

(1986) 01 MAD CK 0027

In the Madras High Court

Case No : Writ Petition No. 10412 to 10416 of 1985

Tamil Nadu Betelnut Packers

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 09-01-1986

Acts Referred:

Citation : (1990) 25 ECC 23 : (1991) ECR 316 : (1986) 25 ELT 649

Hon'ble Judges : S. Mohan, J

Bench : Single Bench

Advocate : K.R.K. Varaprasad, for the Appellant; T. Somasundaram, for the Respondent

Judgement

1. All these writ petitions can be dealt with in a common judgment since all of them raise an identical issue as to the classification, though, of course

the prayers may vary depending upon the circumstances of the case. I will briefly refer to the facts in W.P. 10412 of 1985 to highlight the point

involved. The writ petitioner is a company having its office in Madras. The company is a contractor for Grane Betelnut powder. There is no

manufacture or preparation. Therefore, it is claimed that no excise duty is leviable.

2. The petitioners were asked to take out a licence for the purpose of excise duty on 10.4.1985, which licence was accordingly taken. The

company has furnished a bond under B-2 on the date when it took out a licence to the Superintendent, Central Excise, Madras-1, Dn, for a sum of

Rs. 5,000/- and Rs. 1,000/- towards deposit as security. Further, they had furnished B-13 bond to the Government binding themselves for Rs.

25,000/- towards security deposit. The petitioners have paid an excise duty of Rs. 1,27,560 to the Excise Department, under protest on various

dates.

3. The petitioners' product is called Grane Nut Powder. It is commonly known in Telugu as Crane Wakkapudi, and in Tamil as Kokku Pakku.

4. Under Tariff No. 68 supari item was exempt from the whole of the duty of excise. This exemption came to be granted under Circular No.

17/75, dated 27.5.1985. Claiming the product of the petitioners as Pan Masala, excise duty is sought to be levied by the respondents. The said Pan

Masala is defined as Tariff item 3-A. It contains three parts. The first part gives the contents and its description; and second parts talks of the

mode of sale, i.e., in unit containers, while the third part clearly states that it should be commonly known as Pan Masala. The petitioners claim that

having regard to the price variations and further having regard to the fact that Pan Masala is different from scented supari in shape and in

preparation also also by the commonly known name, the writ petition has come to be preferred stating that the product of the petitioners would not

fall under Tariff Item 3-A.

5. On 30.8.1985, the Central Excise Inspector Group I B, Madras-1 Division, gave a notice demanding a sum of Rs. 1,14,960/-, and a show

cause notice issued by the Assistant Collector on 9.9.1985. It is this show cause notice and the demand that are questioned on the above ground.

Under these circumstance, the relief that is prayed for is certiorarified mandamus to quash the demand of the fifth respondent, dated 30.8.1985,

and refund of the excise duty, along with other deposits. The other writ petitioners are manufacturers of Supari. Writ Petition No. 10413 of 1985

is for a mandamus for refund of the amount paid, after a declaration that the product of the petitioner does not fall under Tariff item 3-A. Similarly

is the relief in W.P. No. 10414 of 1985. Writ Petition No. 10415 of 1985 is for quashing the proceedings of the fourth respondent under O.C.

No. 448/85, dated 19.3.1985 whereby the petitioner has been called upon to L.4 Licence. In W.P. No. 10416 of 1985 a demand notice has

been issued to the petitioner therein, dated 31.8.1985, demanding excise duty, which is sought to be quashed and the consequential relief of refund

is prayed for.

6. The learned counsel for the petitioners urges first of all it is impossible to hold that Tariff Item 3-A will govern the products of the petitioners

herein. Pan Masala is totally a different commodity than scented betel-nut powder. The price varies between the two. The method of manufacture varies. Merely because scented betel-but powder is in containers, it cannot be called as Pan Masala. In any event, it is not commonly known in the market as Pan Masala. Therefore, wherever there is a demand made on the petitioners, it is liable to be quashed because the most essential thing is the product of this kind, though, no doubt, the Excise Department has a power to classify one way or the other, in common parlance must be accepted as Pan Masala. It is this test, which has been adopted in the decision in Union of India (UOI) and Others Vs. Gujarat Woollen Felt Mills, ; Dunlop India Ltd. v. Union of India AIR 1977 SC 597 = 1983 ELT 1566 V.V. Iyer v. Jasjit Singh AIR 1973 SC 94 and 1983 Excise Law Times, 1607. If that is the position, the demand is bad. Therefore, should this Court be inclined to accept the contention of the petitioners that the scented betel-but powder will not fall under Tariff Item 3-A, it should be so declared, and any amount paid therein has to be refunded. There cannot be any objection for such a refund.

7. The learned counsel for the Excise Department Mr. T. Somasundaram, urges that it is still Pan Masala, and that though the scented betel-nut powder cannot be equated to Pan Masala, still having regard to the gradients contained therein, it should fall under Tariff Item 3-A. Whatever it may be, a petition for a mere refund under Article 226 of the Constitution is not maintainable, in view of the decision in Suganmal Vs. State of Madhya Pradesh and Others, since the remedy of suit is still available. Then again, it is not open to the petitioners to claim refund without establishing the fact that they had not passed on the excise duty to the customers. If such a course is permissible, it will amount to the petitioners unjustly enriching themselves. This is precisely the reason a Division Bench of this Court in the decision in Madras Aluminium Co. Ltd. and Another v. Union of India 1981 ELT 478 held that for claiming refund, it is essential on the part of that person claiming refund to prove that he had not passed on the duty or the tax as the case may be to consumers, in which event those consumers alone will be the persons entitled to refund. The same line of reasoning had come to be adopted by the Gujarat High Court as seen from the decision in Union of India v. Ahmedabad

Manufacturing and Calico Printing 1984 ELT 246 and Ogale Glass Works Ltd. v. Union of India and Others 1979 ELT 468.

8. Mr. K. R. K. Varaprasad, in reply to the above arguments, states that the original invoices of the petitioners are with the Department itself.

Therefore, they can easily verify and find out whether the petitioners have passed on the excise duty, and this technical objection should not be allowed to prevail.

9. In this case in so far as the relief is not merely for a mandamus, but only consequential to a declaration that the petitioners' products, viz.,

scented betel-nut powder under whatever trade name they come to be sold, do not fall under Pan Masala, the declaration has to be issued in

favour of the petitioners that Tariff Item 3-A will not apply and the resultant relief of refund of the Amount should be granted. In support of this

submission, the decision in D. Cawasji and Co. and Others Vs. State of Mysore and Another, is cited.

10. It will now consider in seriatim the points urged before me.

(i) Whether the products manufactured by the petitioners, viz., scented betel-nut powder would fall under Tariff Item 3-A.

The said tariff, namely, item 3-A of the Central Excises and Salt Act, 1944, reads as follows :-

Pan masala, that is to say, any preparation containing betel nuts and any one or more other ingredients such as lime, catechu, cardamom, copra

and menthol, put up for sale in unit containers and commonly known as "Pan Masala".

By a reading of this, it is very clear that this definition of Pan Masala contained in Tariff Item 3-A could be divided into three parts. The first part

gives the contents and its description. The second part speaks of the mode of selling, i.e., in unit containers. The third part categorically states that

it should be commonly known as Pan Masala. It may be an accident that the scented betel-nut powder may contain one or the other contents

falling in the first part of the definition. Then again, it may be that this scented betel-nut powder may be sold in containers as well. But what is more

important is that it should be COMMONLY KNOWN AS PAN MASALA. In my considered view, the difference between scented betel-nut

powder and Pan Masala is so telling that there is absolutely no scope for mistake

at all. The Supreme Court has pointed out in more than one instance that in matters of classification of this character, the meaning attributed in a common parlance has to be borne in mind. In the decision in Union of India (UOI) and Others Vs. Gujarat Woollen Felt Mills, , Head-note B reads thus :

The well-known rule in interpreting items in statutes like the Central Excise and Salt Act, 1944 is that "resort should be had, not to the scientific or the technical meaning of such terms, but to their popular meaning or the meaning attached to them by those dealing in them, that is to say, to their commercial sense.

The above decision also related to a case arising under the Central Excises and Salt Act, 1944. The same principle came to be reiterated in the decision in Dunlop India Ltd. v. Union of India AIR 1977 SC 597 1983 ELT 1566 and Head-note A reads thus :

Meanings given to articles in a fiscal statute must be as people in trade and commerce, conversant with the subject, generally treat and understand them in usual course. But once an article is classified and put under a distinct entry, the basis of classification is not open to question. Technical and scientific tests offer guidance only within limits. Once the articles are in circulation and come to be described and known in common parlance, then there is no difficulty for statutory classification under a particular entry.

These authorities are clear enough to hold that unless and until scented betel-nut powder is accepted as Pan Masala in common parlance Ex. 2 the commercial units it cannot be classified under Tariff Item 3-A. It is admitted on both sides that the product manufactured by the petitioners, namely scented betel-nut powder is not commonly known as Pan Masala. Therefore, I find no difficulty whatever in holding that scented betel-nut powder will not come under Tariff Item 3-A to Schedule I of the Central Excises and Salt Act, 1944, extracted above.

11. As to whether a mere application for refund will lie, it is true the Supreme Court had laid down in Suganmal Vs. State of Madhya Pradesh and Others, that unless and until the assessment is challenged and as a consequential relief, after setting aside the assessment, refund could be ordered, a mere writ petition for refund will not lie. But, in this case, the position is different. Actually the petitioners want a proper declaration whether the

scented betel-nut powder would fall under Tariff Item 3A. Once the declaration is answered in favour of the petitioners, I do not know what

further impediment could there be in directing refund. Therefore, the principle laid down in the decision in *Suganmal Vs. State of Madhya Pradesh*

and *Others*, will have no application to the facts of the present case. Then again, why the petitioners should be driven to a suit? Does it involve any

evidence? Does it involve any controversial fact? Not at all. If that be so, there is no justification for driving the petitioners to a suit and directing

them to seek a refund. The learned counsel for the Department further continues against the classification, the petitioners have a right of appeal and

a further right of appeal to the Tribunal and should go to the Supreme Court direct. It is true if there is a controversy as to the classification. But it is

a product which cannot by any stretch of imagination fall under Tariff Item 3-A. If it is sought to be classified under Tariff Item 3-A, certainly the

court should come to the rescue of the petitioners under Article 226 of the Constitution, because notwithstanding the amendment to the Central

Excises and Salt Act, 1944, incorporating Sections 35-B, 35-C and 35-N, still the remedy under the Constitution cannot be taken away by the

amendment, more so when it is admitted that the product manufactured by the petitioners, viz., scented betel-nut powder is not known as Pan

Masala in common parlance. That is enough for the petitioners to succeed under Article 226 of the Constitution.

12. With regard to the prayer for mandamus, the proper remedy is as laid down by the decision in *D. Cawasji and Co. and Others Vs. State of*

Mysore and Another, . Paragraphs 16 and 17 read thus :

Be that as it may, the High Court deduced the conclusion from the decision in *Tilokchand and Motichand and Others Vs. H.B. Munshi and*

Another, that the question whether a declaration by a court that a law is unconstitutional and therefore void would not always furnish the starting

point of limitation for a suit for recovery of the amount paid under that law and that the question must be decided on the facts of each case. The

Court further said that the parties should seek relief under Article 226 as expeditiously as possible and even if the ordinary remedy by way of a suit

is not barred by limitation, it will be proper exercise of discretion under Article 226 of the Constitution to decline to interfere in cases where the

persons approach the court after several years, in the absence of special and sufficient grounds.

If one thing is clear from the judgments rendered in Tilokchand and Motichand and Others Vs. H.B. Munshi and Another, by the Judges who

formed the majority, it is this : they did not consider the payments made by the petitioners as payments made under a mistake of law. Therefore,

we do not see the relevance of that case for the decision of the case here.

In that case, no doubt, the law was declared invalid. But in this case, the classification is totally improper. Hence, I hold there is no legal

impediment for the petitioners getting refund.

13. All that remains now to be considered is about the point of unjust enrichment of the petitioners. The petitioners in each of the cases have filed

affidavits swearing to the fact that they have not passed on the excise duty to the customers. The learned Counsel for the Department also verified

a few of the invoices of the petitioners. But he is not in a position to contend whether the petitioners have passed on the excise duty to the

customers or not. It is true this Court in Madras Aluminium Co. Ltd. and Another v. Union of India 1981 ELT 478 , in paragraph 31 laid down as

follows :

There is one other impediment in the way of the petitioners claiming refund of excise duty in this case. The petitioners, after paying the excise duty

as per the classification made by the excise authorities, have passed on the same to the actual consumers and in fact, the actual consumers have

borne the entire liability towards excise duty. The petitioners admit that they are not able to trace at this stage as to who are the ultimate consumers

in respect of the goods which have suffered excise duty, in respect of which refund is now sought for by them. Though excise duty is levied at the

production of manufacture of goods for home consumption, in substance it is a tax on consumption and, therefore, if at all, it is the consumer who

can claim the refund of the excise duty paid in respect of the articles purchased and consumed by him and not the petitioners who produced the

articles and who have recouped themselves to the extent of the excise duty paid to the State.

After referring to number of cases on this aspect, in paragraph 35, the court concluded as under :

It is well established that the right of the petitioners to get a refund of the excise duty in subject to questions of estoppel, limitation and the like. If

peculiar circumstances existed and they showed that the amount the State has to refund really belongs not to the petitioners but to the consumers,

then the Court will be justified in refusing to direct refund. In this case, any direction to refund the excise duty to the petitioners will result in their

retention of the duty collected by them from the consumers and the court will be siding as unjust enrichment by the petitioners by such a direction.

Admittedly the petitioners have passed on the excise duty to the consumers and this was done on the basis that they have paid excise duty to the

State. But for the payment of excise duty to the State the petitioners will not be entitled to or enable to pass on the duty to the consumers.

Therefore, if there is no possibility of excise duty being refunded to the actual consumers, the petitioners will have the benefit of both the collection

of excise duty from the consumers and the benefit of refund from the State. Thus the court will indirectly and unjustly be enriching the petitioners by

directing a refund of the excise duty paid by them. We are, therefore, satisfied that having regard to all the circumstances the petitioners are not

entitled to get a refund of the excise duty if they are not in a position to trace the actual consumers and pay back the excise duty collected from

them. The discretionary jurisdiction of this court under Art. 226 of the Constitution should be exercised for public good and not to facilitate the

petitioners to make an unlawful gain at the instance of the public (consumers) on the one hand and the State on the other, and the exercise of the

extraordinary jurisdiction by this court must advance the cause of justice and not subserve the object of the petitioners to enrich themselves unjustly

by getting a refund of the excise duty from the State and retaining the same without refunding it to the consumers. In *The Orient Paper Mills Ltd.*

Vs. The State of Orissa and Others, , the Supreme Court while dealing with the validity of Section 14-A of the Orissa Sales tax (Amendment) Act

of 1958, which provided that no refund of tax which the dealer was not liable to pay could be claimed by a person from whom the dealer has

actually realised it and not by the dealer, expressed the view that the dealer having collected the tax from the consumers and paid over the same to

the State, he had no beneficial interest in that amount, that the amount shall be claimable only by the persons who paid the amount to the dealer and

that, therefore, Section 9-B(3) of the Act providing that if the amount realised by the dealer exceeded the amount payable by him as tax such

amount shall be deposited in the treasury in a reasonable restriction imposed on the right of the dealer to obtain refund in the interest of general

public and does not infringe the provisions of Art. 19(1)(6) of the Constitution. The following is the observation of the Supreme Court :-

The amounts collected by the assesseees therefore primarily belonged not to the assesseees but to the purchasers. On an erroneous assumption that

tax was payable, tax was collected by the assesseees and was paid over to the State. u/s 9-B, clause (3) of the Act, as it stood at the material

times, the amount realised by any person as tax on sale of any goods shall, "notwithstanding anything contained in any other provision of the Act,

be deposited by him in a Government treasury within such period as may be prescribed if the amount so realised exceeded the amount payable as

tax in respect of that sale or if no tax is payable in respect thereof. As the tax collected by the assessee was not exigible in respect of the sales from

the purchaser, a statutory obligation arose to deposit it with the State and by paying that tax under the assessment, the assessee must be deemed to

have complied with this requirement. But the amount of tax remained u/s 9-B of the Act, with the Government of Orissa as a deposit. If with a

view to prevent the assessee who had no beneficial interest in these amounts from making a profit out of the tax collected, the Legislature enacted

that the amount so deposited shall be claimable only by the person who has paid the amounts to the dealer and not by the dealer, it must be held

that the restrictions on the right of the assesseees to obtain refund was lawfully circumscribed in the interest of the general public.

The same view has come to be taken by the High Courts as well in the decision in Union of India v. Ahmedabad Manufacturing and Calico Printing

1984 ELT 246 and Ogale Glass Works Ltd. v. Union of India and Others 1979 ELT 468. Paragraph 124 and 125 of 1979 ELT 469 :

In the petition before us, I am unable to persuade myself that justice lies on the side of the petitioners and that this court will be doing justice in

ordering the respondent to refund the amount of Rs. 12 lakhs to the petitioners when, to begin with, that money never came from the petitioner's

pocket. It is true that the respondents may not have the legal right to retain that money, but in the circumstances of the case justice does not require

that these moneys should be transferred from the respondents (who have no right to it) to the petitioners who also have no right to it.

In this view of the matter, the petitioners will not be entitled to the relief claimed by them for refund of the moneys recovered from them during the period from 1962 to the 18th of December, 1972.

Therefore, if the petitioners had passed on the excise duty to the consumers, certainly, they become ineligible to claim the refund since refund could be claimed only by the customers as laid down in the above rulings. This is a controversial fact, which cannot be adjudicated upon by me.

Therefore, I hereby direct the Assistant Collector in each of the cases to examine this question whether the petitioners in each of the cases have

passed on the excise duty to the customers or not. If he comes to the conclusion that the same has not been passed on to the customers, necessary

orders of refund shall be made. Otherwise, a reasoned order for coming to the conclusion that they have passed on the excise duty shall be

passed, the correctness of which could be agitated by the petitioners in the manner known to law.

14. I am informed that the petitioner in W.P. No. 10415 of 1985 has been refunded. That refund will stand.

15. In the result, (1) I hold the product manufactured by the petitioners, viz., scented betel-nut powder cannot be classified as Pan Masala under

Tariff Item 3-A to Schedule I of the Central Excises and Salt Act, 1944 and (2) the impugned demand and show cause notice shall stand quashed,

(3) the petitioners shall be entitled to refund subject to the decision of the Assistant Collector as stated above. The Assistant Collector in each of

the cases is hereby directed to decide the question whether the petitioners in each of the cases have passed on the excise duty to the customers. It

will be open to the petitioners to rely on any document available at their command in support of their claim that they had not passed on the excise

duty to the customers.

16. All the necessary records shall be produced by the petitioners in each of the cases on or before 31.1.1986. Since it is stated by the learned

Counsel for the Excise Department that the department does not have the originals of invoices, it will be open to the petitioners to produce the

duplicate thereof in support of their claim that the excise duty had not been

passed on to the customers. On a consideration of all these materials, the decision shall be rendered on or before 28.2.1986. The writ petitions are allowed as stated above, with costs. Counsel's fee Rs. 1,000/- one set.