U.P. Pollution Control Board And Others vs M/S. Kanoria Industrial Ltd. And ... on 24 January, 2001

Equivalent citations: AIR 2001 SUPREME COURT 787, 2001 (2) SCC 549, 2001 AIR SCW 439, 2001 ALL. L. J. 425, 2001 (2) LRI 727, 2001 (1) UJ (SC) 599, 2001 (2) SRJ 435, (2001) 2 JT 103 (SC), 2001 UJ(SC) 1 599, (2001) 1 EFR 506, (2001) 1 ALL WC 629, (2001) 1 SCALE 381, (2003) 259 ITR 321, (2003) 174 TAXATION 629, (2001) 2 BLJ 281, (2002) 128 STC 26, (2001) 128 ELT 3, (2003) 180 CURTAXREP 402, (2001) 2 SCJ 108, (2001) 1 ALLCRIR 600, (2001) 3 MAD LW 766, (2001) 2 RECCIVR 401, (2001) 3 ICC 726, (2001) 3 CIVLJ 301, (2001) 2 MAD LJ 36

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Bench: S.V.Patil, S.R.Babu

CASE NO.:
Special Leave Petition (civil) 4436-4437 of 1998
Special Leave Petition (civil) 5241-5242 of 1998
Special Leave Petition (civil) 12654 of 1998

PETITIONER:
U.P. POLLUTION CONTROL BOARD AND OTHERS

Vs.

RESPONDENT:
M/S. KANORIA INDUSTRIAL LTD. AND ANOTHER

DATE OF JUDGMENT: 24/01/2001

BENCH:
S.V.Patil, S.R.Babu

JUDGMENT:

L.....I.....T.....T.....T.....T.....T.....T..J J U D G M E N T Shivaraj V. Patil, J.

In all these cases the controversy raised relates to the claim of refund of the amount paid by the respondents as water cess under the provisions of the Water (Prevention and Control of Pollution)

Cess Act, 1977 (for short the Act). Briefly stated, the facts leading to the filing of these petitions are: The respondents are the owners of industrial units manufacturing sugar from sugarcane and liquor/alcohol from molasses, a by- product. On demand made by the State Government under the provisions of the Act they were required to pay water cess. They protested against the demand principally contending that sugar industry and distillery were not industries covered by Entry No. 15 of Schedule I of the Act and consequently they were neither liable to submit any return nor to make any payment of water cess; when their protests were not accepted and the demand persisted for payment of water cess the respondents paid the amount under protest. Some of them filed writ petitions Nos. 3558 of 1980, 494 of 1980 and 17646 of 1986. The writ petitions came to be dismissed. Thereafter, special leave petitions were filed before this Court, which were disposed by judgment in M/s. Saraswati Sugar Mills vs. Haryana State Board and others [(1992) 1 SCC 418], reversing the decision of the High Court and holding that the sugar manufacturing industries did not fall within Entry 15 of Schedule I of the Act. After the said judgment was rendered by this Court representations were made to the Board and the Cess Officer/Assessing Authority of the Board for refund of the amounts illegally and without the authority of law realized by them as water cess. Despite several representations there was no response from the Board and its authorities. Hence the writ petitions were filed consequent upon law declared by this Court in Saraswati Sugar Mills case (supra) seeking a mandamus to the petitioners to refund the amount collected from them as cess with interest @ 18% per annum. In the writ petitions it was contended that the writ petitioners themselves have paid the amount as water under protest and they had not passed on the liability to the customers. The petitioners contested the claim made by the respondents before the High Court. They filed the counter affidavit in the High Court, in short taking the stand that the respondents were not entitled to refund of any amount from the Board for the reasons that after collection, the amount has been paid to the State Government, which in turn has paid the amount to the Government of India; referring to the representations of the respondents it was stated that a reference had been made to the State Government in the matter and their reply was awaited; after the judgment in M/s. Saraswati Sugar Mills case (supra) Entry 15 of Schedule I of the Act was amended with effect from 2.1.1992 covering sugar industries and distilleries and making them liable to pay water cess under the amended provisions of Entry 15 of Schedule I of the Act. In these petitions, we are not concerned with the said amended Entry and the levy and collection of cess from 2.1.1992. The High Court, after considering the rival submissions and relying few judgments of this Court, disposed of the writ petitions directing the petitioners to refund the sums realized from the respondents as water cess after verification of the amount stated to have been paid by them within the given time. Hence the petitioners have filed these special leave petitions. Shri Altaf Ahmed, learned Additional Solicitor General appearing for the petitioners in special leave petitions 4436- 4437 of 1998, contended (1) that in the absence of any specific direction given by this Court in Saraswati Sugar Mills case for refund of the amount collected under the provisions of law, the respondents were not entitled for refund; (2) the respondents having failed in the earlier writ petitions challenging the very levy of cess before the High Court and having not challenged the order of the High Court further could not make claim for refund on the basis of subsequent judgment of this Court; (3) in view of the decision of this Court in Orissa Cement vs. State of Orissa [1991 Supp. 1 SCC 430] no direction could be given for refund of the amount; mere prayer for grant of refund could not be granted by issuing a writ of mandamus; and (4) the High Court could not have entertained the writ petitions of the respondents after inordinate delay of about 4 to 5 years when

their earlier writ petitions were dismissed in 1987. Shri Sudhir Chandra, learned senior counsel and Ms. Indu Malhotra and Shri H.K. Puri, learned counsel for the respondents submitted that having regard to the facts and circumstances of these cases and in the light of the law laid down by this Court as referred to in the impugned judgment, the High Court was quite justified in allowing the claim of the respondents for refund of the amount; when the collection of cess was wholly illegal and not authorized as Entry 15 of Schedule I of the Act did not cover sugar industry and distillery prior to the amendment of the Schedule, the respondents were entitled for refund of the amount; since the respondents had paid the cess under protest the ground of delay could not be put against them; the writ petitions filed by them earlier challenging the validity of collecting cess under Entry 15 of Schedule I of the Act were dismissed by the High Court following the decision of the Division Bench of the same High Court in Civil Miscellaneous Writ No. 21497 of 1986 (The Kisan Sahkari Chini Mills Ltd. Badaun vs. State of U.P. and others), taken in appeal to this Court and was heard along with Saraswati Sugar Mills case; since the appeal filed against the judgment of the Division Bench of the High Court was reversed in the Saraswati Sugar Mills case aforementioned, the argument that the earlier orders passed in some writ petitions had become final was only technical. Shri Dushyant Dave, learned senior counsel for respondents in special leave petitions 5241-5242 of 1998 supporting the submissions made by the learned Additional Solicitor General, added that writ petitions seeking writ of mandamus only for refund of the amount were not at all maintainable. He cited few decisions in support of this submission. The arguments of the learned counsel for the respondents are already noticed above in special leave petitions 4436-4437 of 1998. The learned counsel for the respondents in special leave petition 12654 of 1998 submitted that when the petitioners did not make refund in spite of several representations a writ petition was filed and the same was disposed of on 8.1.1998 following the common judgment impugned in special leave petitions 4436-4437 of 1998 and 5241-5242 of 1998. He submitted that the respondents had also paid the amount under protest and in the matter of refund the respondents stand on the similar footing as the respondents in other petitions. We have carefully considered the submissions made by the learned counsel for@@ JJJJJJJJJJJJJJJJJJJJ the parties. On the question of maintainability of the writ@@ JJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJ petitions we may notice few decisions of this Court on the very point as to claim for refund of money in a writ petition under Article 226 of the Constitution of India. In HMM Limited and another vs. Administrator, Bangalore City Corporation and another [(1989) 4 SCC 640] it is held that a tax or money realized without authority of law is bad under Article 265 of the Constitution and that the money or tax so collected are refundable. In that case octroi was levied and collected in respect of goods on their mere physical entry into the city limits, which were not used or consumed or sold within the municipal limits. This Court, dealing with the refund in para 12 of the judgment, held thus: - We see no ground as to why amount should not be refunded. Realisation of tax or money without the authority of law is bad under Article 265 of the Constitution. Octroi cannot be levied or collected in respect of goods which are not used or consumed or sold within the municipal limits. So these amounts become collection without the authority of law. The respondent is a statutory authority in the present case. It has no right to retain the amount, so far and so much. These are refundable within the period of limitation. There is no question of limitation. There is no dispute as to the amount. There is no scope of any possible dispute on the plea of undue enrichment of the petitioners. We are, therefore, of the opinion that the Division Bench was in error in the view it took. Where there is no question of undue enrichment, in respect of money collected or retained, refund, to which a citizen is entitled, must be made in a

situation like this.

[emphasis supplied] This case fully supports the submissions made on behalf of the respondents. Similar view was taken by this Court in Salonah Tea Company Ltd. Etc., vs. The Superintendent of Taxes, Nowgong and others, etc. [AIR 1990 SC 772]. Para 6 of the said judgment reads: - 6. The only question that falls for consideration here is whether in an application under Article 226 of the Constitution the Court should have directed refund. It is the case of the appellant that it was after the judgment in the case of Loong Soong Tea Estate the cause of action arose. That judgment was passed in July 1973. It appears thus that the High Court was in error in coming to the conclusion that it was possible for the appellant to know about the legality of the tax sought to be imposed as early as 1963, when the Act in question was declared ultra vires as mentioned hereinbefore. Thereafter the taxes were paid in 1968. Therefore the claim in November, 1973 was belated. We are unable to agree with this conclusion. As mentioned hereinbefore the question that arises in this case is whether the Court should direct refund of the amount in question. Courts have made a distinction between those cases where a claimant approaches a High Court seeking relief of obtaining refund only and those refund were sought as a consequential relief after striking down of the order of assessment etc. Normally speaking in a society governed by rule of law taxes should be paid by citizens as soon as they are due in accordance with law. Equally, as a corollary of the said statement of law it follows that taxes collected without the authority of law as in this case from a citizen should be refunded because no State has the right to receive or to retain taxes or monies realized from citizens without the authority of law.

[emphnasis supplied] In the para extracted above, in a similar situation as@@ II arising in the present cases relating to the very question of refund, while answering the said question affirmatively, this Court pointed out that the courts have made distinction between those cases where a claimant approached a High Court seeking relief of obtaining refund only and those where refund was sought as a consequential relief after striking down of the order of assessment etc. In these cases also the claims made for refund in the writ petitions were consequent upon declaration of law made by this Court. Hence, High Court committed no error in entertaining the writ petitions. This Court again in Shree Baidyanath Ayurved Bhawan Pvt. Ltd. Vs. State of Bihar and others [(1996) 6 SCC 86], held that such a writ petition even if assumed to be only for money was maintainable under Article 226 of the Constitution observing thus in para 10 of the judgment: - 10. The writ petition was not a run-of- the-mill case. It was a case where the respondent-State had not acted as this Court had expected a high constitutional authority to act, in furtherance of the order of this Court. That is something that this Court cannot accept. The respondent-State was obliged by this Courts order to refund to the writ petitioners, including the appellants, the amounts collected from them in the form of the levy that was held to be illegal. If there was good reason in law for rejecting the refund claim, it should have been stated. Not to have responded to the appellants refund claim for 11 years and then to have turned it down without reason is to have acted disrespectfully to this Court. Even assuming, therefore, that this was a writ petition only for money, the writ petition fell outside the ordinary stream of writ petitions and, acting upon it, the High Court should have ordered the refund.

This Court in Orissa Cement Ltd.. vs. State of Orissa and others. [(1991) Supp. 1 SCC 430], in para 71 has stated thus: - Once the principle that the court has a discretion to grant or decline refund is recognized, the ground on which such discretion should be exercised is a matter of consideration for the court having regard to all the circumstances of the case.

The learned counsel for the petitioners strongly relied on a Constitution Bench judgment of this Court in Mafatlal@@ JJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJ Industries Ltd. and others vs. Union of India and others [(1997) 5 SCC 536]. That was a case where refund was claimed on the ground that tax/duty had been collected by misinterpreting or misapplying the provisions of the Central Excise and Salt Act, 1944 read with Central Excise Tariff Act, 1985 or Customs Act, 1962 and the Rules and Regulations or the notifications issued under such enactments. In such cases claims for refund had to be preferred under and in accordance with the provisions of the respective enactments before the authorities specified and within the period of limitation prescribed therein. Hence it was held that petition under Article 226 of the Constitution could not be entertained having regard to the legislative intention evidenced by the provisions of the said Act and the writ petition, if any, would be considered and disposed of in the light of and in accordance with the provisions of Section 11-B of the Central Excise and Salt Act, 1944 stating that power under Article 226 has to be exercised to effectuate the rule of law and not to abrogate it. In the present cases there is no corresponding section to Section 11-B of the Central Excise and Salt Act, 1944 for making claim for refund of money and, therefore, the respondents could maintain the writ petitions under Article 226 of the Constitution. Further in para 108(ii) of the judgment it is held that where, however, a refund is claimed on the ground that the provisions of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way of suit or by way of writ petition.

In support of the submission that a writ petition seeking mandamus for mere refund of money was not maintainable, the decision in Suganmal vs. State of Madhya Pradesh and others [AIR 1965 SC 1740] was cited. In para 6 of the said judgment, it is stated that we are of the opinion that though the High Courts have power to pass any appropriate order in the exercise of the powers conferred under Article 226 of the Constitution, such a petition solely praying for the issue of a writ of mandamus directing the State to refund the money is not ordinarily maintainable for the simple reason that a claim for such a refund can always be made in a suit against the authority which had illegally collected the money as a tax. Again in para 9, the Court held :- We, therefore, hold that normally petitions solely praying for the refund of money against the State by a writ of mandamus are not to be entertained. The aggrieved party has the right of going to the civil court for claiming the amount and it is open to the State to raise all possible defences to the claim, defences which cannot, in most cases be appropriately raised and considered in the exercise of writ jurisdiction.

This judgment cannot be read as laying down the law that no writ petition at all can be entertained where claim is made for only refund of money consequent upon declaration of law that levy and collection of tax / cess as unconstitutional or without the authority of law. It is one thing to say that the High Court has no power under Article 226 of the Constitution to issue a writ of mandamus for making refund of the money illegally collected. It is yet another thing to say that such power can be exercised sparingly depending on facts and circumstances of each case. For instance, in the cases on

hand where facts are not in dispute, collection of money as cess was itself without the authority of law; no case of undue enrichment was made out and the amount of cess was paid under protest; the writ petitions were filed within a reasonable time from the date of the declaration that the law under which tax/cess was collected was unconstitutional. There is no good reason to deny a relief of refund to the citizens in such cases on the principles of public interest and equity in the light of the cases cited above. However, it must not be understood that in all cases where collection of cess, levy or tax is held to be unconstitutional or invalid, the refund should necessarily follow. We wish to add that even in cases where collection of cess, levy or tax is held to be unconstitutional or invalid, refund is not an automatic consequence but may be refused on several grounds depending on facts and circumstances of a given case.

Another reason to defeat the claim for refund put forth is that the respondents have filed writ petitions challenging unsuccessfully the validity of levy in question and those orders have become final inasmuch as no appeal against the same has been filed. The contention is put forth either on the basis of res judica or estoppel. It is no doubt true that these principles would be applicable when a decision of a court has become final. But in matters arising under public law when the validity of a particular provision or levy is under challenge, this Court has explained the legal position in M/s. Shenoy and Co. vs. Commercial Tax Officer, Circle II, Bangalore & Ors., [1985 (2) SCC 512] that when the Supreme Court declares a law and holds either a particular levy as valid or invalid it is idle to contend that the law laid down by this Court in that judgment would bind only those parties who are before the Court and not others in respect of whom appeal had not been filed. To do so is to ignore the binding nature of a judgment of this Court under article 141 of the Constitution. To contend that the conclusion reached in such a case as to the validity of a levy would apply only to the parties before the court is to destroy the efficacy and integrity of the judgment and to make the mandate of Article 141 illusory. When the main judgment of the High Court has been rendered ineffective, it would be applicable even in other cases, for exercise to bring those decisions in conformity with the decisions of the Supreme Court will be absolutely necessary. Viewed from that angle, we find this contention to be futile and deserves to be rejected. The next case relied on by the petitioners is Municipal Corporation of Greater Bombay vs. Bombay Tyres International Ltd. & others [(1998) 4 SCC 100] to support the contention that the claim for refund could be made only within the period of limitation prescribed for filing suits for recovery of the amount due. S. Rajendra Babu J., (one of us) speaking for the Bench in para 9 of the judgment has@@ JJJJJJJJJJJJJJJJJJJJJJJJJJJJJ stated thus:- Attacking this finding, the learned counsel@@ JJJJJJJJJJJJJ for the petitioner relied upon the decisions of this Court in Salonah Tea Co. Ltd. Vs. Supdt. Of Taxes [(1998) 1 SCC 401] and Mahabir Kishore vs. State of M.P. [(1989) 4 SCC 1] and submitted that levy of water charges itself being illegal, the recoveries made pursuant to that provision could not be retained but refunded in which event the principles of limitation or laches would not apply. This is not a case where the provisions of the rule which enabled the levy of water charges was struck down on the ground that it was incompetent but on a ground that such rule had been framed inarticulately and was not clear enough. Payments made by the petitioner should be treated as having been made by mistake but once a declaration of law had been made by the Bombay High Court on 16.9.1987, it was open to the petitioner to claim for recoveries and the same should have been made within a reasonable time thereafter. In ascertaining what is the reasonable time for claiming refund, the courts have often taken note of the period of limitation prescribed under the

general Law of Limitation for filing of suits for recovery of amount due to them. In the present case also that standard adopted by the High Court is the same in ascertaining whether there has been laches on the part of the appellant in seeking relief in due time or not. The finding clearly recorded is that long after the charges had been paid and law had been declared by the Court, the writ petition has been filed and, therefore, such a refund should not be allowed. We do not think such a view taken by the High Court calls for interference under Article 136 of the Constitution. Hence we dismiss the petition.

It is clear from the said paragraph that a distinction is made between the claims made for refund where collection of tax was illegal and not authorized and the cases where rule had been struck down on the ground that it had been framed inarticulately and was not clear enough. Further it is only noticed that in ascertaining as to what is the reasonable time for claiming refund, the courts have often taken note of the period of limitation prescribed under the general Law of Limitation for filing suits for recovery of the amount due to them. In exercise of writ jurisdiction, facts and circumstances of each case are to be kept in mind in ascertaining whether there have been laches on the part of the parties seeking relief in due time or not. In these cases having regard to the facts and circumstances already stated above, it cannot be said that there were laches on the part of the respondents or that they had abandoned their claim for refund. In Sales Tax Officer, New Delhi vs. East India Hotels Ltd. And another [(1998) 9 SCC 662] the appellant authority charged sales tax on the sales thereof prior to the judgment of this Court in Northern India Caterers (India) Ltd. Vs. Lt. Governor, Delhi [(1978) 4 SCC 36]. A fresh assessment order was passed thereafter on the basis of the revised return filed by the first respondent. Ultimately an order was passed holding that the first respondent had made application for refund of the excess amount paid within the permissible period. When no action was taken for long period, a writ petition was filed praying for writ of mandamus directing the authority to refund the amount with interest thereon. The High Court allowed the writ petition finding that no further consideration was required and that the defence of unjust enrichment was not maintainable. On the facts of the case, this Court allowed the appeal and directed the Sales Tax authorities to hear the first respondent on the refund application and dispose of the same within a given time. It appears that other cases referred to above were not brought to the notice of this Court. Thus we find that the said case governs its own facts. Hence we reject the contentions advanced on behalf of the petitioner as to the maintainability of the writ petitions. This Court in M/s. Dehri Rohtas Light Railway Company Ltd. Vs. District@@ JJJJJJJJJJJJJ Board, Bhojpur and others [(1992) 2 SCC 598], dealing with a@@ JJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJ case where demand was made for refund in somewhat similar circumstances on the question of delay and laches, in para 13, has stated thus: - The rule which says that the Court may not enquire into belated and stale claim is not a rule of law but a rule of practice based on sound and proper exercise of discretion. Each case must depend upon its own facts. It will all depend on what the breach of the fundamental right and the remedy claimed are and how delay arose. The principle on which the relief to the party on the grounds of laches or delay is denied is that the rights which have accrued to others by reason of the delay in filing the petition should not be allowed to be disturbed unless there is a reasonable explanation for the delay. The real test to determine delay in such cases is that the petitioner should come to the writ court before a parallel right is created and that the lapse of time is not attributable to any laches or negligence. The test is not to physical running of time. Where the circumstances justifying the

conduct exists, the illegality which is manifest cannot be sustained on the sole ground of laches.

The argument that the relief should be denied to the respondents on the ground of delay and laches in approaching the High Court by filing writ petitions claiming refund is equally unsustainable. The claims for refund were made by the respondents within a reasonable time after the judgment was rendered by this Court in Saraswati Sugar Mill case aforementioned. The respondents have paid water cess under protest. The collection of water cess in view of law laid down by this court was clearly illegal and without authority of law. It is also not the case that where the rights are created in third parties on account of delay, if any, in approaching the court and that by entertaining the writ petitions rights of third parties are prejudiced. In this view there was no question of delay and laches on the part of the respondents on the facts found and circumstances stated. The respondents had specifically pleaded that they did not pass on the liability of the water cess on their customers; it appears this contention was not denied by the petitioners before the High Court. On the other hand the only plea taken by the petitioners was that money had been passed to the Central Government under Section 8 of the Act. It was brought to the notice of the Court by the respondents that 65% of the sugar was sold by the respondents through public distribution system under the Essential Commodities Act. Hence there was no question of unjust enrichment also in these cases. The stand of the petitioners that the respondents were not entitled for refund on the ground that@@ JJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJJ the amount of cess collected was passed on to the State@@ JJJJJJJJJJJJJJJJJJJJ Government, which in turn gave it to the Central Government and the Central Government has appropriated the same by passing on money back to various State Pollution Control Boards does not help them. Before the High Court, they only stated that they made reference to the Government in regard to the claim made by the respondents for refund and they were waiting for response. It was also not made out by the petitioners as to how they had difficulties in making the refund to the respondents. It may also be kept in view that immediately after the notices were issued demanding water cess they were challenged. Even in some cases interim orders were also passed in the High court; the amount of water cess was paid under protest. So, in this situation when finally this Court held that the very collection of water cess was without the authority of law, the claim of the respondents for refund cannot be denied merely on the ground that the petitioners passed on the money to the State Government and in turn the money was sent to the Central Government and later the Central Govt. appropriated the same by passing it back to the various State Pollution Control Boards. The High Court in our view having taken all aspects into consideration was right in allowing the claims of the respondents made for refund in the writ petitions. We do not see any good ground or valid reason to interfere with the judgments and orders of the High Court impugned in these petitions. Hence the special leave petitions are dismissed. The parties shall bear their own costs.