Union Of India And Others vs Jain Spinners Ltd. And Another on 10 September, 1992

Equivalent citations: AIR1992SC1993, 1993(41)ECC24, 1992(61)ELT321(SC), JT1992(5)SC386, 1992(2)SCALE541, (1992)4SCC389, [1992]SUPP1SCR484, AIR 1992 SUPREME COURT 1993, 1992 (4) SCC 389, 1992 AIR SCW 2350, (1992) 4 SCR 484 (SC), (1992) 5 JT 386 (SC), 1992 (4) SCR 484, 1992 (5) JT 386, (1992) 61 ELT 321, (1993) 41 ECC 24

Bench: M.N. Venkatachaliah, P.B. Sawant, N.P. Singh

ORDER

1. Leave granted.

2. The respondents herein are the manufacturers of Cellulosic Spun Yarn containing man-made fibre of non-cellulosic origin, i.e., by blending cellulosic fibre and the waste of non-cellulosic origin in different proportions. They filed two classification lists being List No. 4/83 dated 5.7.1983 and List No. 9/84 dated 1.3.1984 under Tariff Item No. 18III(i) showing in each of the two lists (i) 85% of cellulosic fibre and 15% waste of non-cellulosic origin, (ii) 52% of cellulosic fibre and 48% waste of non-cellulosic origin and (iii) 60% of cellulosic fibre and 40% waste of non-cellulosic origin.

3. It appears that from June 1983, the respondent-Company started manufacturing yarn out of blending of NCSW/Viscose and claimed classification under Tariff Item No. 18III(i) as per the classification list effective from 5.7.1983. The main varieties were 40s and 60s and the rate of duty in July 1983 was Rs. 1.30 plus 15% (Additional Duty) plus 10% (Special Duty), i.e., total of Rs. 1.63 approximately, per k.g. for 40s yarn. For the same count of yarn for Polyster/Viscose manufactured out of virgin fibre, the rate of duty was Rs. 9.00 plus 15% (Additional Duty) plus 10% (Special Excise Duty), i.e., total of Rs. 11.25 per k.g. The difference in Central Excise Duty on these two varieties was, therefore, Rs. 9.60 per k.g. for 40s yarn. In the same manner, the difference in duty for 60s yarn was Rs. 6.75 per k.g. The clearances of yarn manufactured out of NCSW/Viscose blend started from July 1983 onwards as the classification list was filed w.e.f. 5.7.1983.

4. At the initial stage, the Assistant Collector, Central Excise, Aurangabad Division granted provisional approval and forwarded samples in both the cases to the Chemical Examiner for his report. The classification claimed by the Company was subsequently finalised granting concessional rate of duty under Notification No. 275/82 dated 13.11.1983.

5. Since the Deputy Chief Chemist in his test report observed that the yarn as classified by the respondent-Company contained fibres of non-cellulosic origin and the cellulosic fibres predominated in weight, the issue was taken for fresh proceedings. A show cause notice was issued on 12.7.1984 asking the Company to show cause as to why their product should not be classified

under Tariff Item No. 18III(ii) as they had misclassified and mis-stated the products.

6. Against the said show cause notice, the respondent-Company approached the High Court by a writ petition under Article 226/227 of the Constitution. The High Court rejected the writ petition. Thereafter, the issue was taken up for adjudication by the Assistant Collector, Central Excise and Customs, Aurangabad Division. During the relevant period, six show cause notices for different amounts, together totalling Rs. 1,10,81,405.94 were issued to the respondent-Company.

7. By his order dated 28.8.1985, the Assistant Collector, Central Excise confirmed the demand made on the respondent of Rs. 1,10,81,405.94 and imposed a penalty of Rs. 500.

8. Against the said order of the Assistant Collector, the respondent-Company preferred a writ petition in September, 1985 being Writ Petition No.810 of 1985 under Article 226 of the Constitution, in the High Court.

9. On 28.10.1985 the respondent-Company also preferred an appeal being Appeal No. 1424 of 1985 under Section 35 of the Central Excise and Salt Act, 1944 [the Act] before the Collector of Central Excise [Appeals], Bombay and applied for stay of the order of the Asstt. Collector.

10. The Union of India contested the writ petition and filed its counter-affidavit. While the application for stay in the appeal was still pending, writ petition came up for hearing on 20.11.1985 for admission, and the High Court on that day passed the following order:

> Rule. Interim stay on condition that petitioners [Respondents herein] deposit in this Court an amount of Rupees Twenty Eight Lakhs by 31st January, 1986 and a further amount of Rupees Twenty eight lakhs by 30.4.1986. For further clearance Petitioner [Respondents herein] to give bank guarantee of the disputed duty on future clearance and pay admitted duty as per 18 III [i] of Central Excise Tariff. Liberty to respondents [Petitioners herein] to apply.
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> The High Court passed the following further order in the writ petition when it came up for hearing again on 19.2.1986:
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> Permitted to withdraw subject to the condition that the Respondent in this Writ Petition should pay interest at Bank rate and refund the amount along with interest within two months of the decision of the Writ Petition provided that the Petitioners succeed ultimately.

11. The respondents deposited the said amount of Rs. 56 lakhs in six instalments between 29.1.1986 and 7.8.1986 after obtaining extensions in time for the relevant deposits. The appellant-Union of India received the said amount from the High Court between 24.2.1986 and 14.8.1986 in three different instalments.

12. The appeal filed by the respondents was allowed by the learned Collector on 19.4.1991. The operative part of the appellate order read as follows:

> The appeal is allowed and the appellants are eligible for the consequential reliefs, if otherwise admissible.
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> (Emphasis supplied)

13. On 31.5.1991, the respondents filed an application for refund of Rs. 56 lakhs plus interest of Rs. 51,44,202.73 at the bank rate, upto 31.5.1991. The application was filed before the Assistant Collector, Central Excise, Aurangabad Division.

14. While the said application for refund was still pending before the Assistant Collector, the respondents approached the High Court on 25.6.1991 with an application in the pending writ petition, being Civil Application No. 2061, of 1991, for the following reliefs:

> [A] That the writ petition be disposed of by an order that impugned order having been set aside by the Collector [Appeals] the Writ Petition does not survive.
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> [B] That the Respondents be directed to pay the sum of Rs. 56 lakhs with interest thereon at 17.5% per annum within two months of the date hereof.
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> [C] That the respondents also be directed to pay the sum of Rs. with interest thereon at 18% per annum within two months of the date hereof.
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> [D] Such further and other reliefs be granted as the nature and circumstances of the case may require.

15. The application was resisted by the appellant-Union of India contending that the respondents had already recovered the duty in question from others and, therefore, they were not entitled to any refund. However, the High Court on 19.9.1991 allowed the application of the respondents thereby allowing them to withdraw the petition and also observed that the ground of 'unjust enrichment' could not be considered at that stage because of the interim order of 19.2.1986 whereunder the appellant-Union of India was permitted to withdraw the amount deposited by the respondents in the High Court subject to the condition that the appellant-Union of India would pay interest at bank rate and refund the amount along with interest within two months of the decision in the writ petition, provided the respondents succeeded ultimately.

16. On the next day, i.e., on 20.9.1991 the Central Excises and Custom Laws [Amendment] Act, 1991 came into operation making the amended provisions of Section 11-B applicable with retrospective effect to all pending applications for refund of duty. The amended Section 11-B inter alia provides that when application for refund of any duty of excise is made the Assistant Collector of Central Excise would satisfy himself that the claimant had not passed on the incidence of the duty to any other person. This obligation is cast on the Assistant Collector even in respect of applications made

before the commencement of the said amended provisions. The amended provisions further apply notwithstanding anything to the contrary constrained in any judgment, decree, order or direction of the appellate Tribunal or any court or in any other provisions of the said Act or the rules made thereunder or any other law for the time being in force. The appellant-Union of India, therefore, took the stand that whether it was the High Court's order of 19.2.1986 or of 19.9.1991 [which was passed prior to the coming into operation of the amended provisions on 20.9.1991 and obviously without taking congnizance of them], it was the duty of the Assistant Collector to satisfy himself that no part of the duty in respect of which the refund was claimed, was recovered by the respondents from any other person, before making any order of refund.

17. Hence on November 16, 1991 the appellant-Union of India filed an application being Civil Application No. 3553 of 1991 before the High Court praying inter alia that two months' time be granted to them to consider the refund of the amount to the respondents in accordance with the amended provisions of Section 11-B of the Act.

18. In November 1991, the respondent-Company also filed a contempt petition being Civil Application No. 3608 of 1991 in the High Court making a grievance that in spite of the orders of the High Court the appellants had failed to comply with the same and asking for committing the officers of the appellant for contempt. On 21.1.1992, yet another contempt petition being Contempt Petition No. 57 of 1992 was filed for the same purpose ostensibly on the ground that in the meanwhile there was a change of the incumbent in the post of the Assistant Collector, Central Excise.

19. It appears that only appellants' application being Civil Application No. 3553 of 1991 came up for hearing on 19.2.1992, and the High Court passed the following order:

> Heard learned Advocate. Rejected in view of order dated 19.9.1991 passed by Division Bench while disposing of main Writ Petition No. 810/85.

20. Thereafter, on 18.3.1992 the contempt petition being Civil Application No. 3608 of 1991 came up for hearing, and the High Court passed the following order:

> Heard.
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> 2. Mr. D. Y. Lovekar, learned Counsel for the Respondents, submits that the question regarding the application of the Central Excise and Custom Laws [Amendment] Act, 1991, is under consideration of the Government and, therefore, he wants four weeks time. In the event if no decision is taken within four weeks, the learned Counsel submits that the department will deposit Rs. 56,00,000 together with interest thereon at bank rate, which comes to about Rs. 56,00,000. Shri Parshurampuria the learned Counsel for the Petitoner, indeed, contends that no further time could be granted as the amount has not been deposited in the Court as previously directed. In the nature and circumstances of the case, we are inclined to grant the request of Shri Lovekar, learned Counsel for the Respondents. We, therefore, adjourn this matter for four weeks. In the event the Respondents do not take decision on the question of

> application of the aforesaid Act within four weeks from today, we direct the Respondents to deposit in this Court the amount of Rs. 56,00,000 together with bank interest as stated above on or before 13th April, 1992. No further time will be granted on any count.

S.O. for 4 weeks.

21. On 13.4.1992, the Assistant Collector, Central Excise, passed an exhaustive order holding that since the respondents had passed on the incidence of the duty to other, they were not entitled to the refund of the said amount of Rs. 56 lakhs and the interest of Rs. 51,44,202,73 and rejected the respondents' claim for the same.

22. Thereafter, the contempt petition filed by the respondent being Civil Application No. 3608 of 1991 along with Contempt Petition No. 57 of 1992 came up again for hearing on 20.4.1992 before the High Court. The order passed by the Assistant Collector, Central Excise was brought to the notice of the High Court. The learned Counsel for the respondents admitted having received the said order and also made a statement that his client was filing writ petition challenging the said order of the Assistant Collector. However, the court held that the decision of the Assistant Collector was not the decision of the Government and that the representation made earlier by the counsel for the appellant-Union of India was that it was the Government which was going to consider the question regarding the application of the amended provisions of the Act and since the Government had not conveyed its decision regarding the application of the Act, the order passed by the Assistant Collector was irrelevant. The High Court, therefore, directed the Union of India to deposit the entire amount of Rs. 56 lakhs together with bank interest on or before 24.4.1992 and adjourned the Civil Application No.3608 of 1991 and Contempt Petition No. 57 of 1992 to 8.6.1992 for further orders in regard to interim relief.

23. From the above narration of events, the following things emerge distinctly: Were it not for the order of stay obtained from the High Court, the amount of the duty would have been recovered by the Department. The orders of the High Court directing the respondents to deposit the amount in court and thereafter permitting the appellant-Union of India to withdraw it were both during the pendency of the writ petition in the High Court. The order permitting the withdrawal was on the condition that the amount would be refunded provided the respondents succeeded ultimately. While the Writ petition was still pending in the High Court, the appeal filed by the respondents before the Collector, Central Excise was allowed in favour of the respondents. As a consequence of the appeal being allowed, the appellate order of the Collector clearly stated that the respondents would be eligible for the consequential reliefs "if otherwise admissible". As a consequence of the appellate order, the respondents filed an application on 31.5.1991 before the Assistant Collector for refund of the amount. While the application for refund was still pending, the respondents also filed an application before the High Court for withdrawal of the writ petition as well as for a direction to the appellants to refund the amount with interest. This application was resisted by the appellants on the ground that the respondents had recovered the duty in question from others and, therefore, the refund of the said amount would unjustly enrich the respondents. The application for withdrawal of the writ petition and for a direction to the appellants to refund the amount was allowed by the High

Court on 19.9.1991 holding that the ground of unjust enrichment could not be considered at that stage since the interim order dated 19.2.1986 was made subject to the condition that the appellant-Union of India would refund the amount provided the respondents succeeded ultimately. On the very next day, i.e. on 20.9.1991 the amended provisions of Section 11-B of the Act came into force with retrospective effect and applied not only to all pending applications for refund of duty but also to all earlier orders and directions given by any court for such refunds. When the appellant-Union of India made an application to the High Court to consider the applicability of the said amended provisions to the present case, time was granted by the High Court for the purpose, and within that time the Assistant Collector considered the said question and passed his order of 13.4.1992 holding that the amended provisions of the Act applied to the present case and in view of the fact that on the material produced before him the respondents had failed to prove that they had not passed on the burden of the duty to others, they were not entitled to the refund of the said amount. The respondent-Company has stated before the High Court that they were filing writ petition to challenge the said order of the Assistant Collector. The High Court, however, did not consider either the order dated 13.4.1992 passed by the Assistant Collector or the question regarding the applicability of the amended provisions of the Act to the present case.

24. It is difficult to appreciate the reasoning of the High Court that it was the Government which ought to have considered the application of the amended provisions of the Act to the present case. Under the Act, the duty is cast upon the specified statutory authority, viz., the Assistant Collector, Excise to consider the said question. It cannot be disputed that the amount which was deposited by the respondents in the court and was withdrawn by the appellant-Union of India was towards the duty which was assessed by the Assistant Collector, Excise. As pointed out earlier, when the amended provisions of the Act came into force on 20.9.1991, the respondents' application for refund filed on 31.5.1991 was pending before the Assistant Collector and, therefore, as provided in the Act, the amended provisions were applicable to the said application. Even if we disregard the said fact, on the ground, as urged vehemently on behalf of the respondents, that independently of the said application they were entitled to the refund by virtue of the order dated 19.2.1986 of the High Court, the amended provisions of the Act would still be operative and prevent the refund, since the provisions are retrospectively applicable, as stated in Sub-section (3) of Section 11-B of the Act, to orders passed by the court as well. The said Sub-section reads 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 provisions 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).

The High Court's order of 19.2.1986 under which alone the refund was claimed could not be an exception to the said provisions nor could the High Court have made such order after 20.9.1991 directing the payment contrary to the said provisions. The Assistant Collector in his order of 13.4.1992 has discussed exhaustively the claim made by the respondents and has pointed out, for reasons recorded therein, that the respondents had failed to prove that they had not passed on the duty in question to others. Whether the reasons given by the Assistant Collector are valid or not is not for us to comment upon in these proceedings and we express no opinion on the same. The

respondents have their remedies to challenge the said orders on merits and they may pursue the same. The only question before us is whether the impugned order dated 20.4.1992 of the High Court which is passed to give effect to its earlier order of 19.2.1986 is valid or not. Since we are of the view that the order of 19.2.1986 attracts the provisions of Sub-section (3) of Section 11-B of the Act which has come into force on 20.9.1991, the respondents are not entitled to take advantage of the said order unless they succeed in showing to the statutory authorities that they had not passed on the whole or any part of the duty in question to others.

25. All the submissions made by Shri Parshurampuria, learned Counsel for the respondents revolved round the said order of 19.2.1986 and are merely different ways of expressing the same thing. The authorities cited by Shri Parshurampuria do not really bear on the point. It is not, therefore, necessary to discuss the said authorities here.

Further, if the contention advanced by the learned Counsel is accepted, it would defeat the amended provisions of the Act. It would then be open to the assessees to obtain orders from courts as in the present case, and instead of paying the assessed amount of duty to the authorities, deposit it in court and arise a plea that what is deposited in court is not duty and the assessees are entitled to get the refund either directly from the court or if it is withdrawn by the authorities, from the authorities, notwithstanding that they have passed on the duty to others. It would create two artificial classes of assessees, viz., those who have paid the duty to the authorities and those who have obtained orders from the courts for depositing the duties in courts. The former will, and the latter will not, be governed by the amended provisions of the Act. This would result in a discriminatory and invidious situation. The view canvassed by the learned Counsel will also open a new door for unjust enrichment by enabling the assessees to bypass the statutory provisions which have been specifically enacted to prevent the malpractice.

26. One other contention raised by Shri Parshurampuria was that the Government had issued a circular on 4.1.1991 whereby attention was invited of all the authorities to the instructions of the Central Board of Revenue that if a duty is paid in case of goods which are fully exempted "it will be in the nature of deposit with the Government and it will not be in the nature of duty". We are afraid that there is a misconception of the purport of the said circular. As is clear from the circular, it appears that certain manufacturers were trying to claim a grant of credit in respect of the duty paid on goods or in respect of finished goods which had used the goods in respect of which the duty had been paid. In order to avail of the said credit, they were paying duty on exempted goods. It, therefore, became necessary to issue the circular in question and to point out, among other things, in paragraphs 2 and 3 of the same, as follows:

> 2. The Ministry of Law has advised inter alia that an exemption notification having been made in accordance with the power conferred by the statute has statutory force and validity and therefore, the exemption is as if it is considered in Parent Act itself. It view of this, the law and Notification have to be followed. It is not the sweet will of the manufacturers to pay the duty on exempted goods. The executive instructions contrary to the statutory position have no legal sanctity. Further, if a person deposits any amount in the name of excise duty which is not leviable by law the amount so

> deposited will not be in the nature of duty; it will be in the nature of a deposit with the Government. As it will not be in the nature of duty, question of granting any credit in respect of the duty paid inputs or in respect of finished goods which have used the goods in respect of which the duty has been paid, does not arise. Copy of the advice of the Ministry of law is enclosed herewith.
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> 3. The Board agrees with the aforesaid advice of the Ministry of Law and according it is clarified that an assessee has got no option to pay duty on his own volition in case the goods are fully exempted from payment of duty. Board's earlier instructions as contained in letter F.No. 267/16/88.CX.8 dated 15.2.88 may therefore be treated as withdrawn.

The contention of the learned Counsel based on the said circular has, therefore, to be rejected and the deposit made by the respondents in the Court has to be held as one towards the duty.

27. The present case has made it necessary to send a word of caution to the courts that when in rare cases it becomes necessary to pass interlocutory orders injecting the statutory authorities from recovering the duty, they should keep in mind the amended provisions of the Act and provide adequate safeguards in the order itself for adjudication of the question whether the assessee has passed on the burden of duty to others, and prevent withdrawal or refund of the amount in case the assessee fails to prove before the proper authority that he has not passed on the burden to others. If the authority after proper adjudication in that behalf comes to the conclusion that the assessee has failed to discharge the burden, the courts, where they have earlier injuncted the authorities from recovering the duty, instead of directing the amount to be paid to the assessee, should direct it to be credited to the fund created for the purpose, under the Act. Such direction will avoid further unnecessary controversy and litigation, although in stricto jure, it may not be necessary to do so. Even without such safeguards, the courts will be bound to follow the amended provisions of the law, and would be unable to order withdrawal or refund of the duty to the assessee unless the assessee discharges the burden cast on him by the statute. In the present case the High Court completely ignored the provisions of the statute and hence the note of caution.

28. In the view we have taken, we allow the appeals. There will, however, be no order as to costs.