

SUPREME COURT OF INDIA

Union of India

Versus

Solar Pesticide Pvt. Ltd.

(B.N. Kirpal, D.P. Mohapatra and R.P. Sethi, JJ.)

Civil Appeal No. 921 of 1992.

04.02.2000

JUDGMENT

Kirpal, J. –

Whether the doctrine of unjust enrichment is applicable in respect of raw material imported and consumed in the manufacture of a final product is the question which arises for consideration in these appeals.

2. In order to decide the aforesaid issue, we need refer to the facts in the case of Civil Appeal No. 921 filed by the Union of India against Solar Pesticide Private Limited (hereinafter referred to as the respondent). The respondent imported copper scrap for use as a raw material in the manufacture of copper oxychloride. At the time of import of copper scrap the respondent sought exemption from payment additional customs duty (also known as countervailing duty or CVD) which was available under the customs Notification No. 35\81 CE dated 1.3.1981. At the time of clearance this duty was paid, subsequently, the respondent filed an application for refund of additional customs duty paid by it at the time of import of copper scrap claiming benefit under the aforesaid exemption Notification of 1.3.1981. The Assistant Collector of Customs, by order dated 16.2.1985, rejected the claim and held that the imported copper scrap was correctly assessed to CVD @ Rs. 3,300\ per M.T.

3. Three years after the rejection of the said claim, a writ petition was filed by the respondent in the Bombay High Court. It was claimed therein that the aforesaid exemption Notification gave complete exemption from payment of excise duty of copper for use in the manufacture of chemicals. Hence, when copper scrap was imported for use in the manufacture of chemicals, additional customs duty (countervailing duty) could not be levied on copper scrap so imported.

4. The High Court accepted this contention and came to the conclusion that the

refund application of respondent had been wrongly rejected. The High Court then considered the contention raised on behalf of the customs authorities that the claim or refund will have to be decided keeping in view of the amendments which had been carried out in 1991 to the Customs Act, 1962 (hereinafter referred to as "the Act"). It was submitted that with the introduction of sub-section 2 of section 27 of the Act, a claim for refund could be entertained if the importer was able to prove that he had not passed on the incidence of such duty to any other person. In other words, the submission was that the refund of duty, the incidence of which has already been passed onto other person, would result in unjust enrichment and in view of the amendments made in the Act, such unjust enrichment is not permissible.

5. The amendments which were made in the Act, inter alia, sought to provide that the manufacturer or importer of goods shall not be entitled to refund of duty of excise or, as the case may be, the duty of customs, if he has already passed on the incidence of such duty to the buyer. The burden of proof that the incidence of the duty has not been passed on to the buyer shall be on the person claiming the refund. The High Court, on interpreting Sections 27, 28C and 28D of the Act, came to the conclusion that the question of unjust enrichment would not arise in the case of captive consumption of the imported raw material. According to it, the question of unjust enrichment would arise under the amended act when refund is asked for by a person who has sold the imported goods and, in the process, had directly passed on the burden of duty to the buyer. This, according to the High Court, was clear from clauses (a), (b) & (c) of the proviso to Section 27(2) read with the presumption contained in Section 28D of the amended Act.

6. In this appeal, there is no dispute with regard to the question as to whether the respondent was entitled to get the benefit of the exemption notification with regard to the payment of the countervailing duty. We, therefore, proceed on the assumption that the decision of the High Court that the respondent was entitled to the said benefit was correct and it would, normally be entitled to refund of the said duty which it had paid.

7. On behalf of the appellant, the learned Attorney General contended that a Nine Judges Bench of this Court in *Mafatlal Industries Ltd. v Union of India*, (1997) 5 SCC 536 has upheld the validity of the amended Section 27 of the Act. He submitted that the perusal of sub-section 2 of Section 27 of the Act shows that onus was on the importer to prove that he had not passed on the incidence of duty to any other person before he could claim refund of the amount of duty paid by him.

8. Learned counsel appearing on behalf of the respondent in this appeal, however, contended that sub-section 2 of Section 27 of the Act cannot be read in isolation. The said provision has to be read with Sections 28C and D of the Act and the principle of unjust enrichment could not apply in the case of captive consumption of the imported raw material.

9. Before considering the rival contentions it is necessary to refer to the relevant provisions of the Act after its amendment in 1991. Sections 27, 28C and 28D read as under ;

"27: Claim for refund of duty :- (1) Any person claiming refund of any duty

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(i) paid by him in pursuance of an order of assessment; or

(ii) borne by him,

may make an application for refund of such duty and interest, if any paid on such duty to the Assistant commissioner of Customs -

(a) in the case of any import made by any individual for his personal use or by government or by any educational, research or charitable institution or hospital, before the expiry of one year.

(b) in any other case, before the expire of six months,

from the date of payment of [duty and interest, if any, paid on such duty] [in such form and manner] as may be specified in the regulations made in this behalf and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 28C) as the applicant may furnish to establish that the amount of [duty and interest, if any paid on such duty] in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such]duty and interest, if any, paid on such duty] had not been passed on by him to any other person :

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section and the same shall be dealt with in accordance with the provisions of sub-section (2):

Provided further that the limitation of one year or six months, as the case may be, shall not apply where any [duty and interest, if any, paid on such duty] has been paid under protest.

[Provided also that in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 25, the limitation of one year or six months, as the case may be, shall be computed from the date of issue of such order].

[Explanation 1] - For the purposes of this sub-section, "the date of payment of [duty and interest if any, paid on such duty], in relation to a person, other than the importer, shall be construed as "the date of purchase of goods" by such person.

[Explanation II - Where any duty is paid provisionally under section 18, the limitation of one year or six months , as the case may be, shall be computed from the date of adjustment of duty after the final assessment thereof]

(2) If, on receipt of any such application, the [Assistant Commissioner of Customs is satisfied that the whole or any part of the [duty and interest, if any, paid on such duty] paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the fund :

Provided that the amount of [duty and interest, if any, paid on such duty] as determined by the Assistant commissioner of Customs under the foregoing provisions of this sub-section shall, instead of being credited to the fund, be paid to the applicant, if such amount is relatable to -

(a) the duty and interest, if any, paid on such duty paid by the importer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person.

(b) the duty and interest, if any paid on such duty on imports made by an individual for his personal use.

(c) the duty and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any paid on such duty to any other person;

(d) the export duty as specified in section 26; 393_ Š

(e) drawback of duty payable under sections 74 and 75;

(f) the duty and interest, if any, paid on such duty borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify;

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty and interest, if any paid on such duty has not been passed on by the persons concerned to any other person.

28C: Price of goods to indicate the amount of duty paid thereon -
Notwithstanding anything contained in this Act or any other law for the time being in force, every person who is liable to a\pay duty on any goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating to assessment, sales invoice, and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold.

28D: Presumption that incidence of duty has been passed on to the buyer -
Every person who has paid the duty on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods."

10. The validity of Section 27 of the Act and the interpretation of the same came up for consideration before this Court in Mafatlal's case (supra). While

upholding the validity at page 631, it was observed that "the situation in the case of captive consumption has not been dealt with by us in this opinion. We leave that question open". It is this question which has now come up for consideration in the present appeals.

11. The first proviso to Section 27(1) deals with cases where application for refund had been made before the commencement of the Central Excise and customs Laws (Amendment) Act, 1991. According to this proviso, such an application for refund shall be dealt with in accordance with the provisions of sub-section (2). In the present bunch of cases, we are concerned with the import of raw material where payment of duty had been made and applications for refund were made prior to the commencement of the Amendment Act, 1991. All such applications are required to be dealt with in accordance with the provisions of sub-section (2) of Section 27 of the Act.

12. Sub-section (1) of Section 27 of the Act provides for making of a claim for refund of duty, in certain cases duty and interest, and the period of limitation within which such a claim has to be made. This sub-section, inter alia, provides that the applicant will have to establish that the amount of duty and interest in relation to which the refund is claimed was collected from, or paid by, him and the incidence of the duty and interest, if any, had not been passed on by him to any other person. Sub-section (2) of Section 27, which applies in the present case, provides that if the Assistant Commissioner is satisfied that whole or any part of the duty\or interest is refundable, then an order shall be made accordingly to that effect and the amount so determined shall be credited to the fund. The word "fund" means, according to Section 2(21A) of the Act, the consumer Welfare fund established under Section 12C of the Central Excises and Salt Act, 1944.

13. Clause (a) of proviso to sub-section (2) of Section 27 of the Act however stipulates that the amount of refund which is found due will not be credited to the fund and shall be paid to the applicant inter alia, if such an amount of refund is relatable to the duty and interest which has been paid by the importer and if he had not passed on the incidence of the same to any other person. In other words if it cannot be shown that the duty, in respect of which refund is claimed, had not been passed on to any other person then in such an event the amount of refund due will be credited to the fund.

14. Sections 28C and D of the Act have been included in the new chapter VA whose heading is "Indicating amount of duty in the price of goods etc. for the purpose of refund". Section 28C makes it obligatory on other person who is liable to pay duty on any goods to, at the time of clearance of goods, indicate in the documents relating to assessment, sales invoice and other like documents the amount of such duty which will form part of the price on which such goods are to be sold. Section 28D contains a presumption that incidence of duty has been passed on to the buyer, but this presumption is rebuttable. In the absence of proof of such duty not having been passed on to the buyer, Section 28D provides that the passing of such duty by the seller to the buyer shall be deemed to have taken place.

15. It was submitted by the learned counsel for the respondent that the scheme of the amending provision should be considered as a whole and Section 27 of the Act should be construed harmoniously with Section 28D of the Act. It was contended that it could not have been the intention to provide for a presumption only in respect of one type of refund and not the other, because the need for presumption would be greater in the case of captive consumption as against resale of imported goods as such. The absence of presumption, therefore, it was submitted, leads to an inference that the provisions of unjust enrichment were not intended to apply to cases of captive consumption.

16. We are unable to agree with the aforesaid submission of learned counsel. Section 27 of the Act is, in a sense, complete code by itself, dealing with the claim for refund of duty. The procedure provided by Section 27(1) is applicable in case of application for refund being filed after the said section was amended. Sub-section (1) itself requires a person making an application for refund to furnish documents and evidence (including the documents referred to in Section 28C) to establish that the amount of duty, in respect to which refund is claimed, was collected or paid by him and incidence of such duty had not been passed on by him to any other person.

17. The use of the words "incidence" of such duty....." is significant. The words "incidence of such duty" mean the burden of duty. Section 27(1) of the Act talks of the incidence of duty being passed on and not the duty as such being passed on to another person. To put it differently the expression "incidence of such duty" in relation to its being passed on to another person would take it within its ambit not only the passing of the duty directly to another person but also cases where it is passed on indirectly. This would be a case where the duty paid on raw material is added to the price of the finished goods which are sold in which case the burden or the incidence of the duty on the raw material would stand passed on to the purchaser of the finished product. It would follow from the above that when the whole or part of the duty which is incurred on the import of the raw material is passed on to another person then an application for refund of such duty would not be allowed under Section 27(1) of the Act.

18. Section 27(2) of the Act, as already noticed, deals with the cases where application for refund had been made prior to the amendment of the Act in 1991. Sub-section (a) of the proviso is similar to the provisions contained in Section 27(1) of the Act i.e. refund of duty paid by the importer will be allowed if he had not passed on the incidence of such duty to any other person. Section 28C of the Act would have reference to those goods which are cleared and would undoubtedly have no application to the cases of the captive consumption. It is in respect of those goods which are cleared that Section 28C requires a person clearing the goods to indicate the amount of duty paid thereon which will form part of the price at which such goods are to be sold. It is not possible to accept the contention that because Section 28C of the Act cannot be applied in the cases of goods imported for captive consumption, therefore, the principle of unjust enrichment would not be

applicable in such cases. As we have already indicated, Section 27 of the Act has been recast with the amendments made in 1991 and the said section does not necessarily have to be read in conjunction with Sections 27C and D of the Act. If the incidence of duty paid on the imported raw material has not been passed on to any other person, then by virtue of proviso to Section 27(2) of the Act in the case where application for refund had been made prior to 1991, refund due on the duty paid would be given to the applicant.

19. Even though in Mafaltlal's case (supra) the question with regard to captive consumption was left open, this Court was called upon to interpret Section 27 of the Act. After discussing and deciding the various contentions which had been raised, the majority judgment of Jeevan Reddy, J. under para 108 at page 631 for the sake of convenience set out the propositions which followed from the judgment. With regard to claim for refund, at page 633 it was observed as follows:

"(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 if 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. Whether the claim for restitution is treated as a consituational 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."

20. We are of the opinion that the aforesaid observations would be applicable in the case of captive consumption as well. To claim refund of duty it is immaterial whether the goods imported are used by the importer himself and the duty thereon passed on to the purchaser of the finished

product or that the imported goods are sold as such with the incidence of tax being passed on to the buyer. In either case the principle of unjust enrichment will apply and the person responsible for paying the import duty would not be entitled to get the refund because of the plain language of Section 27 of the Act. Having passed on the burden of tax to another person, directly or indirectly, it would clearly be a case of unjust enrichment if the importer\seller is then able to get refund of the duty paid from the Government notwithstanding the incidence of tax having already been passed on to the purchaser.

21. Learned Counsel for the respondent had also contended that in cases of captive consumption of imported goods, it would be impossible for the assessee to establish whether the duty component has been passed on to the buyers of the finished products or has been borne by the importer himself. Difficulty in proving that the incidence of the duty borne by the importer has not been passed on to the purchaser of the finished product can be no ground for interpreting Section 27 differently. It is not possible that in no case will an importer not be able to prove that the incidence of the duty imposed on the imported raw material has not been passed on to any other person. In fact in Civil Appeal No. 4381 of 1999 filed by the Commissioner of Customs against M/s Surya Roshini Limited, the importer had produced certificate from the Chartered Accountants giving details of costing of the final product and the Commissioner (Appeals) found as a fact that the component of excess customs duty paid on the imported raw material had not gone into the costing of the finished product. Without going into the correctness of this finding we wish to emphasize that even in cases of captive consumption, it should be possible for the importer to show and prove before the authorities concerned that the incidence of duty on the raw material, in respect of which refund is claimed, has not been passed on by the importer to any body else.

22. The High Court in considering the question of the applicability of the doctrine of unjust enrichment had relied upon the decision of this Court in HMM Limited & Anr. v. Administrator, Bangalore City corporation, Bangalore and Anr., (1989) Supp. 1 SCR 353. That case pertained to the levy of octroi on goods on their entry into the city limits. Octroi had been collected on the said goods even though there was no use or consumption within the Municipal limits. This Court held that the amount of octroi paid was refundable. In this context, a contention had been raised on behalf of the Corporation that refund could not be given because there was a possibility of undue enrichment of the claimant. This Court did not accept this contention and came to the conclusion that octroi was duty on the entry of raw material which was payable by the producer or manufacturer. It was not the duty on going out of the finished products in respect of which the duty might have been charged or added to the costs passed on to the consumers. This Court then concluded that "in such a situation, no question of 'undue enrichment' can possibly arise in this case". This decision is thus clearly not applicable in the present case where the question of unjust enrichment does arise.

23. In *State of Rajasthan and others v. Hindustan copper Limited*, (1998) 9 SCC 708, this Court accepted the averment made in the affidavit on behalf of the assessee to the effect that the excess duty paid on rectified spirit, in respect of which refund was claimed, had not been passed on to any consumer of the final product. It is in view of this that this Court held that the principle of unjust enrichment did not apply. Lastly, our attention was drawn to the case of *Bhadrachalam Papaperboards Ltd. v. Govt of Andhra Pradesh*, 1999(106) E.L.T. 290 (S.C.). In this case claim was made for refund of sales tax which had erroneously been paid. The High Court had denied the refund as it was of the view that the assessee must have passed on the burden to the consumer, thereby applied the principle of unjust enrichment. Allowing the appeal of the assessee, this Court held that the High Court was not right in presuming that the burden of tax had been passed on to the customer. This Court further held on facts that the question of appellant therein passing on the tax liability to the consumer did not arise. This case, therefore, can be of assistance to the respondent.

24. For the aforesaid reasons, we hold that the High Court has not correctly interpreted the relevant provisions of the Customs Act and, in our opinion, the principle of unjust enrichment incorporated in Section 27 of the Act would be applicable in respect of imported raw material and captively consumed in the manufacture of a final product. Whether the incidence of the duty had been passed on to the consumer was not decided by the High Court in *Solar Pesticide's case* (supra) because in its opinion the principle of unjust enrichment could not apply to the cases of captive consumption. In the case of *Solar Pesticide Pvt. Ltd.*, therefore, we do not go into this question whether the incidence of duty had not been passed on by the respondent. This appeal is, accordingly, allowed and the impugned judgment of the High Court is set aside, the effect of which would be that the writ petition filed by the *Solar Pesticide Pvt. Ltd.* stands dismissed. Writ Petition (c) No. 189 of 1993 filed by *M/s Solar Pesticides Private* in this Court also stands dismissed. No costs.

Civil Appeal No. 4381 of 1999.

25. In the above-noted matter the respondent had imported prime quality hot rolled steel in coils on which duty was paid. A claim was made for the refund of the duty on the basis of the classification of the goods. Ultimately the respondent succeeded and the Collector (Appeals) Bombay directed the refund of the excess duty paid. 13 applications for refund were filed and the Assistant Collector grouped them as follows:

i) Claims based on bill of entries at serial numbers 1-6 in the list which were received by the department on 22.6.1989.

ii) claims relating to bills of entries at serial numbers 7-9 and

iii) Claims arising out of rest of the 4 bills of entries.

With regard to the first category the Assistant Collector held that the claims were barred by limitation. claims falling under the second category were held by him to be not maintainable in view of the principle of unjust enrichment and the claims made under the third category were held to be pre-mature. Before the Assistant Collector, the respondent had produced a certificate from its Chartered Accountant in an effort to show that the duty, in respect of which refund was being claimed, had not been passed on to their customers of finished products. The Assistant Collector, however, came to the conclusion that the said certificate did not establish that the duty had not been passed on to the customers.

26. The Collector (Appeals) set aside the order of the Assistant Collector and directed the refund of duty amount of Rs. 85,71,688.34. In arriving at this conclusion the Collector (Appeals) accepted the certificate produced by the respondent from their Cost Accountant who had certified that the respondent had not included the excess duty amount, in respect of which refund was being claimed, in the costing of their finished products. The Collector (Appeals) having accepted the said certificate allowed the refund.

27. The Revenue filed an appeal before the Tribunal. The appeal was dismissed by the Tribunal by following the decision of the Bombay High Court in Solar Pesticides (India) Limited v. Union of India, 1992(57) ELT 201, a decision, which we have now held was not correct. The Tribunal did not go into the question whether in fact there would be unjust enrichment in the event of refund being ordered to be paid. The question requires adjudication by the Tribunal. For the reasons stated above, the decision of the Tribunal in Solar Pesticides (India Limited that the principle of unjust enrichment does not apply to the cases of captive consumption is obviously incorrect. We, therefore, allow this appeal, set aside the judgment of the Tribunal and direct it to decide the appeal of the Revenue afresh on the question as to whether the principle of unjust enrichment would, on facts, apply or not.

Civil Appeal No. 2211 of 1999

28. In view of the decision of this Court in Civil Appeal No. 921 of 1992, we allow this appeal, set aside the judgment of the Tribunal and direct it to decide the appeal of the Revenue afresh on the question as to whether the principle of unjust enrichment would, on facts, apply or not.

Civil Appeal No. 6113 of 1999

29. In a claim for refund of duty, the respondent raised two contentions. Firstly that the duty had not been passed on to the consumer and the principle of unjust enrichment did not apply. The second contention was that in any event, in view of the decision of Bombay High Court in the case of Solar Pesticides (India) Limited v. Union of India, 1992(57) E.L.T. 201, the principle of unjust enrichment was not applicable in cases of captive consumption. Neither the Assistant Commissioner nor the Commissioner

(Appeals) accepted any of the two contentions. It was held that the respondent had failed to prove that the incidence of duty in respect of the imported goods had not been passed on.

30. On appeal filed by the assessee, the Tribunal allowed the same following the decisions of the Bombay High Court in *Solar Pesticides (India) Limited v. Union of India*, 1992(57) ELT 201, which we have now held is not a good law. The Tribunal did not decide as to whether the assessee had passed on the incidence of duty to the consumer. That contention would require consideration. Accordingly, we allow this appeal, set aside the judgment dated 6.7.1999 of the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi and direct it to decide the appeal by the assessee afresh on the question as to whether the incidence of duty on the imported raw material had been passed on by the importer to any other person.

Civil appeal Nos. 5688-99 of 1995

31. In view of the decision of this Court in Civil Appeal No. 921 of 1992, this appeal is allowed.

Civil Appeal Nos. 16890, 16894 and 16885 of 1996

32. In view of the decision of this Court in Civil Appeal No. 921 of 1992, these appeals are allowed, judgments of the High Court are set aside the result of which is that the writ petitions filed by the respondent stand dismissed.

Civil Appeal No. 1565 of 1989

33. The Tribunal upheld the order of the Collector (Appeals) following the decision of Bombay High Court in *Solar Pesticides (India) Limited v. Union of India*, 1992(57) E.L.T.) 201. In view of the decision of this Court in Civil Appeal No. 921 of 1992, this appeal is allowed, judgment of the Tribunal is set-aside. Inasmuch as the Tribunal did not go into the question as to whether excess duty had been passed on or not, the Tribunal should decide the appeal afresh.

Civil Appeals No. 5407-5409 and 6261 of 1999

34. The Tribunal, following the decision of the Bombay High Court in *Solar Pesticide's case* (supra) had allowed payment of refund on the ground that the principle of unjust enrichment does not apply in the case of captive consumption. In view of our decision in Civil Appeal No. 921 of 1992, where the decision of the Bombay High Court has been reverted, these appeals of the Revenue are allowed. No costs.