

PETITIONER:
MAFATALAL INDUSTRIES LTD. ETC. ETC.

Vs.

RESPONDENT:
UNION OF INDIA ETC. ETC.

DATE OF JUDGMENT: 19/12/1996

BENCH:
CJI, A.M. AHMADI

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

Ahmadi, CJI

I have had the benefit of studying the judgments of my learned brothers Reddy, Sen and Paripoornan, JJ. Pursuant to the discussions that I have had with them and with all my other learned brothers on this bench, I find myself to be broadly in agreement with the conclusions recorded by Reddy, J., subject to the two aspects on which I have recorded my views hereunder:

The first of these is the issue regarding the extent to which the jurisdiction of ordinary courts is ousted in respect of claims for refund of taxes illegally levied and collected. In my view, it would be incorrect to hold, as Reddy, J. has done, that every claim for refund of illegal or unauthorised levy tax is necessarily required to be made in accordance with the provisions of the Central Excise Act, 1944 (hereinafter called "the Excise Act"). The leading authority governing this issue is the decision of this court in Dhulabhai and others Vs. State of Madhya Pradesh and Another, [1968] 3 S.C.R. 662. In this case, after analysing the leading decisions in the field, this Court laid down the following propositions with a view to determining the extent to which the jurisdiction of civil courts can be ousted:

"(1) Where the statute gives a finality to the orders of the special tribunals the Civil Courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the civil Courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the Scheme of the

particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit lies.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply."

In view of these propositions, which have been reiterated by this court on several occasions and thus constitute sound law, it is clear that actions by way of suits of petitions under Article 226 of the Constitution cannot be completely eliminated. The claims for refund can

arise under three broad classes and issue of ouster of jurisdiction of civil courts can be understood by focussing on the parameters of these classes which are as follows:

Class I: "Unconstitutional Levy"-- where claims for refund are founded on the ground that the provision of the Excise Act under which the tax was levied is unconstitutional.

Cases falling within this class are clearly outside the ambit of the Excise Act. In such cases assesseees can either file a suit under Section 72 of the Contract Act, 1872 (hereinafter called "Contract Act") or invoke the writ jurisdiction of the High Court under Article 226 of the Constitution.

Class II: "Illegal Levy"-- Where claims for refund are founded on the ground that there is misinterpretation/misapplication/erroneous interpretation of the Excise Act and the Rules framed thereunder.

Ordinarily, all such claims must be preferred under the provisions of the Excise Act and the Rules framed thereunder by strictly adhering to the stipulated procedure. However, in cases where the authorities under the Excise Act arrogate to themselves jurisdiction even in cases where there is clear want of jurisdiction, the situation poses some difficulty. Reddy, J. has held that in all cases, except where unconstitutionality is alleged, the remedy is to be pursued within the framework of the Excise Act. This is a dangerous proposition for it will not cater to situations where the authorities under the Excise Act assume authority in cases where there is an inherent lack of jurisdiction. This is because, if one were to follow Reddy, J.'s reasoning, the authorities under the Act will have the final say over situations in which they totally lack inherent jurisdiction in cases which are ultra vires the Excise Act but intra vires the constitution. To that extent, I would hold that in cases where the authorities under the Excise Act initiate action though lacking in inherent jurisdiction, the remedy by way of a suit under Section 72 of the Contract Act or a writ under Article 226 of the Constitution, will lie. Such a conclusion will not frustrate the exclusion of jurisdiction of civil courts by the Excise Act because the areas where an authority acting under a statute is said to lack inherent jurisdiction have been clearly demarcated by several decisions of this court.

Class III: "Mistake of Law" -- Where claims for refund are initiated on the basis of a decision rendered in favour of another assessee holding the levy to be : (1) unconstitutional; or (2) without inherent jurisdiction.

Ordinarily, no assessee can be allowed to reopen proceedings that have been finally concluded against him on the basis of a favourable decision in the case of another assessee. This is because an order which has become final in the case of an assessee will continue to stand until it is specifically recalled or set aside in his own case.

In Cases where the levy of a tax has been held to be (1) unconstitutional ; or (2) void for want of inherent jurisdiction (as explained in Class II), it is open for the assesseees to take advantage of the declaration of the law so made and claim refunds on the ground that they paid the tax under a mistake of law. This is because such claims are outside the ambit of the Excise Act. In such cases, the limitation period applicable will be that specified in section 17 (1) (c) of the Limitation Act.

Reddy, J. has moulded an exception to the above stated principle. He has held that 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 ignored or put aside as if it did not exist on the basis of the decision in another person's case. However, in my opinion, since the levy of tax has been held to be unconstitutional (which would lead to the conclusion that it should never have been levied in the first place) such an interpretation would be unfair to an assessee who had the foresight to discern the unconstitutionality of the provision (albeit on a different ground) but was unfortunate in not being able to convince the concerned court of the unconstitutionality of the provision. Considering the gravity of the case, in my opinion, it should be left open to such an assessee to use such legal remedy as may be available to him to have the earlier order reviewed or recalled on the basis of the order made in the subsequent case. If he succeeds, well and good; if he fails he must take the consequence of an adverse order against him.

On the issue of the retrospective application of the amended provisions of the Excise Act, I wish to emphasise one practical difficulty that may arise. Reddy, J. has held that in respect of proceedings that have been finally culminated, there is no question of reopening proceedings, and retrospectively applying the amended section 11B. However, in respect of decrees and orders that have become final but have not been executed, the non obstante clause, Section 11B(3), provides as follows:

"(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any court or in any other provision of this Act or the Rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2)."

(Emphasis added)

It is, therefore, clear that in respect of such decrees and orders, the procedure and conditions prescribed in Section 11B will have to be complied with. However, under the scheme of the amended Excise Act, the application for refund which is a pre-requisite for invoking Section 11B (2), is required to be made within six months from the payment of duty. It is obvious that this requirement cannot be complied with in respect of pending decrees and orders. But it must at the same time be realised that in such a case, the assessee was protesting against the recovery of the excise duty from him for which he had even initiated legal proceedings. It would therefore be in order to assume that he had paid the duty even though he was protesting its recovery. To ensure that such orders and decrees are not frustrated, it must be deemed that the duties of excise in such cases were paid "under protest" within the meaning of the second proviso to clause (1) of Section 11B. This would enable the assessees in such cases to file fresh applications under Section 11B(2), thereby complying with the scheme of the amended Excise Act.

Subject to the above, I agree with the rest of the conclusions reached by Reddy, J.

JUDIS