J.K. Lakshami Cement Ltd. vs State Of Gujarat on 18 December, 2019

Author: Harsha Devani

Bench: Harsha Devani, Sangeeta K. Vishen

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 15333 of 2019
With
R/SPECIAL CIVIL APPLICATION NO. 16288 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS.JUSTICE HARSHA DEVANI
and
HONOURABLE MS. JUSTICE SANGEETA K. VISHEN

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?

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J.K. CEMENT LTD.
Versus
STATE OF GUJARAT

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Appearance:
UCHIT N SHETH(7336) for the Petitioner(s) No. 1
MS MAITHILI MEHTA, ASSISTANT GOVERNMENT PLEADER(1) for the Respondent(s) No. 1,2

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CORAM:HONOURABLE MS.JUSTICE HARSHA DEVANI
and
HONOURABLE MS. JUSTICE SANGEETA K. VISHEN

Date: 18/12/2019

COMMON ORAL JUDGMENT

(PER: HONOURABLE MS.JUSTICE HARSHA DEVANI)

1. By these petitions under article 226 of the Constitution of India, the petitioners seek a direction to the respondents to forthwith grant refund of tax amount of Rs.2,12,09,162/- collected from the petitioner by the seller and deposited with C/SCA/15333/2019 JUDGMENT the respondent authorities under the Central Sales Tax Act, 1956 (hereinafter referred to as "the CST Act").

2. Since the facts and contentions in both the petitions are more or less similar, the same were taken up for hearing together and are decided by this common judgment. For the sake of convenience, reference is made to the facts as appearing in Special Civil Application No.15333 of 2019.

3. The petitioner is a public limited company duly incorporated under the provisions of the Companies Act, 1956. The petitioner is engaged in the manufacture and sale of cement and is also inter alia engaged in mining activity. The petitioner is duly registered under the CST Act and in the registration certificate under the CST Act "High and Light Speed Diesel Oil" for use in mining is duly incorporated.

4. The petitioner purchased diesel from the refinery of M/s. Reliance Industries Ltd. located in the State of Gujarat for use in mining activity. Prior to the introduction of the goods and services tax regime, the authorities of the State of Rajasthan under the CST Act duly issued C form declarations to the petitioner enabling the petitioner to purchase diesel at concessional rate of tax from the seller.

5. The goods and services tax regime was introduced in the country with effect from 1.7.2017, which encompassed all goods except six commodities viz. crude oil, petrol, diesel, aviation turbine fuel, natural gas and alcoholic liquor. These six commodities continued to be governed by the respective State value added tax laws for the transactions within the State as well as the CST Act insofar as the interstate transactions were C/SCA/15333/2019 JUDGMENT concerned.

6. It appears that despite the fact that diesel continued to come within the ambit of the CST Act, after 1.7.2017, the authorities in the State of Rajasthan refused to issue C form declarations of purchase of diesel at concessional rate on the ground that after introduction of the GST regime, the registration certificates of the dealers such as the petitioner, automatically stood cancelled and they were not eligible for making purchases of diesel against C form declarations. In view of such stand taken by the authorities of the State of Rajasthan, the seller - Reliance Industries Limited started raising invoice charging full tax @ 20% on sales of diesel to the petitioners. Since the authorities of the State of Rajasthan were not heeding to the request of the petitioner as well as other similarly situated dealers, the petitioner approached the Rajasthan High Court seeking a direction to the authorities of Rajasthan under the CST Act to issue C form declarations in respect of diesel required for use in mining activity and consequential relief for the tax deposited at higher rate in the absence of C form being issued by the authorities of the State of Rajasthan.

7. The Rajasthan High Court issued a notice in the matter and by an interim order dated 20.2.2018, directed the authorities to start issuing C form declarations, which would be subject to the outcome of the writ petition. After such interim order came to be passed, the authorities of the State of

Rajasthan started issuing C form declarations to the petitioner as well as other such dealers who had approached the High Court. Consequently, the seller started charging concessional rate of tax for the sales made by the petitioner.

C/SCA/15333/2019 JUDGMENT

8. In cognate matters of other dealers, the Rajasthan High Court by an order dated 18.5.2018, held that the authorities under the CST Act had erred in refusing to issue C form declarations to dealers for purchase of high speed diesel to be used in mining activity and directed the authorities of the State of Rajasthan to issue C form declarations to the concerned purchasing dealers. It was further directed that in case the petitioners in those cases had to pay any amount on account of wrongful refusal to issue C form declarations, then such petitioners were entitled to refund from the concerned authorities who collected the excess tax. The concerned authorities were directed to process the refund claims within twelve weeks from the date of refund claim.

9. On the basis of the judgment of the Rajasthan High Court, the seller - Reliance Industries Limited duly intimated the respondent authorities of the State of Gujarat regarding the issue as well as the direction given by the High Court to refund the excess amount collected by the concerned authorities and informed them that its various buyers from the State of Rajasthan would approach the authorities for refund. The writ petition filed by the petitioner before the Rajasthan High Court came to be allowed by an order dated 18.2.2019 by following the earlier judgment dated 18.5.2018. Pursuant to the said decision, the petitioner addressed a letter to its seller on 1.3.2019, informing it about the order passed in its case and requested for necessary action and was informed by the seller that it had already informed the jurisdictional authority regarding the decision of the Rajasthan High Court requiring refund of excess tax collected by the concerned authority and, therefore, the petitioner may approach the concerned C/SCA/15333/2019 JUDGMENT authority for refund in accordance with the direction of the Rajasthan High Court.

10. Thereafter, the petitioner addressed a letter dated 19.4.2019 to the jurisdictional authority under the CST Act in the State of Gujarat requesting for refund of excess tax totaling to Rs.2,12,09,162/- collected from the petitioner in accordance with directions given by the Rajasthan High Court. [The petitioner in Special Civil Application No.16288 of 2019 addressed a letter dated 31.8.2019 to the jurisdictional authority of the seller under the CST Act in the State of Gujarat requesting for refund of excess tax totalling to Rs.1,97,32,644/-]. The petitioners also furnished details of the refund claim. However, despite repeated oral inquiries, the respondent authorities have not responded to the claim of refund made by the petitioners nor refunded the amount of excess tax. Being aggrieved the petitioners have filed the present petitions seeking a direction to the respondents to forthwith refund the tax amount collected from the petitioners with appropriate interest on such refund amount.

11. Mr. Uchit Sheth, learned advocate for the petitioners in both the petitions, submitted that the respondent authorities have erred in refusing to refund the amount of excess tax collected and deposited with them even though C form declarations in respect of such transactions have been duly furnished and the Rajasthan High Court has specifically directed the concerned authorities to

refund the excess tax within twelve weeks of the refund claim. Reference was made to section 11B of the Central Excise Act, 1944 and more particularly to clause (e) of sub-section (2) thereof, which provides that the amount of duty of excise and interest, if any, C/SCA/15333/2019 JUDGMENT shall instead of being credited to the fund be paid to the applicant if such amount is relatable to the duty of excise and interest, if any, paid on such duty borne by the buyer, if he has not passed on the incidence of such duty and interest, if any, paid on such duty to any other person.

11.1 Reference was made to the decision of the Supreme Court in State of M.P. v. Vyankatlal & Another, (1985)2 SCC 544, wherein it has been held thus:

> "14. The principles laid down in the aforesaid cases were based on the specific provisions in those Acts but the same principles can safely be applied to the facts of the present case inasmuch as in the present case also the respondents had not to pay the amount from their coffers. The burden of paying the amount in question was transferred by the respondents to the purchasers and, therefore, they were not entitled to get a refund. Only the persons on whom lay the ultimate burden to pay the amount would be entitled to get a refund of the same. The amount deposited towards the Fund was to be utilised for the development of sugarcane. If it is not possible to identify the persons on whom had the burden been placed for payment towards the Fund, the amount of the Fund can be utilised by the Government for the purpose for which the Fund Was created, namely, development of sugarcane. There is no question of refunding the amount to the respondents who had not eventually paid the amount towards the Fund. Doing so would virtually amount to allow the respondents unjust enrichment."

It was submitted that there is no bar that the petitioners cannot be granted the refund though the petitioners are the buyers. It was submitted that just like no statutory provisions are required for applying the principle of unjust enrichment, correspondingly no provision is required for refund to the person who has borne the tax. It was submitted that the C/SCA/15333/2019 JUDGMENT Rajasthan High Court having given a direction to refund the amount to the petitioners, the respondent authorities are duty bound to comply with the same.

11.2 Reference was also made to the decision of the Supreme Court in the case of Mafatlal Industries Ltd. v. Union of India, 111 STC 467 (SC), wherein the court has held thus:

> "99.(xii) Section 11-B does provide for the purchaser making the claim for refund provided he is able to establish that he has not passed on the burden to another person. It, therefore, cannot be said that section 11-B is a device to retain the illegally collected taxes by the State. This is equally true to section 27 of the Customs Act, 1962."

It was submitted that therefore, if the purchaser can show that he has borne the burden of the tax, he can still be given refund. It was submitted that the petitioners having borne the burden of the tax, they are entitled to refund thereof.

11.3 Reference was made to sub-section (3) of section 31 of the Gujarat Value Added Tax Act, 2003 (hereinafter referred to as "the GVAT Act"), which provides that the tax collected and deposited under the provisions of the Act to which a dealer may be held not liable shall not be refunded to the dealer and the amount of such tax shall stand forfeited to the Government. Referring to section 36 of the GVAT Act, which deals with refund of excess payment and says that subject to the other provisions of the Act and the rules, the Commissioner may refund to a person the amount of tax, penalty and interest, if any, paid by such person in excess of the amount due from him, it was submitted that the sub-section specifically says "person" and does not use the expression C/SCA/15333/2019 JUDGMENT "dealer". It was submitted that this is not a refund arising in an ordinary case and that the petitioners were forced to pay the tax on account of the action of the authorities at Rajasthan which was held to be illegal.

11.4 Reliance was placed upon the case of the Supreme Court in the case of Indian Aluminium Company Limited v. Thane Municipal Corporation, 1991 (55) ELT 454 (SC), wherein the court has held thus:-

> "8. In any event the petitioner Company cannot claim concession at this distance as a matter of right. In Orissa Cement Ltd. v. State of Orissa & Ors, A I R 1991 SC 1676, it was observed thus:
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> "We are inclined to accept the view urged on behalf of the State that a finding regarding the invalidity of a levy need not automatically result in a direction for a refund of all collections thereof made earlier. The declaration regarding the invalidity of a provision and the determination of the relief that should be granted in consequence thereof are two different things and, in the latter sphere, the Court has, and must be held to have, a certain amount of discretion. It is well-settled proposition that it is open to the Court to grant, mould or restrict the relief in a manner most appropriate to the situation before it in such a way as to advance the interests of justice."

In the instant case the octroi duty paid by the petitioner Company would naturally have been passed on to the consumers. Therefore there is no justification to claim the same at this distance of time and the court in its discretion can reject the same. For the above reasons, this Special Leave Petition is dismissed with costs."

It was submitted that this court which is exercising writ jurisdiction may mould the relief in an appropriate manner, but C/SCA/15333/2019 JUDGMENT should ensure that the order passed by the Rajasthan High Court is duly complied with.

11.5 Reference was also made to the decision of this High Court in the case of Ranjeet Singh Choudhary v. Union of India, [2019]60 GSTR 511 (Guj), wherein the court held thus:

> "14. In the present case, it was therefore upto the CPWD to apply for refund of the service tax which was paid as per the law prevailing at the relevant time, but which

became refundable on account of retrospective amendment in the law. The CPWD instead of applying for refund, itself insisted that the petitioner must apply and when the petitioner's application for refund was rejected by the Assistant Commissioner of Service Tax, Ajmer, CPWD found a novel way to recover the same from the petitioner by utilizing the petitioner's security deposit, unpaid amounts of final bill and the petitioner's running bills of other contracts. These are wholly impermissible means of recovery.

15. The petitioner as a service provider was basically not even required to bear the service tax burden, as duty was to be collected from the service recipient and to be deposited with the Government revenue, if the service tax was payable. If the amount was refunded by the Service-tax Department, it was the duty of the petitioner to ensure that the same reaches the service recipient. If, however for whatever reason, the refund is not granted, surely the petitioner cannot be asked to bear the burden thereof. Strangely, the service tax department holds that if the refund is granted, the petitioner would retain it and therefore benefit unjustly, and therefore, does not granted refund, citing it a case of unjust enrichment. The CPWD holds a belief that whatever be the reason for the petitioner not being able to retrieve such amount from the service tax department, the CPWD must get it back; even if it is from the petitioner personally. In the process, if we allow this situation to prevail, the petitioner would end up losing the service tax component from his profit which in the first place was not the liability of the petitioner. Instead of a case of C/SCA/15333/2019 JUDGMENT unjust enrichment, it would be a case of unjust impoverishment.

16.The respondent no. 4 was also not correct in his approach while dealing with the petitioner's refund application. In the communication dated 7th November 2016, the petitioner had made it abundantly clear that the service tax refund is being claimed for and on behalf of the CPWD and the petitioner would have no objection, if the amount is directly paid to the said organization. Ignoring such representation of the petitioner, the Assistant Commissioner of Service Tax, Ajmer held that this was a case of unjust enrichment. If he was of the opinion that the petitioner was not the correct person who can ask for refund, he could have stated so in the order. This would have enabled the petitioner to point out to the CPWD the correct reason for not being able to claim refund of the service tax. Instead, the Assistant Commissioner wrongly applied the principle of unjust enrichment and ordered that the service tax shall be deposited with the Consumer Welfare Fund."

It was submitted that in the facts of the present case, the seller viz. Reliance Industries Limited has informed the respondents that the buyers would claim the refund.

11.6 Reliance was also placed upon the decision of the Madhya Pradesh High Court in the case of Hotline CPT Ltd. v. State of M.P. & Ors., [2013]61 VST 367 (MP). In the facts of the said case, the petitioner had paid tax to the respondents No.5 and 6 on account of purchase of diesel for its

in-house consumption and respondents No.5 and 6 had paid the said tax to the State Government. The tax was paid in accordance with the instructions issued by the Commercial Tax Department to respondents No.5 and 6. The court held that in such circumstances, the petitioner was entitled to refund of the amount from the State and accordingly, allowed the petition and directed the respondent authorities to refund the C/SCA/15333/2019 JUDGMENT amount to the petitioner within the period stipulated therein. It was, accordingly, urged that it is always permissible for this court to direct the respondents to make the payment to the petitioners.

11.7 It was submitted that in the present case, the enactment concerned is the CST Act and the petitioners are dealers under the CST Act, but registered in Rajasthan where they are doing business. It was submitted that it is, therefore, incorrect to say that the petitioners are not dealers. It was submitted that in this case, the petitioners are seeking refund under the CST Act and not under the GVAT Act and that the provisions of the GVAT Act are borrowed only for the procedural aspect. It was, accordingly, urged that the petitions deserve to be allowed by granting the reliefs as prayed for therein.

12. Opposing the petitions, Ms. Maithili Mehta, learned Assistant Government Pleader, submitted that while the respondents are not disputing the fact that the amount collected towards tax in the absence of C form declarations is required to be refunded if the C form declarations are furnished; however, such refund can be granted to the seller - Reliance Industries Limited and not to the petitioners. It was submitted that the transactions in question being interstate transactions, the Commercial Tax Department of Rajasthan was required to issue C forms to the petitioners, which were then required to be forwarded to Reliance Industries Limited, but as the Rajasthan Commercial Tax Department refused to grant C forms to the petitioners, they were liable to pay tax @ 20 % which was deposited with the Gujarat Commercial Tax C/SCA/15333/2019 JUDGMENT Department. It was submitted that since the assessment proceedings qua Reliance Industries Limited are still pending for the assessment years in question, the respondent authorities are still to process the application for grant of refund. It was further submitted that the refund shall be paid to Reliance Industries Limited which in turn shall forward the amount to the petitioners. However, the respondent authorities would not be in a position to directly grant refund to the petitioners as it is Reliance Industries Limited who has deposited the tax qua the said transactions. It was submitted that the respondent authorities will process the refund in accordance with law on completion of the assessment proceedings of Reliance Industries Limited for the assessment years in question and grant refund thereafter, which may then be paid over to the petitioners. It was urged that at this stage no cause of action arises in favour of the petitioners and that the petition being devoid of merits deserves to be dismissed.

13. In rejoinder, Mr. Uchit Sheth, learned advocate for the petitioners invited the attention to the provisions of sub- section (3) of section 31 of the GVAT Act, to submit that the seller - Reliance Industries Limited would not be able to claim refund as it has not borne the incidence of tax. It was submitted that there is no statutory bar against giving the refund to the purchaser and that the stand adopted by the respondents flies on the face of the decision of the Rajasthan High Court. It was submitted that Reliance Industries Limited cannot claim refund as the burden has already been passed on to the petitioners; whereas, the petitioners have been disputing the liability to pay tax

right from the inception. It was submitted that the petitioners being the users of the goods, the question of passing the duty burden does not arise and C/SCA/15333/2019 JUDGMENT that in the light of the decision of the Rajasthan High Court, the court may issue appropriate directions to the respondent authorities to refund the amount to the petitioners.

14. In the backdrop of the facts and contentions noted hereinabove, it is an undisputed position that the petitioners have borne the burden of tax as the CST authorities at Rajasthan had refused to issue C forms after the coming into force of the GST regime. On account of non-issuance of C forms, the petitioners were not in a position to submit C form declarations in respect of the diesel purchased by them for their mining activity, as a result whereof, the petitioners could not purchase diesel at concessional rate of tax from the seller - Reliance Industries Limited, which collected tax at the rate of 20 % from the petitioners and deposited the same with the respondent authorities. Now, on account of the directions issued by the Rajasthan High Court in the decisions referred to hereinabove, the CST authorities at Rajasthan have issued C form declarations in respect of the transactions in question. The respondent authorities do not dispute that against the C form declarations, the tax collected from the petitioners and deposited by Reliance Industries Limited is required to be refunded. The sole refrain of the respondent authorities is that such refund can be made to the seller - Reliance Industries Limited after its assessment for the period in question is concluded and not to the petitioners who are not registered as dealers in Gujarat.

15. In the opinion of this court, while adopting the above stand, the respondents have failed to take into consideration the fact that insofar as Reliance Industries Limited is concerned, it has already collected the tax from the C/SCA/15333/2019 JUDGMENT petitioners, and hence, if Reliance Industries Limited seeks refund of the amount against the C form declarations, it would not be entitled to such refund as such claim would be hit by the principles of unjust enrichment. As held by the Supreme Court in State of Madhya Pradesh v. Vyankatlal (supra), only the persons on whom lay the ultimate burden to pay the amount would be entitled to get a refund of the same. The petitioners having borne the ultimate burden in this case, it is only they who would be entitled to refund of the same.

16.Besides the Rajasthan High Court in the petitioners' own case has held that the authorities at Rajasthan were liable to issue 'C' forms in respect of high speed diesel procured for mining purpose through interstate trade. The court has further held that in the event of the petitioners having had to pay any amount on account of the respondents' wrongful refusal to issue 'C' forms, the petitioners shall be entitled to refund and/or adjustment from the concerned authorities who had collected excess tax. The court further directed the concerned authorities to process such claim within twelve weeks of the same being made by the petitioners in writing and the petitioners furnishing the requisite documents/forms.

17. In the present case, in the absence of 'C' forms having been issued by the Rajasthan authorities, the respondent authorities have collected excess tax from the seller - Reliance Industries Limited, who in turn has collected the same from the petitioners. Therefore, in terms of the above order passed by the Rajasthan High Court, once the Rajasthan authorities issue C forms against the sales made by Reliance Industries Limited to the petitioners and the petitioners produce the requisite

documents/forms before the respondent authorities, the C/SCA/15333/2019 JUDGMENT respondent authorities are required to process such claim within twelve weeks of the same being made in writing by the petitioners.

18. Pursuant to the above order passed by the Rajasthan High Court, the petitioner in Special Civil Application No.15333 of 2019 has made an application dated 19.4.2019 to the second respondent for refund of Rs.2,12,09,162/- charged by Reliance Industries Limited. Along with the application, the petitioner has furnished a copy of the order of the Rajasthan High Court, a statement showing the details of high speed diesel purchases, Form 'C' Quarter IIIrd and IVth (F.Y. 2017-18), copy of the letter from Reliance Industries Limited to the Deputy Commissioner of Gujarat Sales Tax and copy of sample invoice. The petitioner in Special Civil Application No.16288 of 2019 has made an application dated 31.8.2019 to the second respondent seeking refund of Rs.1,97,32,644/-. Along with such application, the said petitioner has furnished a statement showing details of purchases, tax charged and submission of 'C' forms against such purchases as well as copy of sample invoice, etc. Thus, the petitioners had duly complied with the direction issued by the Rajasthan High Court and in case the respondents required the petitioners to furnish any other details, it was always open for them to call upon the petitioners to furnish the same. However, the respondent authorities have taken a stand that since it is Reliance Industries Limited which has deposited the tax, such refund application has to be made by it and upon refund being made to Reliance Industries Limited, it can pay the same to the petitioner. However, as noted earlier, Reliance Industries Limited cannot make an application for refund inasmuch as such claim would be barred by the principle of unjust C/SCA/15333/2019 JUDGMENT enrichment. Moreover, as stated by the respondents, in the case of Reliance Industries Limited, the refund claim would be processed during the course of its assessment for the period in question, which may take years together and in the meanwhile the petitioners would be deprived of such amount. Moreover, it may be that while processing the refund claim during the course of Reliance Industries Limited's assessment, the respondents may even adjust the refund amount against its dues. Thus, the stand of the respondents that Reliance Industries Limited should file the refund claim and then pay the amount so refunded to the petitioners is neither legally tenable nor is it practically workable.

19. In the opinion of this court, in the light of the clear directions issued by the Rajasthan High Court in the judgment and order referred to hereinabove, which the respondent authorities are bound to comply with, upon the petitioners making applications for refund along with the requisite documents, the respondents were duty bound to process such claim within a period of twelve weeks from the date of such application. The stand adopted by the respondents that the refund can be made to only to Reliance Industries Limited flies in the face of the order passed by the Rajasthan High Court as well as the above-referred decisions on which reliance has been placed by the learned advocate for the petitioners and is nothing but a purely hyper technical stand adopted by them. Once Reliance Industries Limited has, in clear terms, written to the authorities that various buyers who have purchased HSD in the course of inter-state trade for use in mining activities will be approaching their office for refund of the differential tax amount and has enclosed therewith Customer-wise details of inter-state sales made to buyers in Rajasthan at full rate, it is C/SCA/15333/2019 JUDGMENT evident that Reliance Industries Limited is not disputing the fact that it is the petitioners who are entitled to claim the refund. Under the circumstances, the

respondent authorities are not justified in not processing the refund claims of the petitioners.

20. In case of the petitioners, it is an admitted position that the HSD has been purchased by them from Reliance Industries Limited in the course of inter-State trade for use in mining activities and they are, therefore, the ultimate consumers thereof and hence, the question of passing on the tax burden to anyone would not arise. Consequently, the question of unjust enrichment would also not arise.

21. For the foregoing reasons, the petitions succeed and are accordingly allowed. The respondents are directed to forthwith process the refund claims of the respective petitioners and grant refund of the tax amount collected from the petitioners and deposited by the seller in accordance with law within a period of twelve weeks of the receipt of a copy of this judgment. It is, however, clarified that once the refund claim of the petitioners is processed, Reliance Industries Limited would not be entitled to claim any such refund. Rule is made absolute accordingly, with no order as to costs.

22. Direct service is permitted.

(HARSHA DEVANI, J) (SANGEETA K. VISHEN,J) BINOY B PILLAI