

(1989) 07 OHC CK 0029
In the Orissa High Court
Case No : First Appeal No. 74 of 1986

Union of India

APPELLANT

Vs

Straw Products Limited

RESPONDENT

Date of Decision : 25-07-1989

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B

Citation : (1989) 25 ECR 540 : (1990) 45 ELT 562

Hon'ble Judges : H.L. Agarwal, C.J;S.C. Mohapatra, J

Bench : Division Bench

Advocate : A.B. Misra, for the Appellant; S.K. Ghose and Bibek Mahanti, for the Respondent

Judgement

H.L. Agarwal, C.J.—In this case, we have been called upon to decide the age-old question vexing the Courts as to whether a suit of a particular nature is maintainable in the Civil Court. An equally important question that has come to the surface is as to whether a litigant has got a vested right for redressal of his remedy in a particular forum which cannot be changed or taken away.

2. An objection regarding the maintainability of the suit was raised by the defendant-appellants, but the Subordinate Judge rejected the same and ultimately decreed the suit in part holding that the money having been paid by a mistake of law prior to the coming into force of the amendment (to be noticed hereafter, the suit was maintainable in the Civil Court.

3. In the First Appeal filed by the defendants, it appeared to us to be expedient that the question of maintainability of the suit be taken up and decided in the first instance because in the event of our decision being in favour of the appellants, the valuable time of the Court to examine other questions would be saved. Accordingly, learned Counsel were allowed to argue the jurisdictional question in the first instance.

4. In order to appreciate his legal question, it would be necessary to state the

relevant facts in brief.

5. The plaintiff manufactures varieties of paper including poster paper. Under Item No. 17 of the First Schedule to the Central Excises and Salt Act, 1944 (shortly stated 1the act, the plaintiff claims that it was not liable to pay excise duty from 16-3-1976 till 27-10-1980. But it is claimed that under a mistaken impression of law, it went on paying the excise duty on the quantity of poster paper manufactured by them. However, when the mistake was realised, it applied for refund of the amounts paid as such to the Assistant Collector who rejected the applications.

The plaintiff having also failed before the first appellate authority, i.e., Collector (Appeals), Central Excise, filed a Second Appeal before the Tribunal. But, in the meantime, they hurriedly filed the Title Suit in question.

Admittedly, the appeal before the Tribunal is pending perhaps awaiting the result of this appeal.

In the written statement, apart from refuting the claim of the plaintiff on merits that excise duty was not exigible under the Act, as already stated of maintainability of the suit in the Civil Court was also raised.

6. It cannot be disputed that u/s 9 of the Code of Civil Procedure, all suits of civil nature except those whose cognizances is either expressly or impliedly excluded can be entertained by the Civil Court. But in the present case, the legislature inserted Section 11-B in the Act by Section 21 of the Customs, Central Excises and Salt and Central Boards of Revenue (Amendment) Act, 1978 (ACT 25 of 1978). Section 11-B, so far as relevant, reads as follows :-

:11-B. Claim for refund of duty :-

(1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months form the relevant date :

Provided that the limitation for six months shall not apply where any duty has been paid under protest.

(2) If on receipt of any such application, the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant should be refunded to him, he may make an order accordingly.

(3) xxx xxx xxx

(4) Save as otherwise provided by or under this Act, no claim for refund of any duty of excise shall be entertained.

(5) Notwithstanding anything contained in any other law, the provisions of this section shall also apply to a claim for refund of any amount collected as duty of excise made on the ground that the goods in respect of which such amount was collected were not excisable or were entitled to exemption from duty and no

court shall have any jurisdiction in respect of such claim.

Explanation.- For the purpose of this section-

(A) `refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(B) `relevant date" means-

(a) xx xx xx

(b) xx xx xx

(c) xx xx xx

(d) xx xx xx

(e) xx xx xx

(f) xx xx xx

Section 1(2) of the Amending Act provided that the amendment shall come into force on a date to be appointed by the Central Government later on.

Before the aforesaid provision came into force, another amendment was made by Section 49 of Act 44 of 1980 and the expression `relevant date" in clause (a) was substituted in place of `date of payment" with an Explanation.

Section 11-B was enforced . 17-11-1980. Prior to the insertion of Section 11-B, the matter of refund was governed by Rule 11 of the Central Excise Rules, 1944. On the coming into force of Section 11-B with effect from 17-11-1980, Rule 11 was omitted from the Rules. Under the new scheme, against any decision or order appeal has been provided u/s 35 and provision for revision has also been made. A right of second appeal to the Tribunal has also been provided by the 1980 Amendment.

On a perusal of Section 11-B, it is clear that all matters relating to refund are now vested in the statutory authorities alone.

Let us now examine the main question, i.e., the competency of the Civil Court to entertain a suit for refund, in the light of the above statutory provisions. The general principle that rights entrusted to special Tribunals cannot be adjudicated by the Civil Court is now well- settled by authoritative decisions of various High Courts as well as the Supreme Court. Reference,if any needed, may be made to the case of the State of Bombay (Now Gujarat) Vs. Jagmohandas and Another, State of Kerala Vs. Ramaswami Iyer and Sons, and Munshi Ram and Others Vs. Municipal Committee, Chheharta, . In all these decisions, the general principle as indicated above has been clearly laid down.

The Allahabad High Court, in the case of Union of India (UOI) Vs. Sir Shadi Lal Sugar and General Mills Ltd., had the occasion to consider the question of

maintainability of a suit for refund of excise duty. The Full Bench of that Court took the view that the suit as such was not maintainable.

7. Dr. Shankar Ghose, learned Counsel appearing for the plaintiff- respondent, however, made an ingenious argument to overcome this obvious difficulty. He wanted to draw a line between the claims for refund which were made with respect to a period prior to the coming into force of Section 11-B, i.e., 17-11-1980, and the cause of action accruing to litigants thereafter. He submitted that the bar created by the non- obstante clause in sub-section (5) of Section 11-B that no court shall have nay jurisdiction in ground that the goods in respect of which such amount was collected were no exigible or were entitled to exemption from duty would be effective and operative form 17-11- 1980. Therefore, it would not hit such suits where the claim for refund of an amount collected from a person as duty was made with respect to a period prior to that date. In other words, the submission was that the right of choosing the forum could not be taken away by the Legislature with retrospective effect, particularly when the scheme of Section 11-B was not made retrospective. He submitted that taking any other view would amount to defeating a vest right.

The argument, on the very face of it, is unacceptable and must be rejected as being erroneous. Vested right in the real sense is the right to get refund and not to choose the forum for enforcing the remedy of refund.

In this regard, the submission of Dr. Ghose was that on payment of the amount as duty of excise by mistake, a right the common law accrued to the plaintiff to get back the same when the mistake was discovered. For that purpose, within three years of the discovery o the mistake, the plaintiff can enforce his right in a Civil Court. Such a right having accrued from the date the payment was made, it could have been enforced by a suit, and Section 11-B, which is not retrospective, cannot defeat the vested right.

8. I have said earlier that this argument is only ingenious and ought to be rejected inasmuch as the vested right is the right of recovery, and the forum for enforcing the remedy cannot be cannot be said to be a vested right. A person going to avail his remedy must approach the forum available at the time of enforcing the right. He cannot be permitted to approach the forum which was available on the date of accrual of the cause of action. Undisputedly, on the date when the suit in question was filed, the provisions of Section 11-B (5) were in force. A definite machinery for the relief of refund was provided by the amending provision and the civil remedy under the common law was ousted.

I may usefully refer to the decision of the Supreme Court in the case of New India Insurance Co. Ltd. Vs. Smt. Shanti Misra, Adult, . There the Court was confronted with a problem for consideration as to whether in cases where accidents had occurred prior to the constitution of the Claims Tribunals and the remedy of action in the Civil Court was alive but not suits had been filed, whether claims of any damages arising out of the accidents would be

maintainable before the Accidents Claim Tribunal by filing applications u/s 110A of the said Act or suits would lie for enforcement of rights before the Civil Court which was the forum available when the causes of action for claiming damages arose. It was held that the jurisdiction of the Civil Court had been ousted as soon as the Claims Tribunal was constituted in the area and that filing of cases before the Tribunal was the only available remedy for claiming the compensation.

9. This Court was also faced with a somewhat similar situation in the case of *Duryodhan Samal v. Smt. Uma Devi* [(1985) C. I. T. 360] when the Orissa Civil Courts Act, 1974 came into force repealing the Bengal, Agra and Assam Civil Courts Act, 1887. The question arose as to whether irrespective of the date of institution of the suit an appeal from a decree or order of the Subordinate Judge shall lie to the District Judge where the value of the original suit in which or in any proceeding out of which the decree or order was made did not exceed Rs. 20,000/-, as per the provisions of Section 16(2) of the Act.

It would be seen on a plain reading of the Section that the appellate jurisdiction of the District Judge has been enhanced to Rs. 20,000/- which was previously Rs. 5,000/- under the Bengal, Agra and Assam Civil Courts Act, 1887, and where the value of the decree passed by the Subordinate Judge did not exceed Rs. 20,000/-, the appeal shall lie to the District Judge. The argument that since the right of appeal was a vested right and had accrued to the parties on the date of institution of the suit in the year 1978, that would continue to exist and to that extent the old law must govern the exercise and enforcement of that right.

Applying the dictum laid down by the Supreme Court in the *New India Insurance Company's* case, it was held :-

"The vested right of appeal which accrued to the litigant on the date of institution of the suit had not been taken away, but merely the forum was changed from the High Court to the Court of the District Judge. Since a litigant can have no vested right to pursue his remedy in a particular forum, in this case for lodgment of his appeal and change of forum is merely a change of procedural law, it would operate retrospectively unless a different intention is expressed or can be inferred by necessary intendment."

10. Dr. Ghose advanced another reasoning in support of his submission, namely that the period of limitation provided in Section 11-B is only six months from the date of payment and the right of the plaintiff is taken away since there is not scope for condonation of delay or extension of the period of limitation from the date the mistake was discovered. Dr. Ghose could not cite any direct authority in support of his stand, but referred to a decision of the Supreme Court in the case of *Collector of Central Excise, Chandigarh Vs. Doaba Co-operative Sugar Mills Ltd., Jalandhar*, No doubt, there is an observation in this case that refund can be obtained by filing a suit. But the question involved in the present case is regarding the maintainability of the suit on account of the specific bar u/s 11-B. This question was neither raised nor considered in the aforesaid decision.

Therefore, this decision is of no assistance of Dr. Ghose to support his submission. As regards the period of limitation, Section 5 of the Limitation Act may be applicable to such cases since the same does not appear to have been specifically excluded. Section 17 of the Limitation Act is also applicable to an application for refund.

11. Dr. Ghose also cited some other decisions. But I do not want to notice them and unnecessarily lengthen the judgment since they are clearly distinguishable and there was no occasion for the court in those cases to consider the main controversy with which we are faced in this case.

12. The irrefutable principle of law is that no litigant has, or can have, a vested right in a particular forum. He cannot say as matter of right that his suit or application should be tried by this or that forum which existed on the date his cause of action arose. Forum belongs to the realm of procedure and does not constitute a substantive right of a party or a litigant. (See V.C.K. Bus Service (P) Ltd., Coimbatore and Another Vs. H.B. Sethna and Others, .

13. When the legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless they apply in express terms to pending actions, do not affect them. But there is an exception to this rule, namely where enactments merely affect procedure and do not extend to rights of action. If a statute deals merely with the procedure in an action and does not affect the rights of the parties, it will be held to apply prima facie to all actions, pending as well as future. Whether a person has a right to recover property is a question of substantive law. But in what court he must institute the proceedings is a question of procedural law.

14. Having given my anxious consideration to the facts and circumstances of the case, the provisions of the relevant law and the thrust of the argument made by the learned Counsel appearing for the plaintiff-respondent, I do not feel any hesitation to hold that the jurisdiction of the Civil Court having been ousted by a specific legislation, the suit was not maintainable. Since the decision on the question of maintainability of the suit is sufficient for its dismissal, it is not necessary to examine any other controversy arising in this appeal, particularly when the plaintiff's appeal is pending before the Tribunal.

15. I would accordingly allow this appeal and set aside the judgment and decree of the trial court. The appellants will be entitled to the costs of this appeal. Hearing fee is assessed at Rs. 1,000/- (one thousand) only.