

(1997) 10 AHC CK 0035
In the Allahabad High Court
Case No : C.M.W.P. No. 13701 of 1993

Sir Shadi Lal Enterprises

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 22-10-1997

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : AIR 1998 All 135

Hon'ble Judges : D.P. Mohapatra, C.J;R.A. Sharma, J

Bench : Division Bench

Advocate : Sapru, for the Appellant;

Judgement

D.P. Mohapatra, C.J.—These writ petitions involve common fact situations and common questions of law. The controversy raised in all the cases relates to claim of refund of the amounts stated to have been paid by the petitioners as water cess under the provisions of the Water (Prevention and Control of Pollution) Cess Act, 1977 (Act No. 36 of 1977) (hereinafter referred to the Act).

Therefore, with the consent of learned counsel for parties, they were heard together and they are being disposed of by this common judgment. For the purpose of convenience Civil Misc. Writ Petition No. 13701 of 1993 is taken as the leading case.

2. The petitioners in all the cases are owners of industrial units manufacturing sugar from sugarcane and liquor/alcohol from molasses, which is a by product in the process of manufacture of sugar. On the demand made by the State Government through the Cess Officer/Assessing Authority of the U.P. Pollution Control Board, Lucknow (hereinafter referred to as the Board), the petitioners were required to pay water cess under the Act. The petitioners raised protest against the demand mainly on the ground that sugar industry and distillery were not industries covered by Item No. 15 of Schedule I of the Act and consequently they are not liable to submit any return or make any payment of water cess

under the Act. When their protests were not heeded to by the authorities concerned, who persisted on the demand for payment of water cess, the petitioners paid the amount under protest. They filed writ petitions in this Court (being writ petitions Nos. 3558 of 1980, 494 of 1980, and 17646 of 1986, no writ petition was filed by the petitioner of Writ Petition No, 9046 of 1993). The writ petitions were dismissed. Thereafter, the petitioners filed applications for leave to file appeals before the Supreme Court which were disposed of by the judgment in *Saraswati Sugar Mills v. Haryana State Board* with M/s. *Saraswati Sugar Mills Vs. Haryana State Board and others*, . The Supreme Court reversed the decision of this Court and held, inter alia, that the sugar manufacturing industries do not come within Entry 15 of the Act.

3. After the judgment of the Supreme Court was rendered, the petitioners made representations to the Board and the Cess Officer/Assessing Authority of the Board for refund of the amounts illegally realised from them as water cess. Despite repeated representations there was no response from the Board and its authorities. Under such compelling circumstances, the petitioners filed the writ petitions seeking a mandamus to the respondents to refund the amount in question along with interest at the rate of 18% per annum. It is the case of the petitioners that they have themselves borne the liability of the illegal demand of water cess and they have not passed on the said liability to the customers.

4. In the counter-affidavit filed on behalf of the Board, while not denying the facts stated in the writ petition, the gist of which has been discussed in the preceding paragraph, the stand has been taken that the petitioners are not entitled to refund of any amount from the Board for the reason that after collection the amount has been paid to the State Government, which, in turn, has paid the amount to the Government of India. Referring to the representations submitted by the petitioners, it is averred in the counter-affidavit that a reference has been made to the State Government in the matter and its reply from the Government is awaited. It is also averred in the counter-affidavit that after the judgment of the Supreme Court in *Saraswati Sugar Mills v. Haryana State Board* (supra) Item No. 15 of Schedule I of the Act was amended with effect from 21-1-1992 and sugar industries and distilleries are liable to pay water cess under the amended provisions of Item 15 of Schedule I.

5. It is relevant to note here that Item 15 of Schedule I of the Act, as it stood prior to amendment made in January, 1992, was to the following effect :--

"15. Processing of animal or vegetable product industry."

By the notification dated 2nd January, 1992, published in the Gazette of India Extraordinary Part II, No. G.S.R. 14(E) dated January 2, 1992, an amendment was made to the effect :--

In the entries against Serial Number 15, the following shall be added at the end, namely :--

"including processing of milk, meat, hides and skins, all agricultural, products and their waste."

6. As noted above, the writ petitions have been filed with the prayer for issue of a writ of mandamus to the respondents to refund the money realised from the petitioners as water cess on the basis of the decision of the Supreme Court in the appeals filed by them. Therefore, the relief sought in the writ petitions is in the nature of a claim for money. This question was considered by the Supreme Court in the case of HMM Ltd. and another Vs. The Administrator, Bangalore City Corporation, Bangalore and another, , where the Apex Court ruled that realisation of tax or money without the authority of law is bad under Article 265; the respondent-corporation, which is a statutory authority, has no right to retain the amounts; these are refundable. In that case the question was whether octroi could be levied or collected in respect of goods which are not used, consumed or sold within the municipal limits? The Court held that mere physical entry into the city limits would not attract the levy of octroi and putting the Horlicks power from drums to bottles for the purpose of exporting or taking these out of the city is neither use nor consumption of the Horlicks power attracting the levy of octroi. So these amounts become collection without the authority of law. In paragraph 13 of the judgment, the Supreme Court ordered (at page 53 of AIR) :--

"We, therefore, hold that amounts should be refunded subject to the verification directed by the learned single Judge of the High Court of the amount of refund. The appeal is, thus, allowed. The judgment and the order of the Division Bench of the High Court are, therefore, set aside. In the facts and the circumstances, there will be no order as to costs."

7. A similar view was taken by the Supreme Court in the case of Salonah Tea Co. Ltd. and Others Vs. Superintendent of Taxes, Nowgong and Others, . Therein the Supreme Court ruled that normally in a case where tax or money has been realised without the authority of law, the same should be refunded and in an application under Article 226 of the Constitution the Court has power to direct the refund unless there has been avoidable laches on the part of the petitioner which indicate either the abandonment of his claims or which is of such nature for which there is no probable explanation or which will cause any injury either to respondent or any third party ; it is true that in some cases the period of three years is normally taken as a period beyond which the Court should not grant relief but that is not an inflexible rule. It depends upon the facts of each case. In that case a Division Bench of the High Court of Gauhati in Assam passed a judgment setting aside the order and notices of demand but refused relief of refund claimed by the appellants. Aggrieved thereby, the appellants preferred the appeals before the Supreme Court with the prayer that directions be given to the respondents to refund the tax collected in pursuance of the illegal assessment orders. The Supreme Court, on consideration of the matter, allowed the appeals, set aside the judgment and order of the High Court to the extent that it refused refund of the tax illegally realised by the respondents.

8. Our attention has been drawn to the decision of the Supreme Court in the case of *Suganmal Vs. State of Madhya Pradesh and Others*, in which a Constitution Bench considered the question of refund of tax and held that though the High Courts have power to pass any appropriate order in the exercise of the powers conferred on them under Article 226 of the Constitution, a petition solely praying for the issue of a writ of mandamus directing the State to refund the money alleged to have been illegally collected by the State as tax is not ordinarily maintainable for the simple reason that a claim for such a refund can always be made in a suit against the authority which had illegally collected the money as a tax and in such a suit it is open to the State to raise all possible defences to the claim, defences which cannot, in most cases, be appropriately raised and considered in the exercise of writ jurisdiction. While discussing the question, the Court made the following observation (at page 1742) :

"We have been referred to cases in which orders had been issued directing the State to refund taxes illegally collected, but all such cases had been those in which the petitions challenged the validity of the assessment and for consequential relief for the return of the tax illegally collected. We have not been referred to any case in which the Court were moved by petition under Article 226 simply for the purpose of obtaining refund of money due from the State on account of its having made illegal exactions. We do not consider it proper to extend the principle justifying the consequential order directing the refund of amounts illegally realised, when the order under which the amounts had been collected has been set aside, to cases in which only orders for the refund of money are sought."

9. In a recent decision in the case of *M/s. Shree Baidyanath Ayurved Bhawan Pvt. Ltd. Vs. State of Bihar and others*, , a Division Bench of the Supreme Court considered the previous decision in *Salonah Tea Company Ltd. v. Superintendent of Taxes Nowgaon (supra)* and *Suganma v. State of Madhya Pradesh (supra)* and held that the writ petition was not a run of the mill case; it was a case where the respondent-State had not acted as this Court has expected a high constitutional authority to act, in furtherance of the order of this Court; that is something that this Court cannot accept; the respondent-State was obliged by this Court's order to refund to the writ petitioners, including the appellants, the amounts collected from them in the form of the levy that was held to be illegal; if there was a good reason in law for rejecting the refund claim, it should have been stated; not to have responded to the appellants refund claim for 11 years and then to have turned it down without reason is to have acted disrespectfully to this Court. The Court further observed that even assuming, therefore, that this was a writ petition only for money, the writ petitioners fell outside the ordinary stream of writ petitioners, and, acting upon it, the High Court should have ordered the refund. The Supreme Court allowed the appeal, set aside the judgment of the Patna High Court, also allowed the writ petitions filed by the appellants, quashed the order of the State Government refusing refund and ordered the respondent State to pay the appellants a sum of Rs. 90,723/- with interest thereon at the

rate of 12% per annum.

10. As noted above, Item No. 15 of Schedule I of the Act was amended with effect from January 2, 1992. On reading the averments made in the writ petitioners, it is clear to us that specified amount, refund of which is sought, is said to have been realised from the petitioners prior to the judgment of the Supreme Court in *Saraswati Sugar Mills v. Haryana State Board* (supra). Therefore, the question of considering the liability of the petitioner to pay water cess after amendment of the statute is neither necessary nor has it been pleaded in the writ petition nor argued before us.

11. From the conspectus of the views expressed in the aforementioned decided cases, the position that emanates is that this Court has the power to issue a writ/direction to the respondents to refund the amount illegally realised from the petitioners as water cess. The writ petition in hand was not a run-of-the mill case. It was a case where the respondents were obliged to refund to the writ petitioners the amount realised as water cess in pursuance of the judgment of the Supreme Court in the case of *Saraswati Sugar Mills v. Haryana State Board* (supra). It cannot also be said that the petitioners were guilty of laches in approaching the respondents for refund of the amount. Within a few months, after the judgment of the Supreme Court was rendered, they made representations to the Board and its Assessing Officer, who had realised the amount from them. Neither the said authority nor the State Government/Union of India-respondents made any response to the representations. In the counter-affidavit filed in the cases no specific defence has been taken to deny the claim for refund of the amount illegally realised. On the other hand, the stand taken on behalf of the Board and its Assessing Officer is that a reference in the matter has been made to the State Government and no reply thereto has yet been received from the State Government. In these circumstances, we are not inclined to take the view that the petitioners should be denied relief of refund of the amount realised from them. But we are not a position to issue a writ of mandamus for payment of the amounts specified in the writ petitions in the absence of sufficient materials to determine whether the amounts were realised from the petitioners during the relevant period. Therefore, we direct the respondents to refund the sums realised from the petitioners as water cess after verification of the amount stated to have been paid by them. The exercise will be completed within a period of three months from the date of production of a certified copy of this judgment before the respondents.

12. The writ petitions are disposed of on the above terms. No order as to costs.