Assistant Collector of C.Ex. Vs Bata Shoe Co. (P) Ltd.

Court: Calcutta High Court

Date of Decision: April 16, 2004

Acts Referred: Central Excises and Salt Act, 1944 â€" Section 2

Citation: (2004) 2 CALLT 592 : (2004) 115 ECR 486

Hon'ble Judges: Ashok Kumar Mathur, C.J; Ashim Kumar Banerjee, J

Bench: Division Bench

Final Decision: Allowed

Judgement

Ashim Kumar Banerjee, J.
The respondent is a shoe manufacturing company. For the purpose of manufacturing of shoes cotton fabrics

are required.

2. Prior to August 1,1960 excise duty was not leviable on the said duty paid cotton fabrics.

3. By a notification dated August 1, 1960 issued by the Deputy Superintendent of Central Excise, Batanagar the appellant levied excise duty on the

said cotton fabrics under the tariff item ""friction cloth"".

4. The shoe manufacturing company started making payment of the excise duty on and from the said date under protest. There had been series of

correspondence between the appellant on the one hand and the respondent on the other hand. Ultimately, Ministry of Finance by a circular dated

December 22,196S informed that no duty was payable on the ""friction cloth"" as per the letter of the Central Board of Revenue dated September

26,1963.

5. On June 21,1966 the Central Excise, Batanagar wrote to the appellant that the subject item did not attract excise duty.

6. On the basis of such communication the respondent made application for refund of the duty paid by them during the period April 24,1962 to

June 17, 1966 made under protest. The concerned authority allowed part of the claim which was made for the period after September 26,1963.

However, the period prior thereto was rejected by the concerned authority. As per the order passed by the concerned authority since the Central

Board of Revenue decided the issue and communicated their decision by their letter dated September 26,1963 the respondent was entitled to

refund of the amount paid after September 26,1963, and not before that.

7. Being aggrieved by the decision of the Excise Authority in rejecting part of the claim the instant writ petition was filed by the respondent. The

subject writ petition was heard and disposed of by the learned single judge on July 23, 1979.

8. Before the learned Single Judge it was contended on behalf of the Revenue that the alleged claim of the writ petitioner was barred by limitation

under Rule 11 of the Central Excise Rules. It was also contended that there was no scope for making any payment under protest as per the rule

prevalent at that point of time. It was also contended that the subject fabric was not a friction cloth but it was rubberized water proofing material.

However, the Revenue could not substantiate their view on that score before His Lordship. His Lordship held that the subject products of the writ

petitioner was nothing but a friction cloth. His Lordship relied upon the expert report produced in that regard.

9. His Lordship held that since the amount was paid under compulsion the claim of the writ petitioner was not barred under Rule 11. His Lordship

ultimately directed refund of the duty which was disallowed by the Revenue.

10. Being aggrieved and dissatisfied with the said judgment and order dated July 23,1979 the present appeal was filed by the Revenue.

11. Mr. Shyamal Sarkar, learned Counsel appearing for the appellant urged two points--(i) the claim was hopelessly barred by limitation, and (ii)

the claim was hit by the doctrine of unjust enrichment.

12. In support of his contention Mr. Sarkar relied upon Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, . According to

Mr. Shyamal Sarkar even as per the old Rule 11 prevalent at the relevant point of time refund application was to be made within the certain period

and neither the authority nor the court can condone such period. On the issue of unjust enrichment Mr. Sarkar contended that since the amount of

tax already paid by the respondent had been collected from various consumers refund of the same would amount to unjust enrichment by the

respondent-company and as such the same should not be allowed.

13. Mr. J.P. Khaitan, learned Counsel appearing for the respondent-company, contended that the letter dated September 26,1963 was nothing

but a clarification made by the Central Board of Revenue. By the said letter and/or decision of the Board of Revenue the duty payable on the

particular product was not relaxed. Hence, the said date should not be a cut off date for allowing the refund application. In this regard, Mr.

Khaitan relied upon two decisions of the Apex Court in the case of Lathia Industrial Supplies Co. Pvt. Ltd. v. Collector of Central Excise :

1987(29)ELT751(SC) and M/s. Ranadey Micronutrients etc. Vs. Collector of Central Excise, .

14. On the issue of limitation Mr. Khaitan contended that the particular rule had no application in the instant case as neither the duty was paid

under a misconception or under error or by mistake. It was really in the nature of a compulsive payment made by the respondent-company at the

instance of the Revenue. It was the Revenue who discovered their mistake and thereby asked the respondent-company to make application for

refund and as such the period of limitation prescribed under Rule 11 had no application in the instant case. He also contended that the Rule 11

specified a period of three months which was also extended for the self-removal assessee for one year under Rule 173J. In this regard he referred

two Apex Court decisions in the cases of India Cements Ltd. Vs. Collector of Central Excise, and Collector of Central Excise, Vadodra Vs.

Dhiren Chemical Industries, . He also referred to the Constitution Bench judgment in the case of Mafatlal Industries Limited as well as the decision

of the Special Bench Tribunal in the case of 1983 ECR 1011D which was ultimately upheld by the Apex Court. He also referred to the decision of

the Apex Court in the case of Kunhayammed and Others Vs. State of Kerala and Another,

15. On the issue of unjust enrichment Mr. Khaitan relied upon the Apex Court decision in the case of Union of India and others Vs. Solar

Pesticide Pvt. Ltd. and Another,

16. Lathia Industrial Supplies Co. Pvt. Ltd. v. Collector of Central Excise : 1987(29)ELT751(SC) . In the instant case the Superintendent of

Central Excise issued a circular that on and from a particular date particular process would not amount to manufacture within the meaning of

Section 2(f) of the Central Excises and Salt Act, 1944. The Apex Court held that there was no foundation for fixing a particular cut of date as the

commencement of the period from which the process would not amount to manufacture. The Apex Court found that there had been no change in

law in between and as such fixation of such cut of date was erroneous.

17. In the instant case the Central Board of Revenue by their letter dated September 26,1963 clarified the position. The Central Board of Revenue

was not empowered to levy tariff on a particular item or to exclude particular item from payment of duty. This is within the domain of the

Legislature. The Central Board of Revenue on interpretation of law prevalent on that date made a clarification to the effect that the particular

product was not covered under any excisable tariff. Hence, following the decision of the Apex Court in the case of Lathia Industries (supra) we

hold that fixation of cut off date in the instant case by the Revenue was totally under misconception of law and the basis on which the claim prior to

September 26,1963 was rejected was totally wrong and the learned Single Judge was right in rejecting those contentions.

18. Now question comes to the period of limitation. Rule 11 of the Central Excise Rules already prevalent at the material point of time provided

three months time to make any application for refund in case any amount was paid in excess by mistake or under misconception. The period of

three months was however extended for one year to the self-removal assessee under Rule 173(J). In the instant case neither there was any mistake

on the part of the assessee nor there had been any misconception on their part. This was purely a compulsive mode of recovery by the Revenue on

the basis of misconception of the Revenue authorities which was clarified by the Central Board of Revenue as referred to above. Hence, Rule 11 in

our view had no application. The learned Judge held so and we are in totally agreement with the learned Judge on that score. It was also

contended that there was no provision for payment under protest at the relevant point of time which was subsequently modified. Since we have just

now held that it was neither payment under mistake or misconception nor under any error committed by the assessee as it was recovered by the

Revenue under misconception, contention that the Rule 11 did not contemplate any payment under protest is an argument without any logic. On

this aspect Mr. Khaitan relied upon various Apex Court judgments as referred to above. He also referred to the decision of the Special Bench

Tribunal of CEGAT in the matter of Phosphate Co. Ltd. (supra). In the said case the Tribunal held that in the case of a payment under protest the

period of limitation would not be applicable. The decision in the case of Phosphate (supra) was challenged in a SLP before the Apex Court which

was dismissed after admitting the civil appeal. Mr. Khaitan relying on the Apex Court decision in the case of Kunhayammed and Ors. (supra)

contended that once the SLP is accepted and regular appeal is admitted the dismissal of the appeal would attract the doctrine of merger.

19. Considering the aforesaid Apex Court decisions and carefully examining the law on the subject we are in total agreement with the learned

Single Judge to the effect that the period of limitation prescribed under Rule 11 or under Rule 173(J) would not be applicable in the instant case.

20. The instant case has a significant feature. Before the Revenue authority the period of limitation was not gone into and was not considered. The

concerned authority rejected part of the claim which arose prior to September 26, 1963 on a misconceived impression that while considering the

refund application the date of the board"s clarification should be the cut off date. Hence, the authority also accepted the fact that the period of

limitation had no application in the instant case. Hence, the argument that the claim was barred by laws of limitation was nothing but an afterthought

and was based on misconception of law.

21. This leaves us with the question of unjust enrichment. This issue was neither raised before the learned Single Judge nor in the grounds of appeal

filed by the Revenue before us. The argument was advanced by Mr. Sarkar being prompted by the Constitutional Bench judgment in the case of

Mafatlal Industries Limited (supra). It is true that this particular product was used in manufacture of the products and as such can be termed as

intermediatory manufacture. Hence, there could not have been any direct collection of the said excise duty from the consumers which could debar

the respondent from making any refund application. However, in view of the Constitution Bench judgment in the case of Mafatlal Industries (supra)

we have to reject the claim of the respondent-company.

22. It is true that there cannot be any direct collection of the excise duty by the respondent-company from its consumers. However, such payment

under compulsion must have been reflected in the ultimate cost of the finished products. Hence, ratio of the Constitutional Bench judgment on the

issue of unjust enrichment would become applicable in the instant case. The relevant extract of the decision of the Apex Court in the case of

Mafatlal Industries Ltd. (supra) is quoted below:

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(i) ...

(ii) ...

(iii) A claim for refund, whether made under the provisions of the Act as contemplated in Proposition (i) above or in a suit or writ petition in the

situations contemplated by Proposition (ii) above, can succeed only it the petitioner/plaintiff alleges and establishes that he, has not passed on the

burden of duty to another person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the

burden of the duty or to the extent he has not so passed on, as the case may be. Whether the claim for restitution 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, as

explained in the body of the judgment. Where the burden of the duty 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.

The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot

collect the duty from his purchaser at one end and also collect the same duty 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. The doctrine of unjust enrichment is, however,

inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched.

23. We have also carefully gone through the minority view and the logic behind such view was nicely explained by Suhas Chandra Sen, J. (as His

Lordship then was). However, we are bound to follow the majority view expressed by the Apex Court and following the subject paragraph

quoted supra we are of the view that the claim of the writ petitioner cannot be allowed. It is true that the subject issue was never raised, either

before the learned Single Judge or in the grounds of appeal. However, after the Constitutional Bench judgment we cannot ignore the law laid down

by the Apex Court and we permitted the Revenue to take the plea of unjust enrichment.

24. Although we are in total agreement with the learned Single Judge on the other score we disallow the claim of the writ petitioner on the ground

of unjust enrichment following the decision of the Apex Court in the case of Mafatlal Industries Ltd. (supra).

25. Hence, the appeal is allowed.

26. The order of the learned Single Judge is set aside.

27. There would be, however, no order as to costs.

28. Urgent xerox certified copy would be given to the parties, if applied for.