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# SHRI VALLABH GLASS WORKS LTD. & OTHERS

*v.*

# UNION OF INDIA & OTHERS

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*March 14, 1984*

[E.S. VENKATARAMIAH AND R.B. MISRA JJ.]

C *Constitution of India 1950, Article 226 Indian Contract Act 1872, Section 72 Limitation Act 1963, Section 17(1)(c) & Article 113.*

*Central Excise & Salt Act 1944, First Schedule, Item 23A(1) and Item 68.*

*Excise duty—Claim for refund of excess duty paid—Jurisdiction of the High Court to order refund in a petition under Article 226.*

D Appellant No. 1 was a company engaged in the business of manufacturing different types of glass, viz., figured glass, wired glass, coloured figured glass, rolled glass and coolex wired glass. The Central Excise Department had levied and collected excise duty on the said goods on the basis that they belonged to the category of 'sheet glass' and were therefore subject to payment of excise duty under Item 23A(1) of the First Schedule to the Central Excise and Salt Act, 1944. On February 20, 1976, the appellants applied for the refund of E excess duty paid by them from October 1, 1963 upto the date of the application on the ground that the items of glass in question could not be described as 'sheet glass' mentioned in Item 23A and that since they did not fall under any of the Items 1 to 67 in the First Schedule of the Act they could only be subjected to levy of excise duty under the residuary provision, Item 68. The Assistant Collector of Central Excise rejected the claim for refund and the appellants F there-upon filed a Writ petition in the High Court on September 28, 1976, but the same was withdrawn as a Departmental Appeal filed by the appellants was pending with the Collector. The said Departmental Appeal was however later dismissed and this order was confirmed in the appellants' revision petition to the Government.

The appellants thereupon filed a Writ Petition in the High Court and G assailed the order. The High Court reversed the decision of the departmental authorities and held that the items of glass manufactured by the appellants did not fall within the scope of tariff Item 23A(1) of the First Schedule but that they came within tariff Item 68 thereof, liable to duty accordingly, and directed refund of excess duty paid after February 20, 1976, on which date the dispute was raised. The claim for refund of excess duty paid during the period prior to February 20, 1976 was, however, rejected.

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In the appeal to this Court on the question : (1) whether the appellants are entitled to claim refund of excess excise duty paid prior to February20,

1976 and whether they are entitled to claim refund of such duty paid between October 1, 1963 and February 20, 1976 or during any shorter period, and (2) whether the appellants are entitled to claim such refund in respect of all the goods. A

Allowing the appeal in part.

HELD : 1, (i) The excess amount paid by the appellants would have become refundable by virtue of section 72 of the Indian Contract Act if the appellants had filed a suit within the period of limitation. Section 17(1)(c) of the Limitation Act, 1963 provides that where in the case of any suit or application for which a period of limitation is prescribed under that Act, the suit or application is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff or applicant had discovered it or could have with reasonable diligence discovered it. [186F-G] B C

(ii) Under Article 113 of the Limitation Act, 1963 a suit for recovery of excess duty had to be filed within three years from the date of payment to the Department. [187B]

(iii) The High Courts have power, for the purpose of enforcement of fundamental rights and statutory rights to make consequential orders for repayment of money realised by Government without the authority of law under Article 226 of the Constitution. This is an alternative remedy provided by the Constitution in addition to, but not in supersession of the ordinary remedy by way of suit in the absence of any provision which would bar such a suit expressly or by necessary implication. While there are different periods of limitation prescribed for the institution of different kinds of suits by the Limitation Act, 1963, there is no such period prescribed by law in respect of petitions filed under Article 226 of the Constitution. Whether relief should be granted to a petitioner under Article 226 where the cause of action had arisen in the remote past is a matter of sound judicial discretion governed by the doctrine of laches. Where a petitioner who could have availed of the alternative remedy by way of suit approaches the High Court under Article 226, it is appropriate ordinarily to construe that any unexplained delay in filing of the writ petition after the expiry of the period of limitation prescribed for filing a suit as unreasonable. This rule, however, cannot be a rigid formula. Each case has to be judged on its own facts and circumstances touching the conduct of the parties, the change in situation, the prejudice which is likely to be caused to the opposite party or to the general public. [187D-H] D E F G

In the instant case, the appellant had made excess payment on being assessed by the Department and such payment cannot be treated as voluntary payment precluding them from recovering the amounts. The appellants should in the facts and circumstances of this case be deemed to have discovered the mistake on the date of making each payment of excise duty in excess of the proper duty payable under law. All such excess payments made on or after September 28, 1973 which would fall within the period of three years prior to the date on which the first writ petition was filed should have been ordered to be refunded under Article 226. But the High Court declined to do so. Though H

A the appellant should not be granted any relief in respect of payment made between October 1, 1963 and September 27, 1973 which would fall beyond the three years from the date of the first writ petition, it is not proper and just to negative the claim in respect of excess payments made after September 28, 1973. [187H-188D]

B *Sales Tax Officer, Banaras & Ors.* v. *Kanhaiya Lal Mukundlal Saraf*, [1959] S.C.R. 1350, referred to.

2. In respect of wired glass, a dispute has arisen between the Department and the appellants earlier and in that case while the Department claimed that wired glass was subject to payment of duty under tariff Item 23A(4) the appellants pleaded that wired glass was liable to duty under tariff Item 23A(1). The C Government of India ultimately accepted the case of the appellants, and duty was paid on that basis till February 20, 1976. While the earlier order may not be a legal bar to the contention raised by the appellants on February 20, 1976 that wired glass was not taxable under tariff Item 23A(1) but under tariff Item 68 after that date, it is certainly a circumstance which disentitles the appellants to claim refund of excess duty paid by them in a petition under Article 226. The claim for refund of excess duty paid on wired glass during the D period prior to February 20, 1976 is therefore liable to rejected. [185G-186C]

CIVIL APPELATE JURISDICTION : Civil Appeal No. 3338 of 1979

From the Judgment and Order dated 22 and 23-11-78 of E Gujarat High Court in Spl. Civil Application No. 577 of 1978.

*Anil B. Divan, Ravinder Narain* and *Ms. Rainu Walia* for the appellants.

*M. M. Abdul Khader, G. S. Narayan* and *A. Subhashini* for F the respondents.

The Judgment of the Court was delivered by

VENKATARAMIAH, J. This appeal by speeial leave is filed against the judgment and order dated November 22/23, 1978 of the G High Court of Gujarat in Special Civil Application No. 577 of 1978 filed under Article 226 of the Constitution.

Appellant No. 1 is a company which is engaged in the business of manufacturing diffrent types of glass viz. figured glass wired glass, coloured figured glass, rolled glass and coolex wired H glass at Vallabh Vidyanagar in the State of Gujarat from the year 1963. Appellant No.2 is the Managing Director of appellant No. 1. The Central Excise Department had levied and collected excise duty

on the said goods on the basis that they belonged to the cataegory of sheet glass and were therefore subject to payment of excise duty under Item 23A (1) of the First Schedule to the Central Excises and Salt Act, 1944 (hereinafter referred to as 'the Act'). On February 20, 1976, the appellants applied for the refund of excess duty paid by them from October 1, 1963 upto the date of the application on the ground that the item of glass in question were distinct commercial goods known in the market as figured glass, wired glass, coloured figured glass, rolled glass, coolex figured glass and coolex wired glass and could not be described in common parlance as 'sheet glass' mentioned in Item 23A and that since they did not fall under any of the Items 1 to 67 in the First Schedule to the Act they could only be subjected to levy of excise duty under the residuary provision Item 68 in that Schedule after it was inserted in it.

Item 23A of the First Schedule to the Act at all material times read as.—

"23A. Glass and glassware—

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| (1) | Sheet glass and plate glass | Thirty per cent ad valorem |
| (2) | Laboratory glassware | Ten per cent ad valorem |
| (3) | Glass shells, glass globes and chimneys for lamps and lanterns | Fifteen per cent ad valorem |
| (4) | Other glassware including tableware | Thirty per cent ad valorem." |

The relevant part of tariff Item 68 which was introduced from March 1, 1975 read as:

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| "68. | All other goods not elsewhere specified, manufactured in a factory but excluding | One per cent ad valorem |
| (a) | alcohol, all sorts, including alcholic liquors for human consumption. | |

A (b) opium, Indian hemp and other narcotic drugs and narcotics; and

B (c) dutiable goods as defined in sections 2(c) of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955."

C After holding an enquiry and hearing the appellants, the Assitant Collector of Central Excise, Anand rejected the claim for refund by his order dated September 20, 1976 because he was of the view that the items of goods in respect of which dispute had been D raised fell within the purview of tariff Item 23A (1). Against the said order of the Assistant Collector the appellants filed a writ petition in Special Civil Application No. 1365 of 1976 on the file of the High Court on September 28, 1976. The said petition was admitted but when it was taken up for final hearing it was contended on behalf of the Department that since the appellants had also filed E an appeal against the very same order before the Collector of Central Excise they could not pursue the remedy under Article 226 of the Constitution as it stood then. In view of the above contention the writ petition was withdrawn without prejudice to the remedy by way of appeal. The appeal was thereafter disposed of by the Collector on July 27, 1977 affirming the order of the Assistant Collector. F A revision petition filed by the appellants against the order of the Collector was dismissed by the Government of India by its order dated February 2, 1978. The said order in revision was challenged before the High Court by the appellants under Article 226 of the Constitution. The High Court by its judgment under appeal reversed the decision of the departmantal authorities which had been affirmed G by the Central Government and held that the items of glass manufactured by the appellants namely, figured glass, wired glass, coloured figured glass, rolled glass and coolex wired glass did not fall within the scope of tariff Item 23A(1) of the First Schedule to the Act as it stood at the material time but they came within H tariff Item 68 and were liable to bear duty accordingly. The High Court was, however, of the view that the appellants were only entitled to refund of excess duty paid by them after February 20,

1976 on which date they raised the dispute. Accordingly the High Court issued a writ quashing the decision of the Department in so far as the classification of the goods was concerned and declaring that they were subject to payment of duty under tariff Item 68 of the First Schedule to the Act and not under tariff Item 23A(1) thereof. The Department was further directed to review the relevant assessments accordingly for the period subsequent to February 20, 1976 and to refund any excess duty that might after such review be found to be refundable to the appellants. The claim of the appellants for refund of excess duty paid during the period prior to February 20, 1976 was,however, rejected. The appellants have filed this appeal by special leave only as regards the rejection by the High Court of their prayer for refund of excess duty paid by them prior to February 20, 1976.

The Department has not filed any appeal against the judgment of the High Court. Hence the decision that the goods were taxable under tariff Item 68 and not under tariff Item 23A(1) of the First Schedule to the Act has become final. Item 23A(1) is also stated to have been since amended suitably so as to bring the items of glass in dispute within its scope.

The question which arise for consideration in this appeal are therefore (1) whether the appellants are entitled to claim refund of excess excise duty which had been paid by them prior of February 20, 1976 and if so, whether they are entitled to claim refund of such duty paid between October 1, 1963 and February 20,1976 or during any shorter period and (2) whether the appellants are entitled to claim such refund in respect of all the goods in question.

Since it is convenient to dispose of the second question at this stage, we shall take it up first. A few more facts which are relevant to this issue have to be stated here. As mentioned earlier the goods in respect of which dispute had been raised by the appellants in their application dated February 20, 1976 were figured glass, wired glass, coloured figured glass, rolled glass and coolex wired glass. But it is seen that in respect of wired glass, a dispute had arisen between the Department and the appellants earlier and in that case while the Department claimed that wired glass was subject to payment of duty under tariff Item 23A(4) the appellants pleaded that wired glass was liable to duty under tariff Item 23A(1). The Government of India ultimately by its order dated August 24, 1971 (in Order No. 261 of 1971 of the Government of India on

A Central Excise Revsion Application) accepted the case of the appellants that wired glass was subject to duty under tariff Item 23A (1) and the appellants paid duty on that basis till Febuary 20, 1976. These facts distinguish the case in respect of wired glass from the case in respect of the other goods. While the said earlier order may not be a legal bar to the contention raised by the appellants on B February 20, 1976 that wired glass was not taxable under tariff Item 23A(1) but under tariff Item 68 after that date, it is certainly a circumstance which disentitles the appellants to claim refund of excess duty paid by them in a petition under Article 226 of the Constitution on a ground contrary to their earlier stand. The claim C for refund of excess duty paid on wired glass during the period prior to February 20, 1976 is liable to be rejected. The appeal of the appellants to that extent should, therefore, fail.

In regard to the relief of refund of excess duty paid in respect D of the other goods, the case stands on an entirely different footing. This is a case where the Department had assessed the duty payable by the appellants under a wrong provision. The appellants were obliged to pay the duty so assessed. They did not, no doubt, question the assessments by taking a specific stand as they had done earlier in the case of wired glass. The appellants, however, question- E ed the validity of the levy only on February 20, 1976 on the ground that tariff Item 23A (1) of the First Schedule to the Act under which the duty had been levied was not applicable to the goods. While the Department refused to accept the said plea, the High Court has upheld it. In view of the decision of the High Court, the fact that the appellant had paid duty in excess of what they were bound in F law to pay should be now taken as having been established. It is not disputed that if the appellants had filed a suit within the period of limitation the excess amount would have become refundable by virtue of section 72 of the Indian Contract Act. Section 17(1)(c) of the Limitation Act, 1963 provides that where in the case of any suit or application for which a period of limitation is prescribed under G that Act, the suit or application is for relief from the consequence of a mistake, the period of limitation shall not begin to run until the plaintiff or applicant had discovered it or could have with reasonable diligence discovered it. In the instant case the date on which the mistake was discovered by the appellants or the date on which the appellants could with reasonable diligence have discovered it is H not clear from the record before us. No efforts also was made in the course of the arguments urged on behalf of the appellants to establish it. We have, therefore, to assume that on the date

each payment of excise duty made by the appellants in excess of the proper duty payable by them, the appellants could have discovered with due diligence that the duty claimed from them was excessive. Under Article 113 of the Limitation Act, 1963 which is applicable to this case, a suit for recovery of such excess duty had to be filed within three years from the date of payment to the Department. But the appellants instead of filing a suit, first filed a writ petition in Special Civil Application No. 1365 of 1976 on September 28, 1976 and that petition had to be withdrawn in view of clause (3) of Article 226 of the Constitution as it stood then because the alternative remedy by way of an appeal was available. The appellants could, therefore, file the writ petition out of which the appeal arises only after the disposal of the revision petition by the Government of India as mentioned earlier. It is not disputed that the High Courts have power, for the purpose of enforcement of fundamental rights and statutory rights, to make consequential orders for repayment of money realised by the Government without the authority of law under Article 226 of the Constitution. This is an alternative remedy provided by the Constitution in addition to but not in supersession of the ordinary remedy by way of suit in the absence of any provision which would bar such a suit either expressly or by necessary implication. While there are different periods of limitation prescribed for the institution of different kinds of suits by the Limitation Act, 1963, there is no such period prescribed by law in respect of petitions filed under Article 226 of the Constitution. Whether relief should be granted to a petitioner under Article 226 of the Constitution where the cause of action had arisen in the remote past is a matter of sound judicial discretion governed by the doctrine of laches. Where a petitioner who could have availed of the alternative remedy by way of suit approaches the High Court under Article 226 of the Constitution, it is appropriate ordinarily to construe that any unexplained delay in the filing of the writ petition after the expiry of the period of limitation prescribed for filing a suit as unreasonable. This rule, however, cannot be a rigid formula. There may be cases where even a delay of a shorter period may be considerd to be sufficient to refuse relief in a petition under Article 226 of the Constitution. There may also be cases where there may be circumstances which may persuade the court to grant relief even though the petition may have been filed beyond the period of limitation prescribed for a suit. Each case has to judged on its own facts and circumstance touching the conduct of the parties, the change in situation, the prejudice which is likely to be caused to the opposite party or to the general public etc. In the instant case, the appellants

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had in fact approached the High Court on September 28, 1976 itself by filing Special Civil Application No. 1365 of 1976 for directing repayment of the excess duty paid by them. But no relief could be granted in that petition in view of the provisions of Article 226 of the Constitution as it stood then and the petition had to be withdrawn. Hence even granting that on the date of making each payment of excise duty in excess of the proper duty payable under law, the appellants should be deemed to have discovered the mistake, all such excess payments made on and after September 28, 1973 which would fall within the period of three years prior to the date on which Special Civil Application No. 1365 of 1976 was filed should have been ordered to be refunded under Article 226 of the Constitution. But the High Court declined to do so on grounds of estoppel and acquiesence. While we do agree that the appellants should not be granted any relief in respect of payment made between October 1, 1963 and September 27, 1973 which would fall beyond three years from the date of the first writ petition filed in this case we do not find it proper and just to negative the claim of the appellants in respect of excess payments made after September 28, 1973. In the instant case the appellants had made excess payments on being assessed by the Department and such payments cannot be treated as voluntary payments precluding them from recovering them. (See *Sales Tax Officer, Banaras & Ors.* v. *Kanhaiya Lal Mukundlal Saraf*).[1] We do not also find that the conduct of the appellants is of such a nature as would disentitle them to claim refund of excess payments made in respect of goods other than wired glass.

We, therefore, modify the judgment and order passed by the High Court by quashing the assessments of excise duty made in respect of the goods in question other than wired glass viz. figured glass, coloured figured glass, rolled glass and coolex wired glass for the period between September 28, 1973 and February 20, 1976 also and directing the assessing authority to make a fresh assessment in accordance with law in the light of the decision of the High Court. The respondents are further directed to refund after such fresh determination any excess duty that may be found to have been paid by the appellants. The fresh assessments shall be completed

(1) [1959] S. C. R. 1350.

within four monhts from today. The appeal is, however, dismissed in so far it relates to the claim for refund of excess duty paid in respect of wired glass during that period. A

The appeal is accordingly allowed in part. No costs. B

N.V.K. *Appeal partly allowed.*