaid. On such application, the department issued a communication dated 17-6-2015 and raised two issues. First was with respect to filing of refund application in proper format and second was with respect to supplying of documents showing that the claim is not hit by the principle of unjust

enrichment. We are not concerned with the first issue, since, the petitioner subsequently filed a proper application in the prescribed format. Regarding the issue of unjust enrichment in the communication dated 17-6-2015, the authority has conveyed to the petitioner as under :

"no documents such as, Balance sheet, Ledgers, P & L Account etc. for the relevant F.Y. wherein the said amount of Refund has been shown as ? receivables?, duly certified by the independent Chartered Accountant, have been filed with refund claim to establish that the refund claims is not hit by the principles of unjust enrichment in the present case in terms of section 27(2) read with section 18(5) of the Customs Act 1962."

8. In response to this communication, the petitioner wrote to the Customs Department on 30-6-2015 and contended that the principle of unjust enrichment would not apply. The petitioner relied on various decisions cited in the said communication.

9. Since the department did not pass any order on the petitioner's application for refund, the petitioner filed this petition and prayed that the department be directed to refund the amount in question without raising the issue of unjust enrichment. Facts in other petitions are similar except for the amount of refund involved.

10. It can thus be seen that material facts are not in dispute at all. The short question that calls for consideration is, whether in background of such facts, the department is correct in raising the issue of unjust enrichment?

11. Counsel for the petitioner submitted that the petitioner had provided bank guarantees as directed by this Court in the interim order dated 7-10-2002, which was in the nature of security to protect the interest of the Revenue in case the petitions failed. When the department therefore, encashed the bank guarantees, it was merely the recovery affected through security and not payment of duty by the petitioner. The principle of unjust enrichment would not apply. He relied on following decisions :

(1) Oswal Agro Mills Ltd. v. Asstt. Collector of C.Ex., reported in Ludhiana, 1994 (70) E.L.T. 48 (S.C.)

(2) Somaiya Organics v. State of Uttar Pradesh, reported in 2001 (130) E.L.T. 3 (S.C.)

(3) Union of India v. Grasim Industries Ltd., reported in 2005 (183) E.L.T. 12 (Raj.)

12. On the other hand, learned counsel Shri R.J. Oza opposed the petitions contending that once the High Court dismissed the writ petitions by judgment dated 13-9-2012, the differential customs duty became payable. After waiting for a reasonable period, when the petitioner was not protected by any order from the Supreme Court, the bank guarantees were encashed. At that stage,

therefore, it was a recovery of duty payable by the petitioner. Subsequently, when the judgment of the High Court was reversed by the Supreme Court, such duty became refundable. The petitioner having filed refund application, it was duty of the department to examine the question of unjust enrichment. The Customs authorities were therefore, justified in calling upon the petitioner to provide necessary documents in this regard.

13. Section 27 of the Act pertains to claim for refund of duty. Under sub-section (1) of Section 27, any person claiming refund of any duty or any interest paid or borne by him, could make an application in such form and manner as prescribed for such refund to the competent authority within the time prescribed. Sub-section (1A) of Section 27 requires that the application under sub-section (1) would be accompanied by such documentary or other evidence as the applicant may furnish to establish that the amount of duty or interest in relation to which such refund is claimed, was collected from or paid by him and the instance of such duty or interest was not passed on to any other person. Sub-section (1A) of Section 27 thus, codifies the principle of unjust enrichment, under which, an assessee even after succeeding in establishing that levy of duty was illegal, would not be entitled to refund on such duty if he has passed the element of duty to any other person. Under sub-section (2) of Section 27, upon receipt of an application for refund, if the competent authority finds that the duty paid by the applicant is refundable, he would make an order accordingly. Proviso to sub-section (2) of Section 27 is in consonance with the provisions of sub-section (1A) and lists the instances under which instead of appropriating the duty towards the common fund, the authority would refund it to the applicant.

14. The question of unjust enrichment came up for consideration before the Constitution Bench of Supreme Court in case of *Mafatlal Industries v. Union of India*, (1997) 5 SCC 536 = 1997 (89) E.L.T. 247 (S.C.), in which, in the majority opinion, following principles emerged :

"(A) If the excise duty paid by the assessee was ultimately passed on to the buyers or any other person, and that the assessee has suffered no loss or injury, the action for restitution based on section 72 of the Contract Act, is unsustainable. (This is the legal position even under general law, without reference to section 11B of Central Excises & Salt Act as amended by Act 40/1991.)

(B) The decision in *Kanhaiya Lal's* case and the cases following the same, cannot be understood as laying down the law that even in cases the liability has been "passed on", the assessee can maintain an action for restitution. If the decision in *Kanhaiya Lal's* case (*supra*) and the cases following the said decision, enables such a person to claim refund (restitution), with great respect of the learned Judges, who rendered the above decisions, I express my dissent thereto. In this context, the observations in para 29 - Clause III shall also be borne in mind.

(C) Article 265 should be read along with the Preamble and Article 39(b) and (c)

of the Constitution, and so construed in cases where the assessee has passed on the liability to the consumer or third party, he is not entitled to restitution or refund. The fact that the levy is invalid need not automatically result in a direction for refund of all collections made in pursuance thereto.

(D) The presumption is that the taxpayer has passed on the liability to the consumer (or third party). It is open to him to rebut the presumption. The matter is exclusively within the knowledge of the taxpayer, whether the price of the goods included the "duty" element also and/or also as to whether he has passed on the liability since he is in possession of all relevant details. Revenue will not be in a position to have an indepth analysis in the innumerable cases to ascertain and find out whether the taxpayer has passed on the liability. The matter being within the exclusive knowledge to the taxpayer, the burden of proving that the liability has not been passed on should lie on him."

15. It can thus, be seen that the principle of unjust enrichment would be applicable to every case of claim of refund of duty irrespective of the reason for claiming such refund. In the present case, as noted, the petitioner's goods were allowed to be cleared under interim order of the High Court dated 7-10-2002. Under such interim formula, the petitioner had to furnish bank guarantee for the difference of duty of customs payable under Section 14(1) and 14(2) of the Act. The petitioner provided such bank guarantee. The High Court ultimately dismissed the petitions by judgment dated 13-9-2012. By virtue of dismissal of the petitions by the High Court, higher duty in terms of Section 14(2) of the Act became payable. When the department therefore, encashed the bank guarantees given by the petitioner, it was towards this duty liability which had arisen by virtue of the judgment of the High Court. In plain terms, therefore, it was recovery of the duty payable. The fact that it was unilaterally done by the department and unwillingly suffered by the petitioner is of no consequence. Contrary to what is canvassed before us by the counsel for the petitioner, the encashment of the bank guarantees was no longer in the form of a security. The bank guarantees were undoubtedly securities to safeguard the interest of the Revenue but, once the High Court dismissed the petitions and vacated the interim relief, the duty became payable as on that date. Encashment of the bank guarantees by the department was thus a step in furtherance of recovery of the duties. In the hands of the department, thus at that stage, it was in the nature of duty and not a security. When subsequently the Supreme Court reversed the judgment of the High Court, this duty became refundable. Any refund application would therefore, necessarily be governed by Section 27 of the Act.

16. The question can be looked from slightly different angle. Suppose there was no requirement of giving bank guarantee by the petitioner for clearance of the goods pending the petitions, but the petitions were ultimately dismissed, would the department not be entitled to recover the duty payable through other means? Answer to this question is obviously in the affirmative. If therefore the department had recovered such duties coercively from the petitioner, which later

on becomes refundable on account of the judgment of the Supreme Court, would the principle of unjust enrichment not apply? Once again the answer is obvious. We see no distinction between this hypothetical situation and the actual fact situation of these cases merely because the recovery in the instant cases came through the bank guarantees furnished by the petitioner pending the writ petitions.

17. In case of Oswal Agro Mills Ltd. (supra), on which heavy reliance was placed by the counsel for the petitioner, the High Court had granted stay against the judgment of CEGAT in favour of the assessee on the condition of payment of 50% of the duties to the Excise department within three months and furnishing bank guarantee for the remaining amount within the same period. The appeal was ultimately allowed by the High Court. The Supreme Court however, left the question of refund to be decided by the authorities in accordance with law, whereupon the assessee applied to the department to "refund the amount and the bank guarantees deposited from time to time". Since such refund application was not decided, the assessee approached the Punjab and Haryana High Court, which directed the authorities to decide the same within time frame and directed the assessee to extend the bank guarantee till the disposal of the refund claims. The Excise authorities passed an order holding that the amount deposited by the appellants in Court and withdrawn by the Excise authorities and the amounts gathered by the bank guarantees furnished by the assessee? pursuant to the interim orders of the Supreme Court, were not refundable having regard to the provisions of Section 11B of Central Excises and Salt Act, 1944. In the meantime, since the bank guarantees were not renewed, the department issued upon the bank a demand, pursuant to which, the bank guarantees were encashed. The Supreme Court had however, passed an order declaring that the directions of the High Court to extend the bank guarantee once the appeal was allowed by the Supreme Court was not legal and had directed the Excise authorities to repay the amount to the bank. In said background, the question of unjust enrichment was discussed by the Supreme Court in the following manner.

"8. The judgment in the case of Jain Spinners applies to a case where excise duty has been deposited in court pursuant to an interim order and has been withdrawn by the excise authorities. In such a case, clearly, the assessee has to make an application for refund and to such a case, therefore, the provisions of section 11B squarely apply.

9. Section 11B applies when an assessee claims refund of excise duty. A claim for refund is a claim for repayment. It presupposes that the amount of the excise duty has been paid over to the excise authorities. It is then that the excise authorities would be required to repay or refund the excise duty.

10. The question, therefore, is whether it can be said that the furnishing of a bank guarantee for all or part of the disputed excise duty pursuant to an order of the court is equivalent to payment of the amount of excise duty. In our view, the answer is in the negative. For the purposes of securing the Revenue in the event

of the Revenue succeeding in the proceedings before a Court, the Court as a condition of staying the demand for the disputed tax or duty, imposes a condition that the assessee shall provide a bank guarantee for the full amount of such tax or duty or part thereof. The bank guarantee is required to be given either in favour of the principal administrative officer of the Court or in favour of the concerned Revenue authority. In the event that the Revenue fails in the proceedings before the Court the question of payment of the tax or duty, the amount of which is covered by the bank guarantee, does not arise and, ordinarily, the Court, at the conclusion of its order, directs that the bank guarantee shall stand discharged. Where the Revenue succeeds the amount of the tax or duty becomes payable by the assessee to the Revenue and it is open to the Revenue to invoke the bank guarantee and demand payment thereon. The bank guarantee is security for the Revenue, that in the event the Revenue succeeds its dues will be recoverable, being backed by the guarantee of a bank. In the event, however, unlikely, of the bank refusing to honour its guarantee it would be necessary for the Revenue or, where the bank guarantee is in favour of the principal administrative officer of the Court, that officer to file a suit against the bank for the amount due upon the bank guarantee. The amount of the disputed tax or duty that is secured by a bank guarantee cannot, therefore, be held to be paid to the Revenue. There is no question of its refund, and section 11B is not attracted.

11. We find, therefore, no merit in the review petition. We reiterate our finding that the bank guarantees given by the appellants were not properly the subject matter of the writ petition before the High Court and the High Court was in error in directing the appellants to renew the same. We reiterate our direction to the 1st and 2nd respondents forthwith to re-pay to the State Bank of Patiala, Overseas Branch, Millar Ganj, Ludhiana, the amount of Rs. 1,18,00,000/- collected upon the bank guarantees within two weeks."

18. It can thus, be seen that in the said case of Oswal Agro Mills Ltd. (supra) while recognising that the concept of unjust enrichment would apply to the case where excise duty was paid in the Court pursuant to the interim order passed by the Court and which was withdrawn by the Excise authorities, in facts of the said case, it was held that for encashment of the bank guarantee, said principle could not be applied. We may recall, it was a case where the Supreme Court had already allowed the appeal of the assessee, despite which, the Punjab and Haryana High Court had directed the assessee to extend the bank guarantee. The Supreme Court declared such directions as bad in law. However, since the assessee had not extended the bank guarantee, the department by writing to the bank, had recovered the amount of bank guarantee and it was in this background that the Supreme Court refused to review its earlier order of directing refund of the amount of bank guarantee. Significantly, in this case, the encashment of the bank guarantee was done after the Supreme Court had already allowed the appeal of the assessee and had thus, set aside the judgment of CEGAT, out of which, the department's duty demand arose.

19. In case of Somaiya Organics (supra), the Constitution Bench of the Supreme Court referred to and relied upon the decision in case of Oswal Agro Mills Ltd. (supra). This was however, a case of simple furnishing of bank guarantee, to which the department desired to apply the principle of unjust enrichment. The Supreme Court upheld the contention of the counsel for the assessee that furnishing of a bank guarantee does not tantamount to payment of tax. Following observations may be noted.

"33. Furthermore in, view of the enunciation of the law by this Court in Oswal Agro Mills Ltd. case (supra), a bank guarantee which is furnished cannot be regarded as payment of excise levy which the Government is entitled to retain. The furnishing of a bank guarantee is ordered normally in order to ensure collection of dues. Where, however, the State, as in the present case, has been held not to be entitled to collect or realise vend fee after 25th October, 1989 it cannot be allowed to invoke the bank guarantee and realise the amount of vend fee. What cannot be done directly cannot be done indirectly either. Furnishing of bank guarantee is only a promise by the bank to pay to the beneficiary the amount under certain circumstances contained in the bank guarantee. Furnishing of bank guarantee cannot tantamount to making of payment as it was to avoid making payment of the vend fee that bank guarantees were issued. The respondents, in other words, are not entitled to encash the bank guarantees and realise vend fee in respect of the period prior to 25th October, 1989."

20. In case of Grasim Industries Ltd. (supra), the High Court relying on the judgment of the Supreme Court in case of Oswal Agro Mills Ltd. (supra) and Somaiya Organics (supra) made following observations :

"3. We have heard Mr. Ravi Bhansali, learned counsel for the department and Mr. Rajendra Mehta, learned counsel for the assessee. In our opinion, no referable question of law arises from the order of the C.E.G.A.T. as the same has been decided by the Apex Court. It is held by the Apex Court in Oswal Agro Mills case (supra) that furnishing of a bank guarantee for all or part of the disputed excise duty pursuant to an order of the court is not equivalent to payment of excise duty. It is also held that section 11B applies when an assessee claims refund of excise duty. A claim for refund is a claim for repayment. It presupposes that the amount of the excise duty has been paid over to the excise authorities. The amount of disputed tax or duty that is secured by a bank guarantee cannot, therefore, be held to be paid to the revenue. Therefore, the question of refund under section 11B is not attracted."

21. To this proposition, particularly, when the Court observed that the amount of disputed tax or duty that is secured by a bank guarantee, cannot be held to be "paid" to the Revenue, we are in respectful agreement. However, these observations were made in the background of the facts where the High Court had directed the assessee to furnish bank guarantee for the differential duty. The writ petition was ultimately dismissed on the ground of alternative remedy. While doing so, the Court directed the assessee to keep the bank guarantee alive till

the matter was decided by the Commissioner (Appeals). After the Commissioner (Appeals), dismissed the appeal, the department encashed the bank guarantee. In this background, the CEGAT held that the encashment of the bank guarantee would not amount to payment of duty. This judgment, the High Court upheld holding that no question of law arises.

22. We are therefore unable to uphold the contention of the petitioner counsel and do not find that present situation is covered by the ratio laid down by the Supreme Court either in the case of Oswal Agro Mills Ltd. (supra) or Somaiya Organics (supra).

23. The case on hand is similar to the one decided by the Supreme Court in case of DCW Ltd. v. Union of India, 2015 (324) E.L.T. 702 (S.C.) relied upon by the counsel for the Revenue. In such case, dispute about classification of the imported machinery arose. The High Court first directed the appellant to furnish bank guarantee for a sum of Rs. 1,45,27,079/-. Later on, the High Court directed the assessee to deposit Rs. 70 lakhs with the department and reduced the bank guarantee to be continued by corresponding sum. When the assessee after depositing the first instalment of Rs. 17.50 lacs, defaulted in paying the remaining three instalments, High Court vacated the stay granted earlier and permitted the department to encash the bank guarantee. In further appeal, the Supreme Court allowed the department to encash part of the bank guarantee to the extent of Rs. 70 lakhs. The classification dispute was ultimately settled by the Tribunal, under which, a sum of Rs. 41,48,176/- became payable to the assessee being the difference between the duty payable and the duty actually paid. When the assessee filed the refund application, the same was rejected on the ground that doctrine of unjust enrichment applied. The assessee therefore, again approached the High Court. The High Court allowed the refund to the extent of Rs. 17.50 Lakhs as the same was deposited pursuant to an interim order, in which, it was specifically mentioned that if the appellant ultimately succeeds, such amount would be refunded. However, the remaining claim of the assessee was rejected on the ground the principle of unjust enrichment. When the assessee challenged this judgment before the Supreme Court, the Special Leave Petition was dismissed in following terms :

"7. It cannot be disputed that the doctrine of unjust enrichment as incorporated by section 27 of the Customs Act applies in all such cases. The only exception to the applicability of the aforesaid doctrine is that such amount is not paid as duty but has been paid by some interim orders in some proceedings by the Court as pre-deposit then it is not treated as duty. The endeavour of the appellant is to submit that the aforesaid amount of Rs. 23,98,178/- was also a pre-deposit and, therefore, the High Court has committed error in not directing the refund thereof.

8. We are unable to accept the aforesaid submission. On the facts of the case, as is pointed out above, it is only Rs. 17.50 lakhs which was deposited by the appellant pursuant to the interim orders of the Court. The Court had directed the appellant to deposit Rs. 70 lakhs. As far as the balance amount is concerned that

could not be deposited. It resulted in vacation of the stay order. Thus, once the stay order was vacated, it was open to the Department to recover the amount of duty which was payable as per the orders passed at that time. The amount was, thus, recovered on encashment of the Bank Guarantee by the Department and it was on the basis of the order passed by the Court. The Court had, after vacating the stay order, only permitted the Department to encash the Bank Guarantee.

9. We, thus, are of the opinion that as far as refund of this amount is concerned, it had to be decided in the light of the doctrine of unjust enrichment which was clearly applicable. The order of the High Court is, therefore, without any blemish. This appeal is, accordingly, dismissed."

24. Under the circumstances, the petitions are dismissed. Despite dismissal of the petitions, it would be open for the petitioner to produce necessary documents before the department as demanded in context of the question of unjust enrichment. If such documents are produced latest by 31-7-2016, the department shall process the refund applications in accordance with law.