

(2000) 12 OHC CK 0025

In the Orissa High Court

Case No : Original Jurisdiction Case No. 5990 of 1997

Tata Sponge Iron Ltd.

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 11-12-2000

Acts Referred:

Citation : (2001) 1 OLR 99 : (2001) 122 STC 354

Hon'ble Judges : P.K. Mohanty, J;A.S. Naidu, J

Bench : Division Bench

Advocate : Bibek Mohanty, B.K. Sahoo, M. Dasburma, K.C. Kar and S.K. Misra, for the Appellant; Additional Standing Counsel and Additional Standing Counsel (CT), for the Respondent

Judgement

A.S. Naidu, J.—The petitioner, a public limited company engaged in the business of manufacture and sale of sponge iron at a place called "Bileipada" in Birikala Panchayat under Joda Panchayat Samiti in the district of Keonjhar, has filed the present writ application, inter alia, praying as follows :

(a) Issue a writ in the nature of mandamus/certiorari directing the opposite parties to produce all necessary papers/documents for declaring pioneer industries and in connection with annexures 1 and 2 so that they can be examined and direction can be passed to declare the petitioners as a pioneer industry and also to refund the money collected as sales tax from the petitioner-company and to quash the annexures 1 and 2, if necessary :

(b) Issue a writ in the nature of mandamus directing the opposite parties to produce all necessary documents in connection with annexures 5 and 6 so that they can be examined and if necessary shall be quashed ;

(c) Issue any other appropriate writ and/or order and/or directions as this honourable court thinks fit.

2. With a pious wish to accelerate steady industrial growth in the State, the

Government sponsored attractive package of incentives and number of administrative measures designed to provide facilities to new entrepreneurs who desired to initiate industrial activities in the State of Orissa, The said policy is publicly called as Industrial Policy Resolution, 1980 (hereinafter referred to as "the 1980 Policy").

Clause 6.H. of 1980 policy stipulates different kinds of incentives to different category of industries. The provisions applicable to the petitioner is quoted hereinbelow :

"Large and medium industries whether new or intending to expand or diversify shall be eligible for interest-free sales tax loan equivalent to the sales tax paid within the State by the units during the first five years subject to an annual maximum limit of 10 per cent of the capital invested but not exceeding Rs. 25 lakhs per year. The loan shall be repaid after 10 years of each year's drawal."

3. In consonance with the 1980 policy, the State Government framed the Orissa Sales Tax Loan Rules, 1980 streamlining the procedure to be adopted for availing of the said loan as well as the method for determination, sanction, disbursement, repayment and recovery of the said sales tax loan. It is averred in the writ application that the petitioner-company being a medium industry situated in a panchayat area which started its commercial production from April 1, 1986, was entitled to the benefits advanced under 1980 policy.

4. When the matter stood thus, the State of Orissa after reviewing the modalities stipulated in 1980 policy and after examining its success, decided to introduce a revised industrial policy with effect from April 1, 1986 which is called Industrial Policy Resolution, 1986 (hereinafter referred to as "the 1986 Policy"). The benefits under the 1986 policy were distinct and the same were not made available to the industrial units which are covered under the 1980 policy. The effective date of 1986 policy was April 1, 1986 from which date the incentives available under the 1980 policy and other relevant policy decisions, ceased to be operative except for continuing industries to which the provisions of the 1986 policy was not extended. Relevant provisions of the 1986 policy are quoted hereinbelow :

"Clause 5.B(d) : Effective date.--Effective date for the Industrial Policy of 1986 is April 1, 1986 from which date incentives available under the Industrial Policy Resolution of 1980 and other relevant policy resolutions will cease to be operative except for the continuing industries to which this Policy will not apply. Continuing industries are those which have made any kind of investment before the effective date or have availed of any incentive or facility under the Industrial Policy of 1980."

The petitioner-company which admittedly made its investment prior to April 1, 1986, was thus, not entitled to the benefits of 1986 policy and it was entitled to enjoy the benefits of sales tax loan in accordance with 1980 policy.

5. In the year 1989, the State Government announced a new industrial policy which is called the Industrial Policy Resolution, 1989 (hereinafter referred to as "the 1989 Policy"). The said policy was sponsored in the light of experience gained from implementation of 1986 policy and keeping in view the need to maintain and enhance the tempo of industrialization in the State. The Government in 1989 policy further liberalised the package of incentives declared in the 1986 policy with the twin objective of encouraging new industries and providing support to industries which have come up in the State during the last few years. Under Clause 7,3. of the 1989 policy, sales tax incentives under Part III were also extended to continuing industrial units covered under 1980 policy. Some of the relevant clauses of 1989 policy are quoted hereinbelow :

"7.3.1 : Eligibility : The incentive under this part shall be applicable to "continuing units of 1980 policy".

7.3.2 : Exemption, deferment of sales tax on finished products.--The sales tax incentive on finished products as is applicable to new industrial units under Part I shall be applicable to continuing units of 1980 policy, after the effective date, provided that sales tax loan, if any, availed of under the Orissa Sales Tax Loan Scheme Rules, 1980 is surrendered within the time-limit prescribed in the operational guidelines/instructions."

6. The 1989 policy further stipulated under Clause 7.1.6. that pioneer units will be allowed to defer payment of sales tax collected on finished products for a period of 9 years in Zones "B" and "C" and 11 years in Zone "A". Deferred amount of sales tax in respect of each year will be repaid in full after the expiry of the period of deferment annually. In lieu of deferment, such an industrial unit can opt for exemption of sales tax on finished product for a period of 7 years in Zones "B" and "C" and 9 years in zone "A".

7. A continuing unit has been defined under Clause 2.18. of 1989 policy as follows :

""Continuing units of 1980 policy" means any industrial unit, where fixed capital investment commenced on or after the 1st August, 1980 and prior to the 1st April, 1986 and the unit has gone or goes into commercial production on or after the 1st April, 1986."

Similarly a pioneer industry has been defined under Clause 2.9. of 1989 policy which reads as follows :

""Pioneer unit" means the first two new industrial units with fixed capital investment of more than Rs. 5 crore first going into commercial production in a Panchayat Samiti provided that these two units are not established in growth centre and, no other medium or large industrial unit has gone into commercial production in the concerned Panchayat Samiti prior to the said units."

A new industrial unit has been defined under Clause 2.7. of 1989 policy as follows :

""New industrial unit" means an industrial unit where fixed capital investment has been made only on or after the effective date."

8. Under Clause 3 of 1989 policy, different zones have been defined. District of Keonjhar as would be evident from Clause 3, comes under zone "B". Relying upon the aforesaid provisions, the petitioner-company avers that it being a continuing unit of 1980 policy, and set up in zone "B", is entitled to the sales tax incentives under Part III of 1989 policy. It further claims that the said unit being a pioneer unit, is eligible to sales tax exemption for a period of 7 years. On the basis of such averments, the petitioner-company prays to refund the sales tax collected from him for 2 years. Admittedly, the petitioner being a unit covered under the 1980 policy, has already availed of exemption for 5 years as stipulated in the said policy.

9. Two separate counter-affidavits have been filed, one on behalf of opposite parties 1, 2 and 5 and the other on behalf of opposite parties 3 and 4. In the counter-affidavits it has been specifically stated that Tata Sponge Iron Ltd. was previously known as Ipitata Sponge Iron Ltd. and the said unit is covered under the 1980 policy and the same being not a pioneer unit, is not entitled to any of the incentives granted for pioneer units under 1989 policy. A rejoinder affidavit has been filed on behalf of the petitioner refuting the facts stated in the counter-affidavits.

10. It is pertinent to state that the matter in dispute was before this Court earlier in O.J.C. No. 6198 of 1994, Reported as Ipitata Sponge Iron Ltd. v. State of Orissa [2001] 122 STC 259 filed by Ipitata Sponge Iron Ltd., as the petitioner's unit was previously known. In the said case, after discussing the facts and law, this Court came to a categorical finding that all continuing units of 1980 policy, are entitled to the benefits of 1989 policy irrespective of the fact whether they got the benefit of sales tax loan under 1980 policy or not. This Court held as follows :

"We are satisfied that the petitioner-company being industrial unit covered under Part III is entitled to the benefit of deferment/ exemption of sales tax under the Policy of 1989 with effect from June 10, 1992."

In paragraph 22 of the judgment, this Court further held as follows :

"The petitioner-company has submitted an application before the assessing officer for refund of sales tax, inter alia, on the ground that no sales tax was leviable in view of the benefits extended to the petitioner-company under the 1989 Policy. On behalf of the sales tax authorities it has been submitted that the petitioner-company having realised sales tax from the dealers it cannot claim refund of the same inasmuch as such refund to the company, will be hit by the doctrine of "unjust enrichment". Reliance has been placed on a division Bench decision of this Court reported in [1993] 90 STC 481 (Tangudu Gopalan & Sons v. State of Orissa). The petitioner-company is required to satisfy the concerned authorities that the refund as claimed will not enrich the company in any way or

manner and that the sales tax realised from the dealers will be paid back to them. This is again a question of fact which is to be ascertained on the basis of relevant documentary evidence. The appropriate authority will decide the claim for refund and will consider the said question also."

11. On the basis of the aforesaid finding, this Court directed the sales tax authorities to reconsider and revise the impugned assessment order taking into consideration the benefits of 1980 policy and 1989 Policy as available to the petitioner-company. It further directed the authorities to dispose of the refund application in the light of the discussions made in the judgment.

12. Admittedly the petitioner-company claims refund of the sales tax which it had realised from different dealers. While disposing of the writ application, this Court has observed that the claim of the company will be squarely hit by the doctrine of "unjust enrichment" and directed that the petitioner-company is required to satisfy the concerned authority that the refund as claimed will not enrich the company in any way or manner and that the sales tax realised from the dealers will be paid back to them. However, this being a question of fact, this Court directed the authorities concerned to ascertain the same.

13. After disposal of the writ application in consonance with the direction issued, it appears that a representation was filed by the petitioner-company on April 14, 1997 before the Government of Orissa in Industries Department. The said representation has been disposed of on February 4, 1998 by a cryptic order (annexure 5) observing as follows :

".....The Committee after considering all aspects of the case with reference to the provisions of IPR 1989, came to the conclusion that Ipitata Sponge Iron Ltd., is not eligible to get incentives as a "Pioneer Unit" under the IPR 1989 as it is not a "new" unit under the said IPR. The State Government have been pleased to accept the above interpretation of IPR 1989 and hence your unit is not entitled to avail of the incentives as a pioneer unit."

14. The orders under annexure 6 series are consequential to annexure 5. We are constrained to say that the authorities have failed to understand the directions issued by this Court in O.J.C. No. 6198 of 1994 (Ipitata Sponge Iron Ltd. v. State of Orissa [2001] 122 STC 259) This Court has come to a categorical finding in paragraph 19 of the judgment that the petitioner-company being an industrial unit covered under Part III, is entitled to the benefit of deferment/exemption of sales tax under the Policy of 1989 with effect from June 10, 1992. The said conclusion was arrived on the basis of Clause 7.3.1. of 1989 policy which clearly stipulates that incentives under Part III shall be applicable to continuing units of 1980 policy. After arriving at such a conclusion, this Court observed that before availing of refund, the petitioner-company is required to satisfy the concerned authorities that the refund as claimed will not enrich the company in any way or manner and that the sales tax realised from the dealers will be paid back to them. This Court further observed that this being a question of fact, it is to be

ascertained on the basis of relevant documentary evidence and the appropriate authority will decide the claim for refund and will consider the said question also. This part of the observation/direction was completely lost sight of by the Government while disposing of the representation filed by the petitioner.

15. Law is well-settled that a unit is not entitled for refund of sales tax which has been collected by it from different dealers and paid to the State, on mere asking. The principle of unjust enrichment is squarely applicable to the present case. The said principle was elaborately considered by the apex Court in the case of M/s. Orissa Cement Ltd. and Others Vs. State of Orissa and others, in which it has been observed as follows :

"We are inclined to accept the view urged on behalf of the State that a finding regarding the invalidity of a levy need not automatically result in a direction for a refund of all collections thereof made earlier. The declaration regarding the invalidity of a provision and the determination of the relief that should be granted in consequence thereof are two different things and, in the latter sphere, the court has, and must be held to have, a certain amount of discretion. It is a well-settled proposition that it is open to the court to grant, mould or restrict the relief in a manner most appropriate to the situation before it in such a way as to advance the interests of justice."

The same principle has been reiterated by the apex Court in the case of Indian Aluminium Company Limited Vs. Thane Municipal Corporation,

In a decision reported in Renusagar Power Co. Ltd. Vs. General Electric Co., it has been held as follows :

"The principle of unjust enrichment proceeds on the basis that it would be unjust to allow one person to retain a benefit received at the expense of another person. It provides the theoretical foundation for the law governing restitution. The principle has, however, its critics as well as its supporters. In the words of Lord Diplock : ".....there is no general doctrine of unjust enrichment in English law. What it does is to provide specific remedies in particular cases of what might be classed as unjust enrichment in a legal system that is based upon civil law"."

In the case of State of Rajasthan and Others Vs. Novelty Stores, etc., the apex Court turned down the prayer of refund solely on the ground of unjust enrichment holding as follows :

"The orders of the High Court in the impugned appeals are to be set aside on the sole ground that the respondents after paying octroi duty have passed on the burden to the consumers and collected from the customers on the cloth purchased and sold by them. Therefore, the order of refund would be an unjust enrichment for them. This Court has repeatedly held that such a refund should not be ordered. In that view of the matter without expressing any opinion on the merits during the interregnum Gram Panchayat was entitled to collect the octroi,

since respondents are not entitled to the refund of the amount which is already collected and passed on the burden to the consumers these appeals are to be allowed. The appeals are accordingly allowed and the writ petitions in the High Court stand dismissed."

16. Last but not the least, the seven Judges (sic) Bench of the Supreme Court in the case of *Mafatlal Industries Ltd. v. Union of India* [1998] 111 STC 467 : 1997 (1) SC 684 has dealt with the principle of unjust enrichment in depth. It has been observed in the said judgment that the doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the tax from both ends. In other words, he cannot collect tax from the dealers in one end and also collect the same tax from the State on the ground that it has been collected from him contrary to law. The power of the court is not meant to be exercised for unjustly enriching a person. However, a claim of refund, whether made under the provisions of any Act, Rules or regulation, can succeed only if the petitioner alleges and establishes that he has not passed on the burden of tax to another person/other persons. His refund claim shall be allowed only when he establishes beyond all reasonable doubt that he has not passed on the burden of the tax to any other person. Whether the claim for restitution/refund is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation, but is subject to the above requirement. Where the burden of the tax has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund. But where such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that that amount is retained by the State, i.e., by the people. There is no immorality or impropriety involved in such a proposition.

17. Thus, the question of unjust enrichment being a pure question of fact, the same cannot be adjudicated under writ jurisdiction. The impugned order, annexure 5, reveals a complete non-application of mind. The authorities while disposing of the representation filed by the petitioner have lost sight of the specific direction issued by this Court, and thus, we have no hesitation to hold that the authorities have not applied their mind in the way they were required to do in consonance with the direction of this Court in *O.J.C. No. 6198 of 1994 (Ipitata Sponge Iron Ltd. v. State of Orissa)* [2001] 122 STC 259. As disputed questions of facts are involved which need to be determined for arriving at a just decision, it would not be proper for us to delve into the matter at present and it would be just and proper to direct the authorities to apply their mind and to dispose of the representation afresh sacrosanctly following the directions issued by this Court in *O.J.C. No. 6198 of 1994 (Ipitata Sponge Iron Ltd. v. State of Orissa)* [2001] 122 STC 259 and the law enunciated in the preceding paragraphs.

18. In view of the discussions made above, we direct the sales tax authorities to

dispose of the refund application keeping in mind the ratio laid down by this Court in O.J.C. No. 6198 of 1994 (Ipitata Sponge Iron Ltd. v. State of Orissa [2001] 122 STC 259). It is needless to say that the authorities will give adequate opportunity to the petitioner-company and allow it to file such documents as deemed just and proper for deciding the issue. In view of the fact that the matter is pending since long, we direct that the entire exercise is to be completed within a period of three months from the date of receipt of copy of this order.

With the aforesaid observations and directions the writ application is disposed of.

P.K. Mohanty, J.

19. I agree.