

(1989) 01 KAR CK 0009

In the Karnataka High Court

Case No : Regular First Appeal No's. 11 of 1982 and 279 of 1985

Union of India (UOI)

APPELLANT

Vs

Sterling Varnishes

RESPONDENT

Date of Decision : 25-01-1989

Acts Referred:

Constitution of India, 1950 — Article 226
Contract Act, 1872 — Section 72
Evidence Act, 1872 — Section 79, 80, 81
Karnataka General Clauses Act, 1899 — Section 6

Citation : (1989) 20 ECC 109 : (1989) ILR (Kar) 920

Hon'ble Judges : Hiremath, J

Bench : Single Bench

Advocate : K. Radmarajaiah, for the Appellant; K.G. Raghavan, for the Respondent

Final Decision : Dismissed

Judgement

Hiremath, J

1. Respondent is the manufacturer of industrial varnishes whose product is liable to excise duty under the Central Excise and Salt Act, 1944. The Central Government however issued a notification No. 116/74 dated 21-7-1974 acting under Rule 8 of Central Excise Rules 1944, exempting such goods from excise duty provided that the value of the total production does not exceed Rs. 2,00,000/-. The respondent was not aware of such notification till about the month of April 1978 when it was brought to their notice by a certain official of the Central Excise Department. Therefore, as usual it paid the duty on the goods manufactured during 1974-75 and 1975-76. For these two years the total excise duty paid came to Rs. 10,194-93ps. As the respondent has been paying excise duty in accordance with provisions of Section 79B of the Central Excise Rules the fact that the respondent is not liable to pay any excise duty could be made out only at the end of March 1976 at which time the total products of the year could be made out as the said duty was the one paid under mistake. Notice u/s 80-C,

CPC was issued to the appellants and the Original Suit came to be filed before the trial Court for refund of the said duty amount of Rs. 10,194-93ps and interest at 18% per annum amounting to Rs. 3,670-07ps and the total claim before the trial Court was Rs. 13,865/-.

2. The suit was resisted by the appellants on the ground of limitation and want of jurisdiction in the Civil Courts to entertain the claim. It was contended by the appellants-defendants that the respondent-plaintiff paid the duty for these two years on his own and there was no demand from the appellants. A notification was published in the Official Gazette of India in addition to its circulation to Chamber of Commerce and Trade by trade notification. Under the self removal scheme envisaged under Chapter-VII A of the Central Excise Rules 1944 the plaintiff made payment as and when excisable goods were cleared from the factory. Therefore there was no question of any mistake under which the plaintiff could have paid the duty. None of the officials of the Department invited his attention to the exemption notification. The plaintiff respondent ought to have claimed refund by filing application in accordance with Rule 11 read with Rule 173-J of the said Rules within one year from the date of such payment or adjustment of the same in his account. As the Central Excise and Salt Act (the Act for brief) is a self-contained enactment and when the machinery is provided for claiming refund, the Civil Courts have no jurisdiction to entertain any suit.

3. The Court below found that it had jurisdiction to entertain the suit, that it was the duty paid under mistake and out of the Act, Section 72 of the Contract Act is attracted and the period of limitation being three years from the knowledge of such mistake the suit is in time. It also found that failure on the part of the respondent to claim refund under Rule 11 of the Rules under the Act, is not fatal to the suits. Two separate suits were filed for separate claims for respective years. Consequently, the suits came to be decreed for the duty actually paid, claim of interest having been negatived.

4. Separate appeals are filed and in these appeals preferred by the defendants in the Court below the same points of limitation and jurisdiction are urged. Firstly, according to them the trial Court ought to have found that the rights and liabilities of the parties were governed by the provisions of the Act, the respondent ought to have made a claim before the authority constituted for that purpose under the Act and the Civil Court ought not to have entertained the suit. Such application filed by the respondent was barred by time and rejected by the Assistant Collector of the Central Excise and even the Appellate Authority had dismissed the appeal. In order to get over the bar of limitation, the respondent has sought shelter under the general law of limitation which has no application.

5. For the year 1974-75 the duty paid was Rs. 3,053-27 and for the year 1975-76 the duty paid was Rs. 7,141-66ps. The suits were filed in the Court below on 30-3-1979. A period of six months is prescribed u/s 11-B of the Act for claiming of refund of any duty of excise by filing an application to the Assistant Collector of Central Excise. This limitation does not apply where any duty is paid

under protest. Sub-section 4 of Section 11-B makes it amply clear that save as otherwise provided by or under this Act, no claim for refund of any duty of excise shall be entertained. Sub-section 5 of Section 11-B which is more material reads as follows:-

"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."

It is thus clear that Sub-section 5 has expressly taken away the jurisdiction of a Civil Court to entertain any such claim even if it is for refund on the ground that the duty payable has been exempted. Though on the face of it the jurisdiction of the Civil Court is barred by virtue of this sub-section it is necessary to note that Section 11 -B was inserted by Amendment Act of 1970 with effect from 17-11-1980. It replaced the old Rule 11 which was in force upto 16-11-1980. Rule 11 as it was in force prior to 6-8-1977 was as follows:-

"No duties or charges which have been paid or have been adjusted in an account current maintained with the Collector under Rule 9, and of which repayment wholly or in part is claimed in consequence of the same having been paid through inadvertence, error or misconstruction, shall be refunded unless the claimant makes an application for such refund under his signature and lodges it with the proper Officer within three months from the date of such payment or adjustment, as the case may be."

Rule 173-J however extended the period of limitation to one year from three months.

6. Learned Standing Counsel for the appellants did not urge that the provisions of Section 11-B were attracted. Still he maintained that even under Rule 11 as it prevailed before Section 11-B was introduced are quite applicable. At once the argument that even Section 40 of the Act takes away the jurisdiction of the Civil Court has to be brushed aside for the reason that it relates only to the protection of actions taken under the Act. Therefore, it is unnecessary to advert to this argument of the Standing Counsel. In order to support his argument that when a special machinery for entertaining applications for refund of the duty paid has been envisaged in the Act, the Civil Court has no jurisdiction the learned Standing Counsel relied on a decision of the Supreme Court in the case of Bata Shoe Co. Ltd. Vs. City of Jabalpur Corporation, Section 84(3) of the C.P. & Berar Municipalities Act, was for construction before the Supreme Court and the Supreme Court held that since the Act has devised its own special machinery for inquiring into and adjudicating upon such challenges the common remedy of a suit stands necessarily excluded and cannot be availed of by a person aggrieved by an order of assessment to octroi duty. The Court further observed that both the Act and the Rules contain provisions enabling the aggrieved party effectively

to challenge an illegal assessment or levy of double duty. By reason of the existence and availability of those special remedies, the ordinary remedy by way of a suit would be excluded on a true interpretation of Section 84(3) of the Act, more so when the plaintiffs in fact availed themselves of those remedies.

7. In that case the argument was that the double duty was levied on the plaintiffs though not Justified by terms of Rule 14(B) and this went to the correctness of the levy and not to the jurisdiction of the assessing authority. The Court held that the error could be (sic) only in the manner provided in the Act and not by the authority prescribed therein. It is further contended on behalf of the respondent that it is not a question of refund of any duty levied and paid under the Act, but it is a question of illegal collection of duty outside the Act as, admittedly, the notification clearly exempted payment of duty to a certain limit of production and the collection of the same even though it is voluntary by self-assessment becomes illegal. In that event machinery envisaged under Rule 11 read with Rule 173(J) could not be availed of by the respondent. Article 265 of the Constitution provides that no tax shall be levied or collected except by authority of law. Admittedly, the Central Government had exempted by notification referred to above that production of goods of a certain limit was exempt from excise duty and even if the respondent paid the same by self-assessment or under self removal scheme as it is called the Officers whose duty it was to collect excise duty could not have collected the same. Though the respondent pleaded and led evidence that he was not aware of such an exemption the appellants did not lead evidence to show that in fact he was aware of this notification and there was no question of mistake on his part. If the collection was not under authority of any law then certainly the very collection becomes illegal though it is voluntary.

8. The maxim that everyone is presumed to know law cannot be extended at all events especially in relation to such notifications as the same has no support of any legal provision. Even Section 81 of the Evidence Act enjoins that the Court shall presume the genuineness of every document purporting to be any official Gazette etc. but does not say that it is presumed that every citizen knows the contents of such gazettes, newspapers, etc. Similarly Section 79 of the Evidence Act relates to presumptions as to genuineness of certified copies and Section 80 to presumption as to documents produced as record of evidence. Thus these presumptions under the Evidence Act, relate to genuineness or correctness of documents, maps, enactments etc. referred to thereunder but nothing further. Even the learned Standing Counsel was not in a position to meet this argument that there is no presumption under law that whatever is published in an official Gazette is known to a citizen or a member of the public. Therefore, the fact that the notification exempting such goods from duty was published in the official Gazette does not in any way impute the respondent with knowledge thereof right from the date of publication, thus, leaving no scope for mistaken payment.

9. The respondent clearly pleaded that he was not aware of such an exemption

and the moment he was made aware of it notice u/s 80 CPC was issued and then the suit filed. It was further urged and with sufficient force on behalf of the respondent that there is nothing to show that wide circulation was given to this notification nor is it shown that the respondent is the member of any Chamber of Commerce or Trade Association which subscribes to this Gazette or to which a copy of the same is sent. Even otherwise the argument does appear sound for the reason that the respondent could not have allowed his money locked by unnecessary payment despite exemption allowed by Government. Therefore, even from the practical aspect of the matter it is rather inconceivable that for two years continuously the respondent could have ignored the exemption and unnecessarily paid duty. Therefore, the plea that payment of duty was made under mistake was rightly accepted by the Court below. If that is so it is not challenged that Section 72 of the Contract Act, is attracted and hence Article 113 of the Limitation Act comes into operation giving three years limitation to the suit or to file suit for refund of the duty paid.

10. The Calcutta High Court in the case of DILICHAND SHREELAL v. COLLECTOR OF CENTRAL EXCISE AND ORS 1986 ELT 298. dealt with a similar situation and held that duty paid under mistake of law clearly amounts to collection of duty illegally and refund thereof could be claimed by approaching a Civil Court. The learned Single Judge who decided the case held that Section 11-B of the Act does not come into operation if the duty was paid under mistake of law. It was further held therein that civil suit was not necessary to be filed in such cases and the Writ Jurisdiction of the High Court under Article 226 of the Constitution could be invoked. Similarly, in the case of the ASSISTANT COLLECTOR OF CUSTOMS, MADRAS AND ORS. v. PREMRAJ & GANAPATRAJ & CO. (P) LTD. 1978 ELT 630, invoking the provisions of Article 226 of the Constitution, the Court held that even though the refund application was filed after the expiry of time limit was extended, the High Court could direct refund of the duty paid acting under Article 226 of the Constitution. The High Court of Bombay in the case of STATE OF MAHARASHTRA AND ORS. v. GLAXO LABORATORIES (INDIA) PVT. LTD. AND ANR 1979 ELT LLJ-2861979 ELT J-286. took the view that if duty is illegally collected the plaintiffs could file the suit for refund of the same. Merely because the departmental Officers had turned down the request did not imply that the jurisdiction of the Civil Court Is excluded.

11. The observations of a Division Bench of the Patna High Court in the case of Rohtas Industries Ltd. Vs. Union of India (UOI), are quite apposite. The learned Judges say:-

"It may be mentioned that there is no provision either in the Act or in the Rules made u/s 37 and published in accordance with Section 38 of the Act for any application for refund to be made other than Rule 11 of the Central Excise Rules, 1944, referred to above. In other words, the statute or the Rules made thereunder provide no machinery whatsoever for recovery of duty paid under a mistake when the mistake itself was discovered more than three months after

the payment was actually made."

That was also a case wherein duty had been paid in respect of the exemption of certain goods from payment of excise duty.

12. As far as the constructive knowledge attributed to the respondent is concerned the Supreme Court in the case of *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, made very illuminating observations in this behalf. it said:-

"We are not quite sure that if the maxim that everyone is presumed to know the law is applied, there will be any case of payment under a mistake of law unless that presumption is rebutted in the first instance, for, the moment it is assumed that everyone is presumed to know the law, it is clear that no one can make a mistake as to the law. It is sometimes said that every man is presumed to know the law, but this is only a slovenly way of stating the truth that ignorance of the law is not in general an excuse, (See Frederick Pollock, "Jurisprudence and Legal Essays", page 89) "There is no presumption in this Country that every person knows the law; it would be contrary to common sense and reason if it were so".

13. The argument therefore advanced on behalf of the respondent that the payment was made under mistake and therefore the respondent could approach the Civil Court for refund of the same has sufficient force. This Court in the case of *CANARA RUBBER PRODUCTS PVT. LTD. v. ASSISTANT COLLECTOR OF CENTRAL EXCISE AND ORS* 1983 ELT 97 (Kant). made it clear that Rule 11 cannot be invoked in relation to the claim of refund of duty having been paid under a mistake of law. Payment made under mistake of law cannot be retained by the authorities so collecting, as such retention would amount to levy of duty or tax without the authority of law. Therefore, a person claiming refund of duty made under mistake of law cannot be denied the remedy under Article 32 or Article 226 of the Constitution.

14. A Division Bench of this Court in the case of *Union of India and Others Vs. I.T.C. Limited and Another*, also took a similar view.

15. Even though a few more decisions have been cited at the Bar on this point, I find it unnecessary to advert to them as the decisions cited above and referred to certainly support the case of the respondent that the payment of duty made by him was clearly under mistake and therefore he could approach the Civil Court for directing refund of the same.

16. The Supreme Court in the case of *Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf*, made it amply clear that where it is once established that the payment even though it be of a tax has been made by the party labouring under a mistake of law the party is entitled to recover the same and the party receiving the same is bound to repay or return it. No distinction can be made in respect of a tax liability and any other liability on a plain reading of the terms of Section 72 of the Contract Act. To hold that tax paid by mistake

of law cannot be recovered u/s 72 will be not to interpret the law but to make a law by adding some such words as "otherwise than by way of taxes" after the words "paid". It was further observed that merely because the State has not retained the monies paid as sales-tax by the assessee but has spent them away in the ordinary course of the business of the State will not make any difference to the position and under the plain terms of Section 72 of the Contract Act the assessee will be entitled to recover back the monies paid by it to the State under mistake of law.

17. For the reasons aforesaid, I find that the Court below was Justified in giving a decree in favour of the respondent for recovery of the duty paid by mistake. The Civil Court had jurisdiction to entertain the suits for the reason that the payment was not authorised or was illegal as it was not under any authority of law but was contrary to the notification issued by the Government exempting payment of duty up to a certain limit. In such an event Rule 11 does not come into operation and Section 11-B as now stands or Section 11-B(5) is not attracted as the period covered is prior to the introduction of Section 11-B in the statute book.

18. The argument of the learned Standing Counsel that jurisdiction of the Civil Courts is taken away by introduction of Section 11-B(5) of the Act is equally untenable in view of the Section 6 of the Karnataka General Clauses Act of 1899. The Civil Court had jurisdiction when the suit was instituted and no special provision was made as to the pending suit or proceedings when Section 11-B replaced Rule 11 by the Amending Act.

19. The appeals therefore fail and the same are dismissed with costs.