

(1985) 06 KAR CK 0026

In the Karnataka High Court

Case No : Writ Appeal No's. 830 of 1980 and 160 of 1981

Union of India and Others

APPELLANT

Vs

I.T.C. Limited and Another

RESPONDENT

Date of Decision : 07-06-1985

Acts Referred:

Central Excise Rules, 1944 — Rule 11, 173J

Constitution of India, 1950 — Article 133, 134A, 226

Citation : (1986) 10 ECC 17 : (1985) 5 ECR 2013 : (1985) 21 ELT 655

Hon'ble Judges : S.R. Rajasekhara Murthy, J;K.S. Puttaswamy, J

Bench : Division Bench

Advocate : U.L. Narayana Rao, for the Appellant; C.R. Balaji, Attorney, C.K. Narayana Rao, Ashok Desai and A. Hidayathulla, for the Respondent

Judgement

1. As the questions that arise for determination in these appeals between the same parties are interconnected, we propose to dispose of them by a common judgment.

2. M/s I. T. C. Ltd., a public limited company, incorporated under the Companies Act, which is respondent-1 before us, petitioner No. 1 in W.P. Nos. 11792 of 1978 and 2413 of 1978 out of which these appeals arise and will be hereafter referred to as the respondent. The respondent is inter alia engaged in the manufacture and sale of cigarettes and tobacco products in its five factories situated in different parts of the country, one of which is situated in the City of Bangalore, with which factory products only we are concerned in these appeals. As manufacturer of cigarettes and tobacco products, the respondent is exigible to excise duty under the Central Excises and Salt Act, 1944 (Central Act No. 1 of 1944) and the Rules made thereunder ("the Act" and "the Rules").

3. For the periods from (1) 17-2-1972 to 31-1-1972, (2) 16-2-1972 to 16-3-1972, (3) 1-9-1970 to 28-5-1971, (4) 29-5-1971 to 15-2-1972 and (5) 1-2-1973 to 22-2-1973, the respondent had paid excise duty on the goods manufactured at its Bangalore factory under sections 3 and 4 of the Act as

interpreted by this Court in *AMCO Batteries (P) Ltd. v. Assistant Collector of Central Excise, Bangalore* - (AIR 1963 Mys 216). But the Supreme Court in its decision rendered on 1-12-1982 in *A.K. Roy and Another Vs. Voltas Limited*, disagreeing with the enunciation made by this Court in *AMCO Batteries*" case ruled that excise duty under the Act was leviable on the wholesale cash price at the factory gates or from principal to principal basis and not on the basis of secondary wholesales.

4. On 14th February, 15th February, 27th February and 13th March, 1973, the respondent presented five applications for the aforesaid periods before the Assistant Collector of Central Excise, I.D.O. III Bangalore ("Assistant Collector") claiming refund of the difference of excise duty paid on the basis of the ruling of this Court in *AMCO Batteries*" case and the ruling of the Supreme Court in *Voltas*" case or on the ground that the difference of duty paid and collected by the revenue was without authority of law and the same was legally and justly refundable to it, which were rejected by the Assistant Collector on 19-1-1976 (Exhibit-E in W.P. No. 11792 of 1978).

5. Against the said order of the Assistant Collector, the respondent filed an appeal u/s 35 of the Act before the Appellate Collector of Central Excise, Madras ("Appellate Collector"), who by his order dated 12-7-1976 (Exhibit-F) allowed the same in part and directed the Assistant Collector to refund a sum of Rs. 51,85,647-16 P for the period referred to in the said order. Against the said orders of the Appellate Collector and the Assistant Collector to the extent they rejected its claim, the respondent filed a Revision u/s 36 of the Act as it stood then before Government of India ("Government") which by its order dated 6-7-1978 (Exhibit-J) dismissed the same without, however, exercising the suo motu power of revision against the order of the Appellate Collector, which was available to it as the Act stood. In W.P. No. 11792 of 1978, the respondent challenged the said orders made by Government, Appellate Collector and the Assistant Collector in so far as they rejected its claim for refund. On 4/5-2-1980, Chandrakantaraj Urs, J. has allowed that writ petition and has directed the respondents therein, who are appellants before us, to refund the whole of the amounts claimed by it for the aforesaid periods, the correctness of which is challenged by the appellants before us in W.A. No. 830 of 1980.

6. On 28-2-1977, the Assistant Collector in compliance with the order dated 12-7-1976 (Exhibit-F) of the Appellate Collector, refunded a sum of Rs. 51,85,647-16P to the respondent. With this, the matter to that extent should have become final. But, alas, that did not happen.

7. On 21-1-1978, the Superintendent of Central Excise, Concurrent Assessment and Inspection Group, Bangalore ("Superintendent") issued a show cause notice to the petitioner purporting to be under Rules 10 and 173-J of the Rules calling upon the respondent to make payment of the amounts refunded on 28-2-1977 which was challenged by it in W.P. No. 2413 of 1978. On 10th September, 1980, Chandrakantaraj Urs, J., has allowed the same, the correctness of which is

challenged by the appellants in W.A. No. 160 of 1981 before us.

8. Sri U. L. Narayana Rao, learned Advocate has appeared for the appellants in the appeals. Sriyuts Ashok Desai and A. Hidayathulla of Bombay Bar assisted by Sri C. K. Narayana Rao of Bangalore Bar have appeared for the respondent.

9. Both sides in their full and elaborate arguments have relied on a large number of rulings and we will refer them at the appropriate stages.

10. On the contentions urged before us, the following points arise for determination in the two appeals are :

W.A. No. 830 of 1980

(1) Whether a petition under Article 226 of the Constitution claiming for refund of taxes paid was maintainable or not ?

(2) Whether the claim of the respondent for refund was governed by Rules 11 and 173(j) of the Rules or not ? If so, governed by the said Rules, is it open to this Court to order refunds in excess of the periods in those Rules ?

(3) Whether the respondent was making an unjust enrichment in seeking for refund of excise duty paid for the periods in dispute ?

(4) Whether the direction for refund is justified or not ?

W.A. No. 160 of 1981

(5) Whether the learned Judge was justified in interfering with the show cause notice dated 21-1-1978 or not ?

We not proceed to examine these points in their order.

11. Re : Point No. 1 : Sri Rao relying on the ruling of the Supreme Court in Suganmal Vs. State of Madhya Pradesh and Others, contends that a petition for a mere refund of taxes or excise duty paid is not maintainable under Article 226 of the Constitution.

12. Sri Desai refuting the contention of Sri Rao contends that a petition for refund of taxes paid was maintainable.

13. Article 266 of the Constitution couched in very wide and general terms, the true scope and ambit of which has been explained by the Supreme Court in a large number of case, empowers a High Court to entertain a petition even to exclusively claim for refund of taxes paid to the State. We consider it wholly unnecessary to refer to all the decided cases on the point.

14. In Suganmal's case also the Court only expressed that "normally" a petition for refund should not be entertained under Article 266 of the Constitution. In State of Madhya Pradesh Vs. Bhailal Bhai and Others, and another noticed in Suganmal's case and many other cases, including the latest one in Shri Vallabh Glass Works Ltd. and Another Vs. Union of India (UOI) and Others, dealing with a

case for refund under the very Act, the Supreme Court has held that a petition under Article 226 of the Constitution to enforce a refund of tax is maintainable. Every one of the observations made by the Court in Suganmal's case considered and examined by the learned Judge, do not lend support to the extreme contention urged by Sri Rao.

15. Even otherwise, the respondent had challenged the quasi-judicial orders made by the authorities and had sought for consequential relief for refund. In such a case, a petition under Article 226 is, undoubtedly, maintainable.

16. On any view, the conclusion of the learned Judge on this point is clearly right. We see no merit in the contention of Sri Rao and we reject the same.

17. Re : Point No. 2 : Sri Rao contends that the refund claim made by the respondent though the same did not invoke Rules 11 and 173(j) of the Rules, was only made under those Rules and refund in excess of the period stipulated in them cannot be granted by any of the authorities under the Act or by this Court exercising its powers under Article 226 of the Constitution. In support of his contention, Sri Rao strongly relies on a ruling of the Supreme Court in Madras Rubber Factory Ltd. Vs. The Union of India (UOI) and Others, and the rulings of the High Courts of Calcutta and Delhi in 1979 E.L.T. 236 and 1979 E.L.T. 527 respectively.

18. Sri Desai refuting the contention of Sri Rao contends that the refund claim made by the respondent was founded on the ground that the amounts had been collected without the authority of law or outside the Act to which Rules 11 and 173(j) had no application. In support of his contention, Sri Desai strongly relies on the ruling of the Supreme Court in Patel India Private Limited Vs. Union of India and Others, Vallabh Glass Work Limited's case, several rulings of various High Courts including those of Bombay and Delhi since reported in I.T.C. Ltd. Vs. M.K. Chipkar and others, and I. T. C. Limited v. Superintendent of Central Excise and others 1983 E.L.T. 281 (Delhi) that had occasion to examine a similar claim of the respondent for almost the very periods.

19. On a detailed and critical examination of the question, noticing every one of the rulings cited at the Bar, the learned Judge has concluded that the claims of the respondent for refund founded on the ruling of the Supreme Court in Voltas" case, were not authorised by the Act or were not authorised by law. On this finding, the learned Judge has concluded that Rules 11 and 173(j) had no application. We are of the view that the reasoning and conclusions of the learned Judge on this point is correct.

20. In its applications for refund before the Assistant Collector as also in its appeal and revision, the respondent did not not invoke Rules 11 and 173 J of the Rules. In rejecting the applications for refund, the Assistant Collector did not deal with them as one made under the said Rules. But in the appeal, the Appellate Collector without a full and proper examination, however, concluded that the applications made by the respondent were governed by the said Rules and

directed the refund for the period stipulated in them with which Government concurred.

21. Rule 173(j) only extends the period of 3 months to one year in cases of self-removal and therefore, it is enough to refer Rule 11 only hereafter. Rule 11 is analogous to Section 40 of the Sea Customs Act, 1978 (S.C. Act). Rule 11 regulates the period when a refund is sought on grounds of "inadvertence, error or misconstruction" and not to cases of payments made outside the Act, which has been the consistent case of the respondent.

22. In Patel India's case, the Supreme Court dealing with a case of refund of payments made outside the S.C. Act, has ruled that it would be a case of payment not authorised by law and was not a case of inadvertence, error or misconstruction occurring in Section 40 of that Act. We are of the view that the difference of excise duty paid by the respondent was outside the Act and not authorised by law and its case was squarely governed by the principles enunciated by the Supreme Court in Patel India (P) Limited's case as rightly held by the learned Judge on a full and critical examination.

23. In Madras Rubber Factory" case, that arose directly from a decision rendered by Government under the Act, the Supreme Court dealt with the matter as one governed by the S.C. Act and did not deal with a case of payment made outside the Act or without the authority of law as in Patel India (P) Ltd.'s case. We are, therefore, of the view that the principles enunciated in M.M. Rubber case do not govern the case of the respondent. In Assistant Collector of Customs, Madras and others v. Premraj and Ganapatraj and Co. (P) Limited - 1978 E.L.T. 630 (Madras), Leukoplast (India) Limited v. Union of India and others 1983 E.L.T. 2106 (Bombay), the High Courts of Madras and Bombay have distinguished the M.M. Rubber's case on this very ground. We are in respectful agreement with the views expressed by their Lordships in these cases on this aspect.

24. What follows from the above discussion is that Rule 11 and the period stipulated therein had no application to the case of the respondent and there is no warrant for us to disturb the finding of the learned Judge. We see no merit in the contention of Sri Rao to upset the same and we reject it.

25. Re : Point No. 3 : Sri Rao strenuously contends that the respondent who had collected the difference of excise duty from its customers or passed on the burden to its customers, but seeking refund of the same, was making an unjust enrichment and therefore, this Court should reject the same.

26. Sri Desai contends that this ground and plea of the appellants which is not also true, urged for the first time before us, cannot be permitted to be raised.

27. In their return filed before the learned Single Judge, the appellants did not contend that the respondent in seeking for refund, was making an unjust enrichment. At the hearing of the writ petitions also, the appellants did not urge this ground before the learned Judge.

28. A plea of "unjust enrichment" is not a question of jurisdiction or a pure question of law that can be allowed to be urged for the first time in an appeal. On this short ground alone, we must decline to examine this contention of the appellants. But, we will assume that the appellants had properly pleaded, laid the necessary foundation and examine the same on that basis.

29. Before the authorities and this Court, the respondent claimed that it had paid the difference of exist duty to Government though not bound to pay, on the basis of the principles enunciated by this Court in *AMCO Batteries*" case, which had been disapproved by the Supreme Court in *Voltas*, case. We are of the view that the respondent, who had paid the difference of excise duty on a mistake of law or fact, either of which does not make any difference in India (vide *Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf*, in seeking for refund of the same, does not make an unjust enrichment.

30. In another case of the respondent, almost for the very period in upholding its claim for refund, *Lentin, J.*, of the Bombay High Court in *I.T.C.'s* case with whom *Shah, J.*, concurred, dealing with this very ground has rejected the same in these words.

"Mr. Sethnas reliance on these averments and Ex. 1 is misplaced and does not take into account certain basic factors never disputed by the Department. It is also not in dispute that I.T.C. have no control over the wholesalers after sales, that the wholesalers then sell to secondary wholesalers of their choice who in turn sell to retailers who sell to the customers, and that I.T.C. have an integrated price which includes such excise as is payable in law and not any specific amount of excise. In para 3 of the petition it is stated in unambiguous terms that I.T.C. do not make retail sales or sales in small quantities or operate or maintain any retail shop and that I.T.C. make sales is in large bulk only to wholesale buyers at arms length on principal to principal basis, that I.T.C. do not derive any extra benefit from their wholesale buyers and that the transactions between the letter and I.T.C. are bona fide at arms length and do not have any consideration other than the price of the products, and that during the relevant period I.T.C. followed the self removal procedure laid down by Chapter VII-A of the Rules. In para 4 of the Department's affidavit-in-reply dated 29th March, 1976, these averments are admitted to be substantially correct. Para 4 of the petition goes on to say that during the relevant period I.T.C. mistakenly and bona fide believed that for the purpose of Section 4(a) of the Act, the prices charged by the wholesale dealers to the secondary wholesalers formed the correct basis of assessment whereas according to the true legal position discovered later by reason of the Supreme Court decision in *Voltas*"case, the correct basis of assessment u/s 4(a) was the price charged by I.T.C. to their wholesale dealers. In para-5 of the Department's affidavit-in-reply dated 29th March, 1976 what is denied is the element of mistake averred in para 4 of the petition. It is important to note that both before and after the self removal procedure introduced under Chapter VII-A of the Rules, the price lists were submitted by I.T.C. and were approved by the

Department on the basis of the price charged and realised by the secondary wholesalers from the retailers, which after discount was the price charged and realised by I.T.Cs. wholesale buyers from the secondary wholesalers. Column 2 of Ex. 1 viz. "Maximum list price per Mills" represented the price at which I.T.Cs. products were sold by the secondary wholesalers to the retailers. "Maximum wholesale nett selling price" mentioned in Column 4 represented the nett selling price realised by the I.T.Cs. wholesale buyers from the secondary wholesalers after the permitted discount. From the maximum wholesale nett selling price "Central Excise Duty/Special Excise Duty/Additional Excise Duty" mentioned in Column 5 was deducted to arrive at the "Maximum Valuation" mentioned in Column 6 of I.T.Cs. products for Central Excise duty assessment. Thus the value of the I.T.Cs. products for the purpose of assessment of duty was determined on the basis of the maximum wholesale nett selling price which represented the wholesale buyers' price to the secondary wholesalers. The official current price list submitted by I.T.C. did not indicate the price realised by the I.T.C. from their wholesale buyers as it was believed both by the I.T.C. and the Department that such price was not pertinent for the purpose of determination of the products u/s 4(a). All this is reflected in the written submissions filed by I.T.C. with the Department on 23rd October, 1973 appearing in the petition at page 51 which page has been alluded to in Ex. 1 itself. I.T.C. had an integrated price which included excise duty payable in law and not any specific amount of excise. For example, I.T.C. sold their product to their distributor, say at Rs. 200/- whereas the distributor sold it to the secondary wholesaler with an addition of Rs. 4/-; if the excise duty was 300%, out of Rs. 200/- collected by I.T.C. from their distributor, Rs. 150/- would be excise and Rs. 50/- would be the assessable value; however, the duty paid by I.T.C. would also be on extra four rupees, viz., Rs. 3/- and this would be borne by I.T.C. It is also not without its own significance that not a single of I.T.Cs. wholesalers (or for that matter anyone else) has come forward claiming as his the excess duty paid to the Department by I.T.C.

In the light of this analysis and the undisputed facts, it is difficult to see how I.T.C. can be accused of unjust enrichment, or how in the teeth of this position the charge of unjust enrichment can be brought home to them as suggested by Mr. Sethna merely from I.T.C.'s failure in filing an affidavit in rejoinder."

We are in respectful agreement with these views.

31. On the above discussion, we hold that there is no merit in this contention of Sri Rao and we reject the same.

32. Re : Point No. 4 : On the findings recorded by us on Points 1 to 3, it follows that we cannot interfere with the order of the learned Judge in W.P. No. 11792 of 1978.

33. Even otherwise, the correctness of the claims of the respondent which were all within three years prior to the presentation of its application for refund out of

which for one year the appellate authority had accepted its claim, was not even disputed by the appellants before the learned Judge or before us also. When that is so, the claim of the respondent founded on the ruling of the Supreme Court in "Voltas" case, accepted by the learned Judge exercising his sound judicial discretion, cannot be upset by us.

34. On the above discussion, it follows that Writ Appeal No. 830 of 1980 is liable to be dismissed.

35. Sri Rao contends that every one of the circumstances mentioned in the notice dated 21-1-1978 (Ext-H) called for a detailed examination and decision by the authority constituted under the Act, which could then be challenged in appeals and a reference, did not justify the interference of the learned Judge at the very threshold.

36. Sri Desai contends that the Superintendent was really trying to get round the appellate order that suffered from a patent error of jurisdiction and law justified interference at the very threshold.

37. On an examination of the show-cause notice, the contentions urged by both sides, the learned Judge has concluded that the Superintendent was trying to get round the order of the Appellate Collector and unto the same and therefore, the same called for his interference at the threshold.

38. A casual or a close examination of the show-cause notice issued by the Superintendent reveals that he is really trying to get round the order of the Appellate Collector. We are of the view that the reasoning and conclusion of the learned Judge on this aspect is unexceptionable.

39. Article 226 of the Constitution, undoubtedly, empowers this Court to interfere at any stage of the proceedings. Almost as a rule this Court does not interfere with show-cause notices and leaves the parties to agitate the matters before the authorities constituted under the Act and then only approach this Court. But, that does not mean that this Court cannot interfere in an appropriate case as in the very present case, where a subordinate attempts to undo what had been done by an appellate authority and whose order had become final and binding. On any legal principle, the Superintendent was wholly unjustified and even acted improperly in attempting to undo the order of the Appellate Collector. We are of the view that it was a fit case in which this Court's interference was called for at the very threshold. We see no merit in the contention of Sri Rao and we reject the same.

40. As the only contention urged in Writ Appeal No. 160 of 1981 fails, this appeal is liable to be dismissed.

41. As all the contentions urged for the appellants fail, these appeals are liable to be dismissed. We, therefore, dismiss these appeals. We, however, grant four months time from this day to comply with the mandamus issued by the learned Judge in W.P. No. 11792 of 1978. But, in the circumstances of the cases, we

direct the parties to bear their own costs.

Order on the oral application made by the appellants for a certificate of fitness to appeal to the Supreme Court under Articles 133 and 134-A of the Constitution.

42. After we dictated our order dismissing these appeals, Sri Narayana Rao orally seeks for a certificate of fitness to appeal to the Supreme Court under Articles 133 and 134-A of the Constitution.

43. Sri Desai opposes the applications made by Sri Narayana Rao.

44. We are of the view that the questions decided by us in these cases do not involve substantial questions of law of general importance that needs to be decided by the Supreme Court. We, therefore, reject the oral applications made by the appellants.