IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 771 of 1985
with
SPECIAL CIVIL APPLICATION No 7939 of 1988
with
SPECIAL CIVIL APPLICATION NO. 3994 OF 1986
WITH
SPECIAL CIVIL APPLICATION NO. 3779 OF 1987
WITH
SPECIAL CIVIL APPLICATION NO. 40 OF 1986

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI
and
Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GUJARAT STEEL TUBES LTD.

Versus

BOARD OF TRUSTEES OF PORT OF KANDLA

Appearance:
1. Special Civil Application No. 771 of 1985
MR S. B. VAKIL, SR. COUNSEL WITH MR. ASPI M KAPADIA
FOR Petitioner
Mr SHAILESH BRAHMABHATT FOR RESPONDENTS

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI

and

MR.JUSTICE K.A.PUJ

Date of decision: 28/12/2001

CAV JUDGEMENT

(Per : CHIEF JUSTICE MR DM DHARMADHIKARI)

1. These writ petitions have been filed by the petitioner-Gujarat Steel Tubes Limited aggrieved by rejection of their application filed under section 55 of the Major Port Trusts Act,1963 (for short "the Act") for refund of alleged excess wharfage charges paid on steel coils and uncoated pipes under mistake,to the respondent Kandla Port Trust. The sole ground of rejection of the refund claim is that it is barred by limitation being beyond the prescribed period of six months under section 55 of the Act.

2. The petitioner's case is that in accordance with notification dated 26.6.1975 issued by the Kandla Port Trust under section 48 of the Act read with section 52 , wharfage at the rate of Rs. 12/- per 1000 Kgs. under Entry 44 (i)- Metal and Metal products, not otherwise specified was required to be charged from the petitioner.But excess wharfage at the rate of Rs.21.60 per 1000 Kgs. under Entry 75 `Unspecified items' heavy lifts each weighing 3 tons or above, has been charged from it. The petitioner's further case is that excess wharfage was paid under mistake for various periods. At the time of hearing of these petitions, learned counsel for the petitioner handed over to us a consolidated statement of alleged excess wharfage paid to the Kandla Port Trust for various periods in these the writ petitions. The consolidated statement prepared petitionwise and periodwise is taken as a part of record of this case. In SCA No. 771/85, for the period between 27.9.1981 and 11.4.1983, a sum of Rs. 6, 99,588. 66 has been claimed as refund. In SCA No. 40/1986, for the period from 25.2.1985 to 7.7.1985, a total sum of Rs. 8,25,315.02 has been claimed. In SCA No. 3994/86, for the period 24.3.1986 to 14.10.1985, a sum of Rs. 6,56,172.20 has been claimed towards refund. In SCA No.3779/1987, for the period from 8.5.1986 to 25.3.1987, a sum of Rs. 5,02,176.20 has been claimed and in SCA No. 7939/1988, for the period 24.4.1987 to 17.2.1988, a sum of Rs. 6,83,206.10 has been claimed towards refund.

3. For deciding the sustainability of the refund claims, relevant entries in various notifications fixing rates of wharfage are required to be examined. In the

first notification dated 26.6.1975, relevant Entries 44 and 75 read as under :

"44.

Sr No.	Particulars of goods.	Unit	Rate Rs. P.
(i)	Metal and metal products not otherwise specified.	1000 Kgs.	12.00
(ii)	Scrap and dross.	1000 Kgs.	7.00".

"75.

	Unspecified items" (excluding ammunition and explosives)		
(i)	Heavy lifts each weighing 3 tonnes or above.	1000 Kgs.	21.60
(ii)	Non-heavy lifts each weighing less than 3 tonnes.	1000 Kgs.	18.00".

4. The contention advanced on the basis of the above Entries 44 and 75 by the learned counsel on behalf of the petitioner is that the steel coils for the purpose of wharfage are covered by Entry 44 (i) under the description `metal and metal products' not otherwise specified in any of the other Entries. Steel coils being covered by Entry 44 (i) of the notification, wharfage cannot be charged under Entry 75 under the description `unspecified items'- heavy lifts,etc.

5. The contention advanced on behalf of the petitioner prima facie appears to be correct. Entry 44 (i) read as a whole, clearly brings out that if metal and metal products are covered by sub-entry (i) of Entry 44,

and as clearly stated in that Entry `not otherwise specified' in any other Entries, wharfage can be charged on the metal products under that Entry alone. Entry 75 under the description `unspecified items',with sub-entries (i) and (ii) thereunder, `heavy lifts each weighing 3 tons or above and non-heavy lifts each weighing less than 3 tons' would apply to items not covered by Entry 44- `metal and metal products'. This was the clear position with regard to charging of wharfage so long as notification dated 26.6.1975 was in force.

6. Notification dated 26.6.1975 was amended with effect from 10.5.1984 and a separate Entry 45 was introduced for metal and metal products describing various categories of metal products and with different rates prescribed per 1000 Kgs. The notification prescribing rates of wharfage was further amended with effect from 14.2.1985 and two separate Entries 76 and 84 are introduced for unspecified items at the rate of Rs. 30.60 per 1000 Kgs.with specific rate of wharfage for heavy lifts, packed or unpacked weighing 3 tons and above at the rate of Rs. 36.80 per 1000 Kgs. As a result of amendment to the notification, the two relevant Entries with effect from 14/2/1985 read as under :

"76. Unspecified item (excluding ammunition and explosives) 1000 Kgs. 30.60

84. All heavy lifts being packages and unpacked items weighing singly 3 tonnes or above, excluding containers, railway wagons,carriages, locomotives, motor vehicles and timbers. 1000 Kgs. 36.80".

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7. From the above amendment notification,it is clear that after 14.2.1985 even metal and metal products covered by Entry 45, if they are heavy lifts, are liable to pay higher wharfage at the rate of Rs. 36.80 per 1000 Kgs. This was,however, the situation after 14.2.1985 consequent to introduction and change of the language of

Entry 84. Prior to 14.2.1985, however,metal and metal products were liable to wharfage charge at the rate prescribed under Entry 44. To metal and metal products covered by Entry 44, Entry 76 for unspecified items, at different rates for heavy lifts and non-heavy lifts was not attracted.

8. In opposing the claim for refund of the alleged excess wharfage, the learned counsel appearing for the respondent-Kandla Port Trust could not seriously dispute the fact that under the notification dated 26.6.1975 and before its amendments with effect from 10.5.1984 and 14.2.1985,wharfage for metal and metal products was charged at the rate prescribed in Entry 44 and it was so also from other customers like Oil and Natural Gas Corporation Limited. It is when the petitioner came to know that on metal and metal products wharfage is charged under Entry 44 from ONGC that the petitioner is said to have realised its mistake of paying wharfage at the higher rate under Entry 75 and raised its claim for refund by its letters dated 11.4.1986 and 26.4.1986.

9. Learned counsel appearing for Kandla Port Trust mainly opposed the refund claim on the provision of section 55 of Major Port Trusts Act, 1963. He stated that over-charge towards wharfage can be claimed from the Board of Trustees only by a claim application under section 55 and within the prescribed period of six months from the date of payment .It is urged that application for refund in all these five cases is clearly barred by limitation prescribed under section 55 of the Act and,therefore, a writ petition for the same is not maintainable.

10. The second ground urged is that in the writ petitions, there are pure money claims and the appropriate remedy is under section 55 or by a civil suit on payment of requisite court fees. The last ground urged is based on the doctrine of unjust enrichment. It is submitted that since on the basis of wharfage charged, burden must have been transferred by the petitioner company to its customers,this court should decline to grant refund as that would amount to unjust enrichment of the party. Reliance has been placed on Nine-Judges Bench decision of the Supreme court in the case of Mafatlal Industries Ltd. vs. Union of India, (1997) 5 SCC 536; Union of India vs. Bhadra Sahakari Sakkare Karkhana Niyamit, AIR 1999 SC 2865; Union of India vs. V.I.P. Industries Ltd.,AIR 1999 SC 1551 and Deputy Commissioner ,Andaman District vs. Consumer Cooperative Stores Ltd.

(1999) 1 SCC 507.

11. On behalf of the petitioner, leaned senior counsel appearing for the petitioner,in counter-reply submitted that provision of Major Port Trusts Act do not exhaust all general remedies for claiming refund. The Act confers no powers and remedies for adjudication of such claims.The decision of Nine-Judges Bench decision of the Supreme court in Mafatlal case (supra) was on the provisions of the Central Excise Act which are totally different from the provisions of the Act under consideration.It is submitted that the ratio of that case is not attracted to the facts herein where admittedly, excess wharfage was paid under a misunderstanding of the entries of the notifications. It is submitted that even though period of limitation is prescribed for claiming refund from the Board of Trustees, regular remedy of a civil suit or a writ petition is neither expressly nor impliedly barred. This court, therefore, should not deny legal and equitable relief to the petitioner only on the ground that onerous alternative remedy of a civil suit on payment of requisite court fees is available. The learned counsel also pressed into service the provisions of section 72 of the Contract Act and section 17 (1) (c) of the Limitation Act. On the basis of these provisions, it is urged that for making refund application, the period would commence from the date of discovery of the mistake of making excess payment towards wharfage. That would be the starting point of limitation even for a civil suit for which the prescribed period of limitation is three years. He submitted that even if the claim for refund was made in a civil suit, it would not be barred and,therefore,this court in a writ petition should not refund relief to the petitioner only on the ground of delay or limitation.

12. After considering the submissions made by the learned counsel for the parties, we are clearly of the opinion that in equity and law, the petitioner is entitled to refund claimed in SCA No. 771/1985 for the excess wharfage paid in for the period 27.9.1981 to 11.4.1983 which is the period covered by the notification dated 26.6.1975 which came to be amended by inserting new and substituted Entries by notifications dated 10.5.1984 and 14.2.1985.

13. So far as SCA Nos. 40/1986, 3994/86, 3779/1987 and 7939/1988 for the refund claims of the periods from 25.2.1985 to 17.2.1988
are concerned, on the basis of amended Entries in the notification prescribing rates of wharfage for different

types of goods on the basis of weight, we do not find that the the claim for refund made by the petitioner can be sustained. In the amended notification brought into effect from 10.5.1984,Entry 45 contains wharfage rates for metal and metal products providing for different varieties of those products and for different rates per 1000 Kgs. With effect from 14.2.1985, Entry 84 which is added is very widely worded as under :

"84. All heavy lifts being packages
and unpacked items weighing singly
3 tonnes or above, excluding
containers, railway wagons,
carriages,locomotives, motor
vehicles and timbers. 1000 Kgs. 36.80."

After addition of the above in Entry 84 with effect from 14.2.1985, metal products covered by Entry 44 in notification dated 26.6.1975 as amended with effect from 10.5.1984 having heavy lifts weighing 3 tons and above, are to be charged for wharfage under newly added Entry 84. Prior to insertion of the above Entry 84 with effect from 14.2.1985, the position was, however, different, as under the original notification dated 26.6.1975, metal and metal products falling under Entry 44 being specified items with separate rates of wharfage charge prescribed per 1000 Kgs, Entry 75 under the head `Unspecified items' with different rates of heavy lifts weighing 3 tons and above or non-heavy lifts each weighing less than 3 tons, was not at all attracted. Application of Entry 75 was specifically excluded to metal and metal product items specified in Entry 44.

14. On the basis of the interpretation of various Entries in the original notification and the amendment notification in the manner stated above, in our opinion, the claim for refund only for the period before 14.2.1985 and prior to insertion of Entry 84 for all heavy lifts, deserves to be sustained.

15. So far as the grounds urged on behalf of the Port Trust to oppose refund claim on the provisions of section 55 being the only remedy within the limitation prescribed therein, coupled with the doctrine of unjust enrichment are concerned, amongst all cases cited at the Bar, in our opinion, Nine-Judges bench decision of the Supreme court in Mafatlal case (supra) requires closer examination for the purpose of deciding whether the refund claims are barred by section 55 of the Act and remedy of a writ petition or a civil suit can be allowed to be resorted to the parties. In Mafatlal case (supra), majority opinion

is given by Justice B.P.Jeevan Reddy for other four Judges Justices J.S. Verma, S. C. Agrawal, A.S.Anand and B.N. Kirpal. Justice Ahmadi has given a separate opinion concurring with the opinion of majority but partly disagreeing with it by entering a rider. Other minority opinion is of Justices Paripoornan for himself and on behalf of Justice S.C.Sen.

16. We have gone through the ratio of the decision in Mafatlal case (supra). The most striking feature of the case is that it was concerning refund claim based on the provisions of the Central Excise Act. In the Central Excise Act,prior to its amendment by Act 40/1991 and after it, provisions of section 11B and the Rules framed thereunder prior and after the amendment of the Act, provided for a complete machinery including provisions of appeals upto Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT) for claiming refund. Provisions of the Central Excise Act provided for period of limitation of six months from the relevant date i.e. date of payment of duty and there is express bar in sub-section (5) of section 11B of the said Act on any court to exercise jurisdiction in respect of refund claims. This bar continued after amendment to the said Act by Act 40/1991 resulting in substitution of new section 11B. It is after examination of the provisions of the Central Excise Act with the Rules thereunder and taking into consideration the total machinery provided for refund in its provisions with express bar to entertain any refund claim by any court, that by majority, the bench in Mafatlal case (supra) came to the conclusion that as there are exhaustive provisions of refund, remedy of civil suit is barred. It is further held that the writ remedy being constitutional remedy, although not barred, the writ court has to decide the refund claim in accordance with the provisions of law i.e.Central Excise Act and the Rules providing for a procedure and limitation for claiming refund. It is on this ratio that the following conclusions drawn by the majority in para 108 (i) of the judgment are required to be appreciated and applied:

"(i) Where a refund of tax/duty is claimed on the ground that it has been collected from the petitioner/plaintiff -whether before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991 or thereafter- by misinterpreting or misapplying the provisions of the Central Excises and Salt Act,1944 read with Central Excise Tariff Act, 1985 or Customs Act,

1962 read with Customs Tariff Act or by misinterpreting or misapplying any of the rules, regulations or notifications issued under the said enactments, such a claim has necessarily to be preferred under and in accordance with the provisions of the respective enactments before the authorities specified thereunder and within the period of limitation prescribed therein. No suit is maintainable in that behalf. While the jurisdiction of the High courts under Article 226- and of this court under Article 32- cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act.The writ petition will be considered and disposed of in the light of and in accordance with the provisions of section 11B . This is for the reason that the power under Article 226 has to be exercised to effectuate the rule of law and not for abrogating it.

The said enactments including section 11B of the Central Excises and Salt Act and section 27 of the Customs Act do constitute `law' within the meaning of Article 265 of the Constitution of India and hence, any tax collected,retained or not refunded in accordance with the said provisions must be held to be collected, retained or not refunded,as the case may be, under the authority of law. Both the enactments are self-contained enactments providing for levy, assessment, recovery and refund of duties imposed thereunder. Section 11B of the Central excises and Salt Act and section 27 of the Customs Act,both before and after the 1991 (Amendment) Act are constitutionally valid and have to be followed and given effect to. Section 72 of the Contract Act has no application to such a claim of refund and cannot form a basis for maintaining a suit ora writ petition. All refund claims except those mentioned under Proposition (ii) below have to be and must be filed and adjudicated under the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be. It is necessary to emphasise in this behalf that Act provides a complete mechanism for correcting any errors whether of fact or law and that not only an appeal is provided to a Tribunal-which is not a

departmental organ- but to this court,which is a civil court."

Justice Ahmadi in his partly concurring opinion has relied on the Constitution Bench decision of the Supreme court in the case of Dhulabhai vs. State of M.P., AIR 1969 SC 78 and that case has not been over-ruled by the majority opinion. In Dhulabhai case (supra), it has been held that bar of general remedy of a civil suit is not to be readily inferred unless there is express or implied provision in the special enactment. The Supreme court in Dhulabhai case (supra) laid down the following propositions which,in our opinion, are still good law, as held in the separate opinion of Ahmadi, C.J. and not dissented from in the majority opinion:

"(1) Where the statute gives a finality to the orders of the special tribunals the civil courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted inconformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case, it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act.

Even the High court cannot go into that question on a revision or reference from the decision of the Tribunals.

(4) when a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act .In either case, the scheme of the particular act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply."

17. Other minority opinion of Justice Paripoornan for himself and Justice S.C.Sen also refers to Dhulabhai case (supra) and has come to the following conclusion on the issue in question:

"(E) It is not possible to conclude that any and every claim for refund of illegal/unauthorised levy of tax can be made only in accordance with the provisions of the Act (Rule 11, Section 11B etc. as the case may be),and an action byway of suit of writ petition under Article 226 will not be maintainable under any circumstances. An action by way of suit or a petition under Article 226 of the Constitution is maintainable to assail the levy or order which is illegal, void or unauthorised or without jurisdiction and/or claim refund, in cases covered by Propositions (1), (3), (4) and (5) in Dhulabhai case, as one passed outside the Act, and ultra vires. Such action will be governed by the general law and the

procedure and period of limitation provided by the specific statute will have no application."

18. We have thus tried to cull the ratio of the decision in Mafatlal case (supra). The most distinguishing feature of that case is that it was based on the provisions of the Central Excise Act containing detailed provision providing full machinery for claiming refund with remedy of appeal upto CEGAT. There was express bar on any court to entertain claims for refund towards alleged over-payment of excise duty. It is on the express provisions of the Central Excise Act that the majority was of the opinion that even if a writ petition is not barred, it is to be decided and considered on the basis of relevant provisions in the Central Excise Act and outside its provisions, no relief can be granted.

19. So far as Major Port Trusts Act is concerned, wharfage rates are to be prescribed and charged under Chapter VI. Section 48 (1) (d) empowers the Board of Trustees to fix wharfage by a notification.Section 55 of the Act which is pressed into service for resisting the refund application, reads as under :

"55. Refund of overcharges- No person shall be entitled to a refund of an overcharge made by a Board unless his claim to the refund has been preferred in writing by him or on his behalf to the Board within six months from the date of payment duly supported by all relevant documents.

Provided that a Board may of its own motion remit overcharges made in its bills at any time".

Excepting for provisions contained in section 55 quoted above, there is no other provision where any authority has been given power of adjudication of refund claims. In our opinion, section 55 of the Act is the only provision which enables a party to approach for refund to the Board of Trustees within the prescribed time of six months from the date of payment. This is a provision providing internal remedy under the Act through the Board for claiming refund. The Board is not the adjudicating authority and there is no detailed procedure or machinery provided for adjudication of refund claims. There is no provision of appeals. We also do not find in the provisions of the Act any express or implied bar of civil remedy in a regular court or Constitutional court. All those provisions which are to be found in the Central Excise Act providing for independent adjudicating forum

with provision of appeals upto CEGAT coupled with express bar on any court, are conspicuously absent in the provisions of the Major Port Trusts Act. The decision in Mafatlal case (supra) can have no application to the refund claims under the present Act. As has been held by the Constitution Bench of the Supreme court in the case of Dhulabhai (supra), ouster of jurisdiction of civil court is not to be readily inferred. The provisions of section 55 of the Act do not give even a faint indication that refund application to the Board is the only available remedy and all other general remedies in court of law are barred. Intention of section 55 is apparent that if a refund application within the prescribed period is made to the Board, the Board may consider the claim but in our opinion, general remedy through court can never be said to be barred either expressly or impliedly. So far as constitutional remedy under Article 226 of the High court is concerned, ordinary legislation cannot take away the said remedy. Even in a writ petition, in extraordinary circumstances, this court is competent to grant monetary relief if the alternative remedy is highly onerous and time consuming and where the claim is prima facie legal and valid. In these cases, refund claims were made in the year 1985 onwards and the petitions were filed in 1985, 1986 and 1988. They are pending in this court. The respondent-Board could not dispute the fact that on the basis of the original notification dated 26.6.1975, wharfage should have been charged under Entry 44 as it stood then, as was charged from ONGC and other parties. The claim based on original Entry 44 is thus undeniable on merits.

20. Thus, claim for refund of excess payment of wharfage made under Entry 44 prior to insertion of Entry 84 with effect from 14.2.1985 cannot be resisted on any justifiable ground. Both law and equity is in favour of the petitioner for the refund claim in SCA No. 771/1985. It would be highly unjust to relegate the petitioner at this distance of time to the remedy of civil suit which is available only on payment of requisite court fees with uncertainty of course of civil litigation involving appeals that may be preferred. The claim for excess wharfage paid prior to 14.2.1985 is clearly sustainable.

We, therefore, do not find any force in the objection that the claim being purely monetary and barred by section 55 of the Act, this court should refuse relief.

21. So far as doctrine of unjust enrichment which has been pressed into service is concerned, in our opinion,

the same is wholly inapplicable. The refund claim is not for any tax burden which would have been passed on to any customers. It is nobody's case that the alleged excess wharfage paid was made good by passing on burden to any customer. There is no foundation laid by any of the parties for considering the plea of unjust enrichment. It is also not clear to what use the goods were put to on which wharfage was charged and whether any burden was passed on to any customer. This plea was raised for the first time in the course of arguments before this court only to take some support from the decision in the case of Mafatlal Industries (supra). Such a plea, at the fag end of the case cannot be allowed to be raised.

As a result of the discussion aforesaid, we allow SCA No. 771/1985 and direct the respondent-Trust to verify the claim in the petition and make refund of a sum of Rs 6,99,588.66 with 6% interest thereon from the date of filing of the petition till payment. Rule is made absolute.

Other refund claims in SCA Nos.40/1986, 3994/1986, 3779/1987 and 7939/1988 covered by the notification brought into effect from 14.2.1985 are rejected. These petitions are accordingly dismissed with no order as to costs. Rule is discharged.

(D. M.Dharmadhikari, C.J.)

(K.A. Puj,J.,)

parekh