

(2007) 07 CAL CK 0027

In the Calcutta High Court

Case No : APO No. 274 of 2002, APOT No. 212 of 2002 and W.P. No. 1821 of 2001

Vinod Somani

APPELLANT

Vs

Calcutta Municipal Corporation and Others

RESPONDENT

Date of Decision : 30-07-2007

Acts Referred:

Calcutta Municipal Corporation Act, 1980 — Section 183(5)
Constitution of India, 1950 — Article 14, 226, 265, 32
Contract Act, 1872 — Section 72
Limitation Act, 1963 — Section 17(1)

Citation : (2007) 4 CHN 416

Hon'ble Judges : Pinaki Chandra Ghose, J; Biswanath Somadder, J

Bench : Division Bench

Advocate : Ambar Mazumdar and Debapriya Gupta, for the Appellant; Ashok Das Adhikary and Swapan Debnath, for the Respondent

Final Decision : Dismissed

Judgement

1. This appeal is arising out of an order passed by the Hon"ble First Court dated 28th February, 2002 dismissing the writ petition filed by the writ petitioner/appellant herein for refund of the mutation fees which were paid by the writ petitioner/appellant herein under the provisions of Calcutta Municipal Taxation Regulations (1989) (hereinafter referred to as "the said regulations").
2. In view of the fact that the said regulations was declared as ultra vires on the Hon"ble First Court and subsequently the order of the High Court was affirmed by the Hon"ble Supreme Court reported in Calcutta Municipal Corporation and Others Vs. Shrey Mercantile Pvt. Ltd. and Others,
3. In the appeal the moot question is whether the writ petitioner/appellant herein is entitled to get the benefit of the order so passed by the Hon"ble First Court declaring the said regulations as ultra vires.
4. The fact as it appears before us that in August, 2002, the writ petitioner/

appellant herein filed an application claiming the refund of the mutation fees paid by him earlier in terms of the said regulations. It appears that the Hon''ble First Court held that the writ petitioner/appellant herein is not entitled to get the refund of the said mutation fees.

5. Mr. Ambar Mazumdar, learned Advocate appearing in support of this appeal submitted before us that when the said regulations has already been declared as unconstitutional, the effect should be given retrospectively and not

prospectively and he upon a decision reported in M/s. Shrey Mercantile (P) Ltd. and Others Vs. The Calcutta Municipal Corporation and Others, in support of his contention.

6. He also relied upon another decision reported in Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, and submitted that the fees so collected by the Corporation must be refunded and accordingly, he relied upon the decisions reported in State of Himachal Pradesh and Others Etc. Etc. Vs. Nurple Private Bus Operators Union and Others Etc. Etc., 2000(2) CHN 181 (State of West Bengal v. Shrey Merchantile Pot. Ltd. and Ors.); 2007(1) CHN 851 (Eastern Coalfields Ltd. v. Sudama Das and Ors.) and Abhijit Dey Vs. Learned West Bengal Administrative Tribunal and Others, in support of his contention.

7. On the contrary, Mr. Ashok Das Adhikary, learned Advocate appearing in support of the respondent contended that the writ petitioner did not protest while paying the mutation fees or did not even challenge the liabilities while paying such fees. The claim of the refund after 4 years is barred by limitation under the provisions of laws of limitation and the writ petitioner also cannot get the benefit of declaration of the said regulations as ultra vires at this stage.

8. He further contended that the statutory provisions operates prospectively and not retrospectively and, therefore, declaring such collection as unconstitutional in the said order, should be given effect to prospectively and not retrospectively.

9. In support of his such contention, he relied upon the decisions reported in Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, and A.P. Steel Re-Rolling Mill Ltd. Vs. State of Kerala and Others, and submitted that if it is found that the Hon''ble Court has been approaching after a long delay, the same may be disentitled to obtain a discretionary relief.

10. After hearing the facts of the case and after perusing the materials on record and after considering the decisions cited before us, it appears to us that in the decision of Shrey Mercantile (P) Ltd. (supra) the Court held that Part IV of the Calcutta Municipal Corporation Act (hereinafter referred to as "the said Act") deals not only with the levy of taxes but it also deals with assessment, valuation, collection and recovery of taxes. The entire machinery for filing of reports, objections and inspections of records and properties given under the Part which deals with taxation. The maintenance of assessment books, annual reports, valuation reports etc. all given under the Part which deals with taxation Section

183(5) of the said Act tells that under the said section it has been stated that the fees are payable for mutation as may be prescribed under the said regulations. But the primary object of such a charge is to augment the revenue and the levy of surcharge cannot be treated to be a part of the regularity measure.

11. The Corporation while prescribing the fees under the said regulations, has levied the fees on ad valorem basis which is one more circumstance to show that the impugned levy is in the nature of tax and not in the nature of a fee. Moreover, a quantum of levy indicates that it is a tax and not a levy. The Hon''ble Supreme Court after analyzing the provisions of the said Act and the said regulations came to the conclusion that the impugned levy is in exercise of power of taxations under the said Act to augment the revenues primarily and not as a part of the regularity measure. The purpose of mutation is to register the transfer in the records of the Corporation which in turn would help the Corporation to recover taxes from the existing tax payer. Therefore, the Hon''ble Supreme Court held that no special benefit has been given to the transferee who is made statutorily liable to inform the Corporation of the change, if any, in the name of the person primarily to pay taxes. Mutation enquiries are instituted in the interest of the Corporation for the tax purpose and not for the benefit of any tax payer.

12. The Hon''ble Supreme Court also held that there is no reason given for charging different rates dependent on the value of the property and the case of transfer. Therefore, the Hon''ble Supreme Court held that by doing so the existence of the levy falls different on persons, similarly, situated resulting in violation of Article 14 of the Constitution of India.

13. Moreover, the quantum of fees disproportionate to the so-called "services" which shows arbitrariness in the levy of such imposition and the Court came to the conclusion that the levy is irrational, arbitrary and discriminatory and beyond Section 183(5) of the said Act and has no reasonable nexus with the object of legislation.

14. The Hon''ble Supreme Court has also drawn a distinction between "taxes" and "fees" and held that the taxes are burden of pecuniary nature imposed for different costs of Government functions whereas charges are "fees" where they are imposed upon a person to defray cost of particulars, services rendered to his account, the different between "a levy" and "a tax" is on account of source power. Hence, the Hon''ble Supreme Court held in these circumstances that in the garb of regulations, any fee or levy which has no connection with the cost or expense of administering the regulation cannot be imposed and such levy can be justified which can be treated as a part of regularity measure. It is not plenary as in the case of power of taxation. Applying all these decisions the Hon''ble Supreme Court declared the levy as irrational, arbitrary, discriminatory and beyond Section 183(5) of the said Act.

15. The sum of the principles laid down in the decision of Mafatlal Industries Ltd.

(supra) by the Hon''ble Supreme Court, are reproduced hereunder for the purpose of deciding this appeal. In the said decision the Hon''ble Supreme Court held in Paragraph 108 (ii) as follows:

Where, however, a refund is claimed on the ground that the provision of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition. This principle is, however, subject to an exception; where a person approaches the High Court or the Supreme Court challenging the Constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be reopened on the basis of a decision on another person's case; this is the ratio of the opinion of Hidayanath, C. J. in Tilokchand Motichand and we respectfully agree with it. Such a claim is maintainable both by virtue of the declaration contained in Article 265 of the Constitution of India and also by virtue of Section 72 of the Contract Act. In such cases, period of limitation would naturally be calculated taking into account the principle underlying Clause (c) of Sub-section (1) of Section 17 of the Limitation Act, 1963. A refund claim in such a situation cannot be governed by the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be, since the enactments do not contemplate any of their provisions being struck down and a refund claim arising on that account. In other words, a claim of this nature is not contemplated by the said enactments and is outside their purview.

16. Furthermore, in the same decision the Hon''ble Supreme Court held in Paragraph 108 (iv) as follows:

It is not open to any person to make a refund claim on the basis of a decision of a Court or Tribunal rendered in the case of another person. He cannot also claim that the decision of the Court/Tribunal in another person's case has led him to discover the mistake of law under which he has paid the tax nor can he claim that he is entitled to prefer a writ petition or to institute a suit within three years of such alleged discovery of mistake of law. A person, whether a manufacturer or importer, must fight his own battle and must succeed or fail in such proceedings. Once the assessment or levy has become final in his case, he cannot seek to reopen it nor can he claim refund without reopening such assessment/order on the ground of a decision in another person's case. Any proposition to the contrary not only results in substantial prejudice to public interest but is offensive to several well-established principles of law. It also leads to grave public mischief. Section 72 of the Contract Act, or for that matter Section 17(1) (c) of the Limitation Act, 1963 has no application to such a claim for refund.

17. In the decision of M/s. Tilokchand & Motichand (supra), the Hon''ble Supreme Court held that the writ petition was dismissed on the ground of delay which was filed before the Hon''ble Supreme Court under Article 32 of the Constitution of India. It appears to us that the Bench decided the question whether any time-

limit at all can be imposed on petitions under Article 32 of the Constitution and whether the analogy can be drawn from an Article of the Indian Limitation Act. Further, it appears to us that the said questions cannot have any bearing in the facts and circumstances of the case although the point of delay has been urged before us by Mr. Das Adhikary.

18. In the decision of *M/s. Rup Diamonds (supra)* the Hon''ble Supreme Court held that the same point has been decided and rejected on the ground that the writ petition filed before the Hon''ble Supreme Court after the rejection by the authorities and in view of inordinate delay in preferring such claim before the authorities in filing the writ petition under Article 32 of the Constitution of India before the Hon''ble Supreme Court. The Court also declined to interfere with the matter in question on the ground of inordinate delay.

19. In the decision of *Orissa Cement Ltd. (supra)* where the Hon''ble Supreme Court has held that a finding regarding the invalidity of a levy need not automatically result in a direction for the refund of all collections thereof made earlier. The declaration regarding the invalidity of a provision and the determination of the reliefs 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 discrimination.

20. It is open to the Court to grant, mould or restrict the reliefs in a manner most appropriate to the situation before it in such a way as to advance the interest of justice. It is not always possible in a situation to give a logical and complete effect to a finding, where a person affected by an illegal exaction files an application for refund under the provisions of the relevant statute or files a suit to recover the taxes is paid under a mistake of law. The Court can grant relief only to the extent permissible under the Rules of Limitation. Even if he files an application for refund or a suit for recovery of the taxes paid for several years, the relief will be limited only to the period in regard to which the application or suit is not barred by limitation. Where a petitioner seeks relief against an illegal exaction in a writ petition filed under Article 226 of the Constitution of India, the question has often arisen whether a petitioners prayer for refund of taxes collected over an indefinite period of years, should be granted once the levy is found to be illegal. To answer the question in the affirmative would result in discrimination between persons based on their choice of the forum for relief, a classification which, *prima facie*, is too fragile to be considered a relevant criterion for the resulting discrimination. This is one of the reasons why there has been an understandable hesitation on the part of the Courts in answering the above question in the affirmative.

21. Once the principle that the Court has a discretion to grant or decline refund is recognized, the ground on which such discretion should be exercised is a matter of consideration for the Court having regard to all the circumstances of the case. It is possible that a direction for refund may be opposed by the State on grounds other than laches or limitation. Thus even where the levy of taxes is found to be

unconstitutional, the Court is not obliged to grant an order of refund. It is entitled to refuse the prayer for good and valid reasons. Laches or undue delay or intervention of third party rights would clearly be one of those reasons. Unjust enrichment of the refundee may or may not be another. But the vital interest of the State is a relevant criterion for deciding that a refund should not be granted. Hence, refund of all the cesses collected since 1964 would work hardship and injustice.

22. The Hon''ble Supreme Court also held in the same decision that though the levy of the cess was unconstitutional, there shall be no direction to refund to the assesses of any amounts of cess collected until the date on which the levy in question has been declared unconstitutional.

23. In the decision of *Nurpur Bus Operators*''(supra) the Hon''ble Supreme Court held that once the provisions are declared invalid, consequently, the collection made thereunder stood invalidated. Furthermore, in our opinion, the decision of *Eastern Coalfields* (supra) has no application in the facts and circumstances of this case.

24. In the decision of *Abhijit Dey* (supra) the Hon''ble Supreme Court held that the judgment of a Bench of same strength cannot dispute the correctness of the judgment of an earlier Bench of large number of Judges.

25. After considering all these decisions cited before us and after analyzing the facts of the case and after perusing the materials on record, we come to the conclusion that the amount so collected by the Corporation under the said regulations has to be declared as invalid. Accordingly, we hold that after the Hon''ble Supreme Court quashed the said regulations and/or declared as ultra vires, any collection which has been done by the Corporation under the said regulations, has to be declared as invalid.

26. Hence, we cannot brush aside the fact that the appellant all through remained silent and did not challenge his liability to pay such mutation fees. The appellant did not take any steps to challenge the said regulations and long after his claim became barred by limitation and the appellant/writ petitioner filed this writ petition for refund.

27. We have also considered the decision of the *Orissa Cement Ltd.* (supra), the three-Judges'' Bench of the Hon''ble Supreme Court, where the Court held that though the levy of cess was unconstitutional, there shall be no direction for refund to the assesses of any amount of cess until the date on which the levy has been declared unconstitutional and the refund of the cess collection would cause hardship and injustice.

28. After following the said decisions as well as the decision of *Mafatlal Industries Ltd.* (supra), we come to the conclusion that the effect should be given prospectively and not retrospectively. The appellant/writ petitioner did wait outside the fence and watched the litigation pending before the Court, did not

take steps for a long time and, thereafter, turned around when the Court passed an order setting aside the said provision and is trying to get benefit. Such action of the appellant cannot be appreciated after such an inordinate delay.

29. For the reasons stated hereinabove, the appeal is dismissed.