

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) No. 2812/2007**

NEERAJ KUMAR & ANR. Petitioners
Through: Mr. Shailesh V. Sharma, Adv.

versus

COMMISSIONER OF CENTRAL EXCISE Respondent
Through: Mr. S.C. Aggarwala, Adv.

% Reserved on: 27th August, 2010.
Date of Decision : 20th September, 2010

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

J U D G M E N T

MANMOHAN, J

1. Present writ petition has been filed under Article 226 of the Constitution of India praying for issuance of an appropriate writ, order or direction directing the respondent to pay interest at 18% between the date of seizure and the date of refund on the cash amount of Rs. 18,00,000/- and bank drafts totalling to Rs. 1,71,327/- which had been ordered to be released by an adjudication order dated 29th August, 2006.

2. The relevant facts of this case are that on 29th December, 2004, cash amounting to Rs. 18,00,000/- and ten bank drafts amounting to Rs. 1,71,327/- were seized by the respondent from petitioners under Section 110 of the Customs and Excise Act, 1962 (hereinafter referred to as 'the Act') on the belief that they were liable for confiscation under Section 121 of the Act, as made applicable to the central excise matters vide notification No. 68/63 CE dated 4th May, 1963. It is the respondent's case that currency and bank drafts were seized as the petitioners were unable to explain their possession.

3. However, show cause notice was adjudicated vide Order No. 16/JC/D-1/2006 dated 29th August, 2006 by the Joint Commissioner of Central Excise, Technical, Delhi-I who ordered for release of seized cash and bank drafts to the dealer. But at the same time, Joint Commissioner directed imposition of penalty of Rs. 1,00,000/- on the dealer under Rule 25(1)(a) of the Central Excise Rules, 2002 for contravening the provisions of Sub-Rules (1) and (7) of Rule 11 of the said Rules.

4. It is pertinent to mention that aggrieved by the Joint Commissioner's order, on 20th November, 2006, M/s. Sushi Chem & Plastic Industries preferred an appeal before the Commissioner, Central Excise, Delhi-I with a prayer that the penalty imposed may be set aside and the Commissioner, Central Excise, Delhi-I may provide any other relief in the facts and circumstances of the case. It is pertinent to mention that petitioners never prayed for any interest to be awarded in

the petition filed before the Commissioner, Central Excise, Delhi-I.

5. The Commissioner, Central Excise, Delhi-I vide its order dated 14th May, 2009 held that the request for payment of interest on the seized amount could not be acceded to as the issue of interest was neither raised before the adjudicating authority nor in the appeal filed by the petitioners.

6. While the appeal filed by M/s. Sushi Chem & Plastic Industries was pending before the Commissioner, Central Excise, Delhi-I, on 17th April, 2007 the present writ petition was filed prayed for the following reliefs:-

“(a) Direct the respondent to pay interest @ 18% on the cash amount of Rs. 18,00,000/- and the bank drafts amounting to Rs. 1,71,362/-, which have been ordered to be released vide adjudication order bearing order in original no. 16/JC/D-I/2006 dated 29th August, 2006, w.e.f. 29th December, 2004, the date of the recovery and taking into possession of the said amount and/or

(b) pass any other order as may be deemed fit and proper in the interest of justice.”

7. Mr. Shailesh V. Sharma, learned counsel for petitioners submitted that the present case was a glaring example of unjust enrichment on the part of the respondent. He further submitted that the respondent was liable to pay interest for the period it had unlawfully seized the petitioners' cash and bank drafts.

8. Mr. S.C. Aggarwala, learned counsel for the respondent submitted that the present writ petition was not maintainable in view of

the fact that two alternative remedies were available to the petitioners, namely, filing of a civil suit for recovery of interest and/or filing of an appeal against the order of the Joint Commissioner.

9. Mr. Aggarwala pointed out that even in the appeal filed by M/s. Sushi Chem & Plastic Industries, no prayer for interest had been made and consequently, claim for interest at this stage was barred by the provisions under Order 2 Rule 2 of Code of Civil Procedure, 1908 (for short 'CPC').

10. Mr. Aggarwala also pointed out that the petitioners had initially filed a writ petition being WP(C) 21072/2005 challenging the seizure and for refund of money. He stated that in view of the result of the adjudicating proceedings, the petitioner no. 1 had chosen to withdraw the earlier writ petition. According to him, this clearly showed that the petitioners had accepted the order passed by the Joint Commissioner. Consequently, Mr. Aggarwala submitted that in view of the dismissal of aforesaid WP(C) 21072/2005, the present writ petition was barred by the principles of *res judicata*.

11. Mr. Aggarwala lastly submitted that petitioners' prayer could not be allowed by virtue of Section 40 of the Central Excise Act, 1944. Section 40 of the Central Excise Act, 1944 prohibits any suit or any proceedings against the Central Government or any officer thereof for doing any act in good faith in pursuance to the Central Excise Act or rules framed thereunder. According to him, since seizure was directed

on the basis of powers conferred by law, no malafides could be attributed to the respondent in seizing the currency. Therefore, according to him, the prayer of petitioners for grant of interest could not be granted.

12. Having heard learned counsel for the parties and having perused the file, we are of the opinion that the dismissal of WP(C) 21072/2005 would not operate as *res judicata* because the adjudication order directing refund of amounts to the petitioners was passed subsequent to the filing of the said writ petition.

13. However, in the appeal filed by M/s. Sushi Chem & Plastic Industries before the Commissioner, Central Excise, Delhi-I the relief for interest could and should have been prayed for. To circumvent the failure to pray for the said relief, the present writ petition could not have been filed.

14. In any event, a writ petition for award of interest simplicitor is not maintainable in view of the fact that the petitioners had an alternative remedy to claim the said relief either by way of an appeal before the Commissioner, Central Excise, Delhi – I or by way of a suit.

15. The Supreme Court in ***Suganmal v. State of Madhya Pradesh & Ors*** AIR 1965 SC 1740 has held as under:-

“6. On the first point, we are of 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. We have been referred to cases in which orders had been issued directing the State to refund taxes illegally collected, but all such cases had been those in which the petitions challenged the validity of the assessment and for consequential relief for the return of the tax illegally collected. We have not been referred to any case in which the Courts were moved by a petition under Article 226 simply for the purpose of obtaining refund of money due from the State on account of its having made illegal exactions. We do not consider it proper to extend the principle justifying the consequential order directing the refund of amounts illegally realised, when the order under which the amounts had been collected has been set aside, to cases in which only order for the refund of money are sought. The parties had the right to question the illegal assessment orders on the ground of their illegality or unconstitutionality and therefore could take action under Article 226 for the protection of their fundamental right, and the courts, on setting aside the assessment orders, exercised their jurisdiction in proper circumstances to order the consequential relief for the refund of the tax illegally realised. We do not find any good reason to extend this principle and therefore hold that no petition for the issue of a writ of mandamus will be normally entertained for the purpose of merely ordering a refund of money to the return of which the petitioner claims a right.

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8. We may also refer to *Burmah Construction Co. v. State of Orissa* AIR 1962 SC 1320, where it was prayed that an appropriate writ directing the State of Orissa to refund the amount of sales tax and penalty realised from the appellant be issued. Shah J., speaking for the court, said :

"The High Court normally does not entertain a petition under article 226 of the Constitution to enforce a civil liability arising out of breach of contract or a tort to pay any amount of money due to the claimant and leaves it to the aggrieved party to agitate the question in a civil suit filed for that purpose. But an order for payment of money may sometimes be made in a petition under articles 226 of the Constitution against the State or against an officer of the State to enforce a statutory obligation."

9. 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 defenses to the claim, defences which cannot, in most

cases, be appropriately raised and considered in the exercise of writ jurisdiction.”

(emphasis supplied)

16. Subsequently, the Supreme Court in ***Union of India & Ors v.***

M/s. Orient Enterprises & Anr. (1998) 3 SCC 501 has held as under:-

“6. In *Suganmal* this Court has laid down that a writ petition under Article 226 of the Constitution 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. This Court has made a distinction between a direction for refund given by way of consequential order in a case where the legality of the assessment is questioned and a case where the petition is only for the purpose of seeking refund. It has been observed:

“We do not consider it proper to extend the principle justifying the consequential order directing the refund of amount illegally realised, when the order under which the amounts had been collected has been set aside, to cases in which only orders for the refund of money are sought. The parties had the right to question the illegal assessment orders on the ground of their illegality or unconstitutionality and, therefore, could take action under Article 226 for the protection of their fundamental right, and the courts, on setting aside the assessment orders, exercised their jurisdiction in proper circumstances to order the consequential relief for the refund of the tax illegally realised. We do not find any good reason to extend this principle and, therefore, hold that no petition for the issue of a writ of mandamus will be normally entertained for the purpose of merely ordering a refund of money to the return of which the petitioner claims a right.”

7. The Court has emphasised that there was no legal right in the appellant who had filed the writ petition to claim the refund under the relevant statute.

8. In the present case also till the insertion of Section 27-A in the Act by Act 22 of 1995 there was no right entitling payment of interest on delayed refund under the Act. Such a right was conferred for the first time by the said provision. Act 22 of 1995 also inserted Section 28-AA which provides for payment of interest on delayed payment of duty by a person who is liable to pay the duty. Thus at

relevant time there was no statutory right entitling the respondents to payment of interest on delayed refund and the writ petition filed by them was not for the enforcement of a legal right available to them under any statute. The claim for interest was in the nature of compensation for wrongful retention by the appellants of money that was collected from the respondents by way of customs duty, redemption fine and penalty. In view of the law laid down by this Court in Suganmal a writ petition seeking the relief of payment of interest on delayed refund of the amount so collected could not, in our opinion, be maintained. The decisions on which reliance has been placed by Shri Rawal were cases where the legality of the orders requiring payment of tax or duty were challenged and the High Court in exercise of its jurisdiction under Article 226 of the Constitution, while setting aside the said orders, has directed the refund of the amount so collected with interest. The direction for payment of interest in these cases was by way of consequential relief along with the main relief of setting aside the order imposing the tax or duty. Those cases stand on a different footing and have no application to the present case. The appeal is, therefore, allowed, the impugned judgment of the High Court is set aside and the writ petition filed by the respondents before the High Court is dismissed. No order as to costs.

(emphasis supplied)

17. Consequently, the present writ petition is dismissed but with no order as to costs.

MANMOHAN, J

CHIEF JUSTICE

SEPTEMBER 20, 2010

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