

(1989) 03 CAL CK 0052

Calcutta High Court

Case No: C.R. No"s. 1351-54 (W) /80

Rasoi Vanaspati Industries Ltd.

APPELLANT

Vs

Collector of C. Ex.

RESPONDENT

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**Date of Decision:** March 30, 1989**Acts Referred:**

- Central Excise Rules, 1944 - Rule 11, 173J
- Constitution of India, 1950 - Article 226, 265
- Contract Act, 1872 - Section 21, 22, 72

**Citation:** (1989) 43 ELT 32**Hon'ble Judges:** Susanta Chatterji, J**Bench:** Single Bench**Advocate:** Sitaram Bhattacharya, for the Appellant; N.C. Roychowdhury and Sardar Amjad Ali, for the Respondent

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**Judgement**

Susanta Chatterji, J.

The present rules were issued relating to four writ petitions on 29-2-1980. There was, however, no interim order. It appears that applications were filed for refund of the excise duty paid by mistake. It was further placed on record that Rule 11 of the Central Excise Rules, 1944 provides for claim of refund of excess duty paid. The application for refund was rejected by the Assistant Collector, Central Excise, Calcutta Division since refund claim was found to be barred by limitation. The said order was challenged before the Appellate Collector, Central Excise, Calcutta. The Appellate -Authority considered the case carefully and in those four cases the appellate authority observed that the claim for refund was barred by limitation as Rule 11 read with Rule 173J of the Central Excise Rules, 1944 do not provide anything for condonation of delay. Being aggrieved the petitioner moved in revision and the Additional Secretary to the Government of India found that the applicant did not care to lodge a refund claim for a period of four years and there is no reason why they should seek relaxation of time limit for their carelessness to get the refund

of duty, more so, when the burden of duty charge must have been passed on to the consumer. Upon such finding as to the period of limitation as well as on merit the revisional application was rejected. Thus being aggrieved against all the aforesaid impugned orders the present rules have been issued in the writ jurisdiction on the ground that due to inadvertance excess duties were paid and Rule 11 of the Central Excise Rules, 1944 read with 173J of the said Rules do not stand in the way of refund of the amount paid in excess under error and/or inadvertance or misconstruction. The case of the Petitioner is that the revisional authorities acted with misconception as to the provisions of the Excise Act and the Rules thereunder in the matter of payment of excise duties and the procedures relating thereto. The impugned orders as passed suffer from inherent defects and the revisional authorities should have held that the petitioner's cases come within Section 72 of the Contract Act and the reliefs ought to have been granted as thereunder and there is no bar/impediment thereto, as submitted.

2. The petitions and the Rules issued thereon are, however, seriously contested by the respondents Excise authorities. Mr. Bhattacharya, learned Advocate appearing for the writ petitioner has drawn Court's attention to a judgment passed in Civil Rules No. 4167-68(W) of 1979 by Sudhir Ranjan Ray, J. (As His Lordship then was) on the 4th March 1988. It appears from the said judgment in (Doyapara Tea Company Limited v. Assistant Collector of Central Excises, Calcutta and Ors.) that similar cases as the present ones were considered and having heard the learned Advocates for both the sides in those cases, the said writ petitions were allowed and the Rules were made absolute. Various decisions were cited from the Bar that the High Court in exercise of the power under writ jurisdiction has the power for the purpose of enforcement of fundamental rights and statutory powers to give consequential reliefs by ordering repayment of money realised without any authority of law. The special remedy under Article 226 of the Constitution is not intended to supersede completely the other normal remedies or to deny the defences legitimately open in such action. It was further found that the controversy could have been avoided had the Legislature while prescribing a period of limitation for preferring such claims under Special Statute, made provisions authorising the statutory functionaries to condone the delay in preferring such claim, and on such delay being explained satisfactorily. But so long as it is not done, the writ Court as a court of equity has the power of granting reliefs in case of collection of tax without authorities of law in contravention of Article 265 of the Constitution, as found. Accordingly, the respondents in the said two Civil Rules were directed by issuance of a Writ of Mandamus to refund to the petitioner therein the excess excise duties paid for within a period of sixty days from date. Relying on such decision with much emphasis. Mr. Bhattacharya, learned Advocate for the petitioner has also drawn Court's attention to the reported decision in [Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf](#), wherefrom it will appear that the term "mistake" used in Section 72 of the Contract Act has been used without any qualification or

limitation whatever and comprises within its scope a mistake of law as well as of fact. It was further held therein that there is no warrant for ascribing any limited meaning to the word "mistake". There is no conflict between the provisions of Section 72 on the one hand and Sections 21 and 22 of the Contract Act on the other. The true principle is that if one party under a mistake, whether of fact or law, pays to another party money which is not due by contract or otherwise, such money must be repaid and the mistake lies in thinking that the money paid was due when in fact it was not due and that mistake, if established, entitles the party paying the money to recover it back from the party receiving the same. Much emphasis has been laid to the said reported decision and it is submitted on behalf of the petitioner that there is no bar in allowing the writ petitions accordingly in the present case. By the impugned orders herein, the authorities concerned have not considered the cases of the petitioner in their proper perspective and simply on the ground of limitation those have been refused.

3. Mr. Roychowdhury, learned Advocate for the contesting respondents has drawn Court's attention that apart from the question of limitation, the excise duties paid by the petitioner have already been realised from the consumers and that thus the said burden has already been passed over and thereafter in writ jurisdiction the petitioner cannot ask for refund of the duties allegedly paid by mistake and cannot obtain reliefs by way of refund while the same have already been realised in a circuitous manner. Mr. Roychowdhury, learned Advocate has further drawn Court's attention to certain decisions which were not brought to the notice of Sudhir Ranjan Ray, J (As His Lordship then was) at the time of disposal of the abovementioned two Civil Rules. In particular, Court's attention is drawn to a decision reported in [U.P. State Electricity Board Lucknow Vs. City Board, Mussoorie and Others](#), wherein at page 886, it appears that the contention relating to the validity of levy of additional charges could not be raised by the City Board under Article 226 of the Constitution in respect of the period prior to the filing of the writ petition. The additional charge of 7-1/2 per cent was levied in 1962 and the City Board did not question the same before the Court till March 21, 1968, when it filed the writ petition. It is further seen therein that it has not stated that it had not collected charges from the consumers of electric energy supplied by it at the rate which would cover the additional 7-1/2 per cent. The writ petition was therefore liable to be dismissed as unjust enrichment cannot be allowed. In the same volume, there is another decision at page 901 (State of M.P. v. Vyankatlal) wherein it was found that the recovery by the sugar factory of the "sugar fund", the difference between the supply price and the ex-factory price paid by it under the relevant Notification is not permissible when the burden of paying the amount was transferred by the sugar factory to the purchasers and the factory had not to pay the amount from its own coffers. Allowing such a refund would amount to unjust enrichment of the sugar factory. Only the persons on whom lay the ultimate burden to pay the amount would be entitled to get a refund of the same and if it is not possible to identify the persons on whom had the burden been

placed for payment towards the fund, the amount of the fund can be utilised by the Government for the purpose for which the fund was created, namely, development of sugarcane.

4. This Court only finds that on the theory of unjust enrichment the writ petition therein was not entertained for refund of the amount of excess payment by mistake. In particular, attention of the Court has been drawn to the reported decision in [Roplas \(India\) Ltd. and another Vs. Union of India and another](#), wherein the Division Bench of Bombay High Court has specifically considered the problems as are raised in the instant proceedings. The question of refund as well as of limitation and the duties paid under mistake of law as well as principles of unjust enrichment vis-a-vis duty paid by mistake by manufacturer and recovered from the consumers to be refunded under Section 72 of the Contract Act or Article 226 of the Constitution were duly considered. It was found therein that the relief by way of refund of the money paid under a mistake is based on the provisions of Section 72 of the said Act and as per that Section, a person to whom money has been paid, by mistake or under coercion must repay or return it. In all cases, it is not the manufacturer or the trader as the case may be who pays the amount but ultimately it is the consumer who does so and therefore what is necessary in cases as such is to find out from whose pocket ultimately the money for such payment has come or who has ultimately borne its brunt. Further, it will be a travesty of the judicial process if it is allowed to be abused for patently illegal and unjust recoveries by those who have not paid the amounts, as in the instant case. It was fairly conceded on behalf of the writ petitioners in the said case that they have recovered from their customers the whole of the excise duties involved in all the three claims and hence it was held in the said decision that it was not therefore necessary to go into the question of limitation but proceed on the basis that the payment of excise duty was made under a mistake of law and that all claims are within time, and since the petitioners have already recovered the whole of the duty from their customers, they are not entitled to refund even u/s 72 of the Contract Act.

5. Although Mr. Bhattacharya, learned Advocate for the petitioner has drawn Court's attention to another decision of the Bombay High Court reported in [Assistant Collector of Central Excise, Kalyan Division and another Vs. Dipsi Chemicals Pvt. Ltd. and another](#), where in the question of refund and as to Civil Court's jurisdiction and/or duty collected without authority of law, recoverable in a Civil Court were considered. After going through the decisions aforesaid and in particular the decision (supra) and the decision in [Roplas \(India\) Ltd. and another Vs. Union of India and another](#), this Court finds that in those cases, a serious question has arisen as to whether apart from the question of limitation, the writ petition should at all be entertained for unjust enrichment and whether the writ Court should interfere to permit the writ petitioners to get the refund while the actual burden has already been passed over to the consumers. This principle of unjust enrichment in the proper perspective as found in the decision of (Supra) and in the decision of

(Supra) very much weighs with this Court and this Court with respect does not agree with the findings as made by this Court in Civil Rules No. 4167-68(W) of 1979 (Supra) by Sudhir Ranjan Ray J. (As His Lordship then was). In the said Civil Rules, the questions raised in the Bombay High Court cases were not considered and necessary directions for refund of the excess duty paid were given.

6. Considering all the aspects of the matter, these cases, in my view, must be referred to a larger Bench of this Hon"ble Court for effective adjudication on the question as to whether apart from the, question of limitation, the petitioners are otherwise entitled to any relief as the same would result in unjust enrichment.

7. Accordingly, these Rules be placed before the Hon"ble Chief Justice for referring the same to a larger Bench on the questions as raised above.