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SALONAH TEA COMPANY

v.

SUPERINTENDENT OF TAXES NOWGONG & CRS. ETC.

DECEMBER 18, 1987

B

[SABYASACHI MUKHARJI AND S. RANGANATHAN, JJ.]

Constitution of India, 1950: Article 226—Petition for refund of tax paid under mistake of law—Maintainability of—Not to be turned down on the negative plea of alternative remedy.

C

Assam Taxation (On Goods Carried by Road or on Inland Waterways) Act, 1961: ss. 7, 9, 16 & 23—High Court Setting aside assessment order—but refusing refund on triable issue of limitation—Validity of.

D

Limitation Act, 1963, Article 113, Laches—Discretion—Exercise of by Court—Must be fair and equitable.

E

The Assam Taxation (On Goods Carried by Road or Inland Waterways) Act, 1954 was struck down as *ultra vires* the Constitution in *Atiabari Tea Co. Ltd. v. State of Assam*, AIR 1961 SC 232. A new Act was thereafter passed which received the President's assent on April 6, 1961. The High Court declared the said Act to be *ultra vires* on August 1, 1963. The State and other respondents preferred appeals before Supreme Court against the decision. In the meantime, in *Khyerbari Tea Co. Ltd. & Anr. v. State of Assam*, [1964] 5 SCR 975 the Court held the Act to be *intra vires* on December 13, 1963. Following the decision in *Khyerbari* case the appeals filed by the State and others were allowed by this Court on April 1, 1968. After this decision the respondents required the appellants by notices under s. 7(2) of the Act issued on July 8, 1968 to submit return for the period ending June 30, 1961, September 30, 1961, December 31, 1961 and March 31, 1962. Due to the penal consequences mentioned in the said notices the appellants filed returns on July 11, 1968. The assessment orders were passed under s. 9(3) of the Act. The tax was duly paid.

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In November 1973 the appellants filed writ petitions before the High Court seeking direction for refund of the tax paid under mistake relying on the High Court's Judgment in *Loong Soong Tea Estate* (Civil Rule No. 1005 of 1969) dated July 10, 1973 declaring the assessment as without jurisdiction.

The High Court set aside the orders and notices of demand but refused claim of refund on the ground of delay and laches. It took the view that it was possible for the appellants 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*. The taxes having been paid in 1968 the claim in November 1973 was belated. It, however, held that the claim for refund was a consequential relief.

In the appeals to this Court it was contended for the appellants that they had paid the tax under a mistake of law and were entitled to seek refund thereof, and a writ petition seeking refund of tax realised without the authority of law cannot be rejected on the ground of limitation or delay unless such delay can be said to amount to laches or has caused some irreparable prejudice to the opposite party.

Allowing the appeals,

HELD: *By the Court:* (Per Sabyasachi Mukharji & Rangana-
than, JJ.)

The money was refundable to the appellants. The writ petitions were within time. [484H]

Per Mukharji, J.

1. No State has the right to receive or to retain taxes or monies realised from citizens without the authority of law. There is in such cases concomitant duty to refund the realisation as a corollary of the constitutional inhibition that should be respected unless it causes injustice or loss in any specific case or violates any specific provision of law. [480H; 485E-F]

In the instant case, tax was collected without the authority of law. The notices were without jurisdiction. So was the assessment made under s. 9(3) of the Act. The respondents, therefore, had no authority to retain the money so collected, and as such the money was liable to refund. [480D]

2.1 In an application under Article 226 of the Constitution the Court has power to direct the refund unless there has been avoidable laches on the part of the petitioner which indicate either the abandonment of his claims or which is of such nature for which there is no probable explanation or which will cause an injury either to respondent or any third party. [484C-D]

A 2.2 Courts have, however, made a distinction between those cases where a claimant approaches a High Court seeking relief of obtaining refund only and those where refund is sought as a consequential relief after striking down of the order of assessment etc. A petition of the former nature is not ordinarily maintainable for the simple reason that a claim for such a refund can always be made in a suit wherein 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. [480F-H; 483B]

C In the instant case, s.23 of the Assam Act provided for refund to a producer or a dealer any sum paid or realised in excess of the sum due from him under that Act. The section thus applies only in a case where money is paid under the Act. If there is no provision for realisation of the money under the Act, the act of payment was *ultra vires*, the money had not been paid under the Act. In that view of the matter the case did not come within s. 23 of the Act. The High Court having found that the claim for refund was a consequential relief, it could have directed the D State to refund the amount in question. [483G-H; 484A-B]

E 2.3 Exercise of every discretion must be fair and equitable. The period of limitation prescribed for recovery of money paid by mistake under the Limitation Act was three years from the date when the mistake was known. In the instant case, knowledge is attributable from the date of judgment in *Loong Soong's* case on 10th July, 1973. There being a statement that the appellants came to know of that fact in October 1973 and there being no denial by the averment made on this ground, the High Court was in error in presuming that there was a triable issue on this ground and refusing to grant refund. Within a month in November 1973 the present petitions were filed. There was no unexplained delay. The appellants had proceeded diligently. There is nothing to indicate that had they been more diligent, the appellants could have discovered the constitutional inhibition earlier. The position is not clear even if there is a triable issue. The position becomes clearer only after the decision in *Loong Soong's* case. It could not, therefore, be said that the appellants had abandoned their claims. [487B-D]

G *Suganmal v. State of Madhya Pradesh and Others.*, AIR 1965 SC 1740; *Tilokchand Motichand & Ors. v. H.B. Munshi & Anr.*, [1969] 2 SCR 824; *Kantilal Babulal v. H.C. Patel* 21 S.T.C. 174; *Chandra Bhushan & Anr. v. Deputy Director of Consolidation (Regional), U.P. & Ors.*, [1967] 2 SCR 286; *R.L. Kapur v. State of Madras*, [1972] 3 H SCR 417; *State of Madhya Pradesh v. Bhailal Bhai & Ors.*, [1964] 6

➤ SCR. 261; *Ramchandra Shankar Deodhar & Ors. v. The State of Maharashtra & Ors.*, [1974] 2 SCR 216; *A.V. Venkateswaran, Collector of Customs, Bombay v. Ramchand Sobhraj Wadhwani and another*, [1962] 1 SCR. 753; *Shiv Shankar Dal Mills etc. etc. v. State of Haryana & Ors. etc.*, [1980] 1 SCR. 1170 and *State of Madhya Pradesh and others etc. etc. v. Nandlal Jaiswal and others etc. etc.*, AIR 1987 SC 251 referred to. A B

➤ 3. It is only on the delivery of the judgment in *Loong Soong's* case in 1973, the appellants realised the right to claim the relief of refund as a consequential relief, setting aside the assessment and the assessment was set aside by the very order itself. That right has been granted by the High Court. The High Court has not refused the setting aside on the ground of delay. It would be inconsistent for the High Court to refuse to grant consequential relief after setting aside the assessment. If the realisation was without the authority of law and that was declined by the High Court by the judgment in the instant case, which claimed also the consequential relief, that relief must automatically follow. Refunding the amount as a consequence of declaring the assessment to be bad and recovery to be illegal will be in consonance with justice, equity and good conscience. [489F-H] C D

➤ 4. The challenge to the assessment on the ground that the assessment was bad could not be made in an appeal under the Act because the right to appeal being a creature of the Act, if the Act is *ultra vires* that right would not ensure to the benefit of the appellant. Section 16 of the Act under which an appeal lay within thirty days from the date of service of an assessment order therefore had no application. Similarly, ➤ rule 55 of the Rules framed under the Act barring claims of refund unless made within one year from the date of the original order of assessment, being unconstitutional had no application. [485H; 486A-B; 487H] E F

Per Ranganathan, J.

➤ 1. The assessments on the appellants were illegal. The taxes demanded on the basis thereof had been collected without the authority of law. The High Court, therefore, while allowing the appellant's ➤ prayer for quashing the assessment should also have allowed the refund of the illegally collected taxes. [490D] G

Superintendent of Taxes v. Onkarmal Nathmal Trust, [1975] Supp. SCR 365, applied. H

- A The petitions filed in November, 1973 were within the period of limitation prescribed in Article 113 of the Limitation Act read with s. 23 of the Assam Act. The appellants' averment that they realised their mistake only when they came to know about the decision of *Loong Soong Tea Estate* case in July, 1973 stands uncontroverted. There is nothing on record to show that the appellants had realised their mistake earlier. [49:D-F]
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State of M.P. v. Bhailal Bhai, [1964] 6 SCR 261 referred to.

- It was considered unnecessary therefore to consider the larger question whether the bar of limitation would be fatal to a writ petition for refund. [49:F-G]
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CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 3023—3029 OF 1979.

- From the Judgment and Order dated 14.6. 1979 of the High Court of Gauhati in Civil Rule Nos. 509 to 512 of 1973.
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R.F. Nariman, P.H. Parekh. M.K.S. Mench and Sanjay Bharthri for the Appellants.

Prabir Chaudhary for the Respondents.

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The Judgment of the Court was delivered by

- SABYASACHI MUKHARJI, J.** These appeals arise out of the Judgment and order dated 14th June, 1979 of the High Court of Gauhati in Assam setting aside the order and notice of demand under the Assam Taxation (on Goods carried by Road or Inland Waterways) Act, hereinafter called the Act, but declining to order any refund of the taxes paid. In 1954 Assam Taxation (on Goods carried by Road or Inland Waterways) Act was first enacted. This Court struck down the Act as *ultra vires* the Constitution of India. See *Atiabari Tea Co. Ltd. v. The State of Assam & Ors.*, AIR 1961 SC 232. On 6th of April, 1961 a new Act passed received the assent of the President. The High Court again struck down the Act declaring it *ultra vires* the Constitution on 1.8.63. On 13.12.63 *Khyerbar Tea Co. Ltd. & another v. State of Assam*, [1964] 5 SCR 975 in a challenge to the Act under Article 32 of the Constitution, this Court held the Act to be *intra vires*. On 19th December, 1966, Judgment was passed in Civil Rule No. 190/1965. On 1st April 1968, the appeals preferred by the State of Assam against the
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High Court order dated 13.12.63 were allowed on the basis of the declaration of the Act to be *intra vires* the Constitution. Thereafter notices were issued by Superintendent of Taxes, Nowgong, requiring the appellant under section 7(2) of the Act to submit returns for the period ending 30.6.61, 30.9.61, 31.12.61 and 31.3.62. Returns were duly filed. Assessment Orders were passed under section 9(3) of the said Act. On 10th July, 1973, the High Court passed judgment in *Loong Soong Tea Estate*, (Civil Rule No. 1005 of 1969) declaring the assessment as without jurisdiction. It is the case of the appellant-petitioner that in view of the above judgment, the appellant came to know about the mistake in paying the tax as per assessment order and also that the appellant became entitled to refund of the amount paid. The present Writ Petition was filed in November, 1973 before the High Court of Assam. Thereafter in June, 1976, the learned Single Judge of the High Court referred the matter to a larger Bench. The Division Bench on June 14, 1979, passed judgment setting aside the orders and notices of demand but refused relief of refund claimed by the appellant.

Aggrieved thereby, the appellant has preferred the present appeals. The appellant-petitioner claimed in all these petitions that the assessments were illegal and prayed that directions be given to the respondents to refund the tax collected in pursuance of those orders.

The Legislature of Assam passed the Act, as mentioned hereinbefore in 1954 called the Assam Taxation (on Goods carried by Road and Inland Waterways) Act, 1954 which purported to levy tax on manufactured tea and jute carried by road and inland waterways. The Act was declared *ultra vires* the Constitution by this Court in *Atiabari* case (supra) on the ground that previous sanction of the President was not taken. Thereafter the Legislature passed the Act which received the assent of the President on 6.4.61. The validity of the Act was also challenged and the High Court declared that Act to be *ultra vires* on 1st August, 1963. Against the judgment and order passed by the High Court, the State of Assam and other respondents preferred appeals before this Court. In the meantime, M/s Khyerabari Tea Co. Ltd. challenged the provisions of the Act directly before this Court by filing an application under Article 32 of the Constitution and this Court in its judgment dated 13.12.63 held the Act to be *intra vires*. Following the aforesaid decision of this Court, the appeals filed by the State of Assam and others against the judgment of the High Court were allowed by this Court on the 1st April, 1968. It was after this decision that the respondents required the appellant by a notice under section

A 7(2) of the Act issued on 8.7.68 to submit returns for four periods mentioned hereinbefore. Due to penal consequences mentioned in the said notices in the event of failure to file return and pay the taxes, the appellant filed return on July 11, 1968 and paid the various taxes.

B In the judgment under appeal after elaborate discussion, the High Court came to the conclusion that when a petitioner approaches the High Court with the sole claim for refund of money by writ of mandamus, the same is normally not granted but where the refund is prayed as a consequential relief the same is normally entertained if there is no obstruction or if there be no triable issue like that of limitation which could not be conveniently tried in writ petition.

C In this case indisputably it appears that tax was collected without the authority of law. Indeed the appellant had to pay the tax in view of the notices which were without jurisdiction. It appears that the assessment was made under section 9(3) of the Act. Therefore, it was without jurisdiction. In the premises it is manifest that the respondents had no authority to retain the money collected without the authority of law and as such the money was liable to refund.

E 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 where refund is 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 realised from citizens without the authority of law.

In *Suganmal v. State of Madhya Pradesh and Others*, AIR 1965 SC 1740, this Court held that the High Courts have power to pass any appropriate order in the exercise of the powers conferred on them under Article 226 of the Constitution. A petition solely praying for the issue of a writ of mandamus directing the State to refund the money alleged to have been illegally collected by the State as tax was 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 and in such a suit it was 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. It appears that Section 23 of the Act deals with refund. In the facts of this case, the case did not come within section 23 of the Act. But in the instant appeal, it is clear as the High Court found in our opinion rightly that the claim for refund was a consequential relief.

In *Tilokchand Motichand & Ors. v. H.B. Munshi & Anr.*, [1969] 2 S.C.R. 824, claimants in that case contended that they did pay taxes under section 21(4) of the Bombay Sales Tax Act, 1953 which was *ultra vires* on the particular ground on which it was struck down by this Court. On 28th March, 1958 the petitioners in that case filed a writ petition in the High Court and contended that section 21(4) of the said Act was *ultra vires* the powers of the State Legislature and was violative of Articles 19(1)(f) and 265 of the Constitution. The single Judge of the High Court dismissed the petition on the ground that the petitioners defrauded their customers and so were not entitled to any relief even if there was a violation of fundamental rights. The appellate bench of the High Court dismissed the appeal on the ground that it would not interfere with the discretionary order of the single Judge. Thereafter, it appears that on December 24, 1958, the Collector attached the properties of the petitioners for recovering the amount as arrears of land revenue and the petitioners paid the amount in instalments between August 1959 and August 1960. On September 29, 1967 this Court in *Kantilal Babulal v. H.C. Patel*, 21 S.T.C. 174 struck down section 12A(4) of the Bombay Sales Tax Act, 1946 corresponding to section 21(4) of the 1953 Act, on the ground that it was violative of Article 19(1)(f) of the Constitution inasmuch as the power conferred by the section was unguided, uncanalised and uncontrolled and so was not a reasonable restriction on the fundamental right guaranteed under that Article. On the assumption that section 21(4) of the 1953 Act was also liable to be struck down on the same ground, on February 9, 1968, the petitioners therein filed a writ petition under Article 32 of

- A the Constitution claiming a refund of the amount. The petitioners contended that they did not know that the section was *ultra vires* on the particular ground on which this Court had struck it down and they had paid the amounts under coercion or mistake, that the mistake was discovered on September 29, 1967 (the date of the judgment of this Court) and that they were entitled to the refund under section 72 of the
- B Indian Contract Act, 1872.

It was held by the majority that the petition should be dismissed on the ground of laches. Hidayatullah, C.J. held that Article 32 gave the right to move the Court by appropriate proceedings for enforcement of fundamental rights and the State cannot place any hindrance in the way of an aggrieved person. But once the matter had reached this

C Court, *the extent or manner of interference is for this Court to decide.* (emphasis supplied). The Chief Justice reiterated that this Court had put itself in restraint in the matter of petitions under Article 32. For example, this Court, reiterated the Chief Justice, refrained from acting under the Article if the party had already moved the High Court under

D Article 226 and if the High Court had exercised its parallal jurisdiction. It was said in such a case, the Court would not allow fresh proceedings to be started under Article 32 but would insist on the decision of the High Court being brought before it on appeal. Similarly, in inquiring into belated and stale claims, this Court should take note of evidence of neglect of the petitioner's own rights for a long time or of

E the rights of innocent parties which might have emerged by reason of the delay. The Chief Justice emphasised that it was not possible for this Court to *lay down any specific period as the ultimate limit of action* and each case will have to be considered on its own facts. A petition under Article 32 was neither a suit nor an application to which the Limitation Act applied. Further, putting curbs in the way of enforce-

F ment of fundamental rights through such legislative action might be questioned under Article 13(2) for, if a short period of limitation was prescribed the fundamental right might be frustrated. Therefore, for the matter of relief in each case, this Court had to exercise its descretion from case to case and where there was appearance of an avoidable delay and the delay affected the merits of the claim, this Court held the

G party disentitled to invoke its extraordinary jurisdiction. In the facts of that case, the majority Judges found that by his own conduct, the petitioner had abandoned his own litigation years ago and the Court would not apply the analogy of the Article in the Limitation Act in cases of mistake of law and give him relief.

H Bachawat, J. in a concurring judgment observed that the normal

remedy for recovery of money paid to the State under coercion or mistake of law is by suit. The right to move this Court for enforcement of fundamental rights was guaranteed by Article 32, and no period of limitation was prescribed for such a petition. Bachawat, J. reiterated that the writ issues as a matter of course if a breach of a fundamental right is established, but this did not mean that in giving relief under the Article this Court might ignore all laws of procedure. The extraordinary remedies under Articles 32 and 226 of the Constitution, said Bachawat, J., are not intended to enable a claimant to recover monies the recovery of which by suit is barred by limitation. In the absence of any rules of procedure under Article 145(1)(c), the Court may adopt any reasonable rule. Bachawat, J. emphasised that for example, the Court will not allow a petitioner to move this Court under Article 32 on a petition containing misleading and inaccurate statements. Similarly, the general principles of *res judicata* were applied where applicable on grounds of public policy. Bachawat, J. emphasised that where the remedy in a writ application under Article 32 or Article 226 corresponded to a remedy in an ordinary suit and the latter remedy was subject to the bar of a statute of limitation, the Court imposed on analogy the same limitation on the summary remedy in the writ jurisdiction even though there was no express statutory bar of limitation, on grounds of public policy and on the principle that the laws aid the vigilant and not those who slumber. Mitter, J. more or less expressed the same view.

Sikri, J. allowed the appeal because he was of the opinion that the petitioners were under a mistake of law, the mistake was discovered, like all assessees, when the Court struck down section 12A(4) of the 1946 Act and they came to this Court within six months of that date and hence there was no delay.

Hegde, J. allowed the petition. He was of the opinion that in the facts of that case, there was no delay.. He observed that mere impression of a party that a provision of law might be *ultra vires* cannot be equated to knowledge that the provision was invalid.

Under Article 113 of the Limitation Act, 1963 the limitation was the period of three years from the date the right to sue accrues. It may be noted that in the instant case under section 23 of the Act, it was provided that the Commissioner shall, in the prescribed manner refund to a producer or a dealer any sum paid or realised in excess of the sum due from him under this Act either by case or, at the option of the producer or dealer, be set off against the sum due from him in

A respect of any other period. Section 23 applies only in a case where money is paid under the Act. If there is no provision for realisation of the money under the Act, the act of payment was *ultra vires*, the money had not been paid under the Act. In that view of the matter section 23 would not apply.

B

The High Court in the instant case after analysing the various decisions came to the conclusion that where a petitioner approached the High Court with the sole prayer of claiming refund of money by writ of mandamus, the same was normally not granted but where the refund was prayed as a consequential relief the same was normally entertained if there was no obstruction or if there was no triable issue like that of limitation. We agree that normally in a case where tax or money has been realised without the authority of law, the same should be refunded and in an application under Article 226 of the Constitution the Court has power to direct the refund unless there has been avoidable laches on the part of the petitioner which indicate either the abandonment of his claims or which is of such nature for which there is no probable explanation or which will cause any injury either to respondent or any third party. It is true that in some case the period of three years is normally taken as a period beyond which the Court should not grant relief but that is not an inflexible rule. It depends upon the facts of each case. In this case, however, the High Court refused to grant the relief on the ground that when the section was declared *ultra vires* originally that was the time when refund should have been claimed. But it appears to us, it is only when the *Loong Soong* case was decided by the High Court in 1973 that the appellant became aware of his crystal right of having the assessment declared *ultra vires* and in that view of the matter in October, 1973 when the judgment was delivered in July, 1973 the appellant came to know that there is mistake in paying the tax and the appellant was entitled to refund of the amount paid. That was the time when the appellant came to know of it. Within a month in November 1973 the present petition was filed. There was no unexplained delay. There was no fact indicated to the High Court from which it could be inferred that the appellant had either abandoned his claims or the respondent had changed his position in such a way that granting relief of refund would cause either injury to the respondent or anybody else. On the other hand, refunding the amount as a consequence of declaring the assessment to be bad and recovery to be illegal will be in consonance with justice, equity and good conscience. We are, therefore of the view that the view of the High Court in this matter cannot be sustained.

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Chandra Bhushan & Anr. v. Deputy Director of Consolidation (Regional), U.P. & Ors., [1967] 2 S.C.R. 286 was a case where this Court observed that the High Court erred in exalting a rule of practice into a rule of limitation and rejecting the petition of the appellant for refund without considering whether the appellant was guilty of laches and undue delay. Shah, J. delivering the judgment of the Court observed that the primary question in each case is whether the applicant had been guilty of laches or undue delay. A B

Reference may be made in this connection to *R.L. Kapur v. State of Madras*, [1972] 3 S.C.R. 417. There the question arose about punishing for contempt. The jurisdiction conferred on the High Court under Article 215 of the Constitution to punish for contempt of itself was a special one, not arising or derived from the Contempt of Courts Act, 1952, and therefore, not within the purview of the Penal Code. Such a position is also clear from the provisions of the Contempt of Courts Act. The effect of section 5 of that Act was only to widen the scope of the existing jurisdiction of a special kind and not conferring a new jurisdiction. So far as contempt of the High Court itself is concerned, as distinguished from that of court subordinate to it, the Constitution vested these rights in every High Court, and so no Act of a legislature could take away that jurisdiction and confer it afresh by virtue of its own authority. That being the position, this Court held that section 25 of the General Clauses Act would not apply. C D

Similarly, it appears to us that this was a tax realised in breach of the section, the refund being of the money realised without the authority of law. The realisation is bad and there is a concomitant duty to refund the realisation as a corollary of the constitutional inhibition that should be respected unless it causes injustice or loss in any specific case or violates any specific provision of law. E F

In that view of the matter in the facts of this case we are of the opinion that the money was refundable to the appellant. The appellant had proceeded diligently. There is nothing to indicate that had the appellant been more diligent, the appellant could have discovered the constitutional inhibition in 1966. The position is not clear even if there is any triable issue. The position becomes clearer only after the decision in *Loong Soong's* case as mentioned hereinbefore. G

Our attention was drawn on behalf of the respondents that under section 16 of the Act an appeal lay in the prescribed manner within thirty days from the date of service of any order of assessment but the H

- A challenge to the assessment on the ground that the assessment was bad could not be made in an appeal under the Act because the right to appeal being a creature of the Act, if the Act is *ultra vires* that right would not enure to the benefit of the appellant.

- In *State of Madhya Pradesh v. Bhailal Bhai & Ors.*, [1964] 6 S.C.R. 261 this Court had occasion to consider what was unreasonable delay in moving the court when tax was paid under a mistake. There the respondents were dealers in tobacco in the State of Madhya Bharat. The State had imposed sales tax on the sale of imported tobacco by the respondents. But no such tax was imposed on the sale of indigenous tobacco. The respondents filed writ petitions under Article 226 of the Constitution for the issue of writ of mandamus directing the refund of sales tax collected from them. They contended that the impugned tax was violative under Article 301(a) of the Constitution and they paid the tax under a mistake of law and the tax so paid was refundable under section 72 of the Indian Contract Act, 1872. The appellant contended that there was no violation of Article 301 of the Constitution, and even if there was such violation the tax came within the special provision under Article 304(a) of the Constitution and the High Court had no power to direct refund of tax already paid and in any event the High Court should not exercise its discretionary power of issuing a writ of mandamus directing this to be done since there was unreasonable delay in filing the petition. The High Court rejected all the contentions of the appellant and a writ of mandamus was issued as prayed for. It was held that tax was violative under Article 301 of the Constitution. But it was held that even though the tax contravened Article 301 of the Constitution, it was valid if it came within the saving provisions of Article 304 of the Constitution. Tobacco manufactured or produced in the appellant State, similar to the tobacco imported from outside had not been subjected to the tax and therefore the tax was not within the saving provisions of Article 304(a) of the Constitution. It was reiterated that the tax which had already been paid was so paid under a mistake of law under section 72 of the Indian Contract Act. The High Courts had power for the purpose of enforcement of fundamental rights and statutory rights to grant consequential reliefs by ordering repayment of money realised by the Government without the authority of law. It was reiterated that as a general rule if there has been unreasonable delay the court ought not ordinarily to lend its aid to a party by the extraordinary remedy of mandamus. Even if there is no such delay, in cases where the opposite party raises a *prima facie* issue as regards the availability of such relief on the merits on grounds like limitation the Court should ordinarily refuse to issue the writ of

mandamus. Though the provisions of the Limitation Act did not as such, it was further held, apply to the granting of relief under Article 226, the maximum period fixed by the legislature as the time within which relief by a suit in a Civil Court must be claimed may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Article 226 could be measured. The Court might consider the delay unreasonable even if it is less than the period of limitation prescribed for a civil action for the remedy. Where the delay is more than that period it will almost always be proper for the court to hold that it is unreasonable. The period of limitation prescribed for recovery of money paid by mistake under the Limitation Act was three years from the date when the mistake was known..In this case knowledge is attributable from the date of the judgment in *Loong Soong's* case on 10th July, 1973 and there being a statement that the appellant came to know of that fact in October, 1973 and there being no denial by the averment made on this ground, the High Court, in our opinion, in the instant case was in error in presuming that there was a triable issue on this ground and refusing to grant refund.

In *Ramachandra Shankar Deodhar & Ors. v. The State of Maharashtra & Ors.*, [1974] 2 S.C.R. 216, in a different context, it was observed that laches or existence of alternative remedy may be ground for not granting relief. But in view of the facts of this case, it is not necessary to deal with that case in any detail.

In *A.V. Venkateswaran, Collector of Customs, Bombay v. Ramchand Sobhraj Wadhwani and another*, [1962] 1 S.C.R. 753 this Court held that the High Court was in error in its view that though the respondent had failed to exercise his statutory remedy, the fact that it had become time-barred at the date of the hearing of the appeal against the order in the petition under Article 226, was a good ground for the Court to exercise its discretion in granting the relief prayed for by the respondent in his petition.

Learned counsel drew our attention to Rule 55 of the Act where it was stated that no claim to any refund shall be allowed unless it was made within one year from the date of the original order of assessment or within one year of the final order passed on appeal or revision as the case may be, in respect of such assessment. It was contended on behalf of the respondents that here a fixed period of limitation was prescribed and by virtue of Article 226 of the Constitution, we should not allow to subvert that rule. This principle, in our opinion, in view of the fact that the rule was unconstitutional will have no application.

A In *Shiv Shanker Dal Mills etc. etc. v. State of Haryana & Ors. etc.*, [1980] 1 S.C.R. 1170 Krishna Iyer, J. speaking on behalf of himself as well as on behalf of R.S. Pathak, J. as the learned Chief Justice then was and A.D. Koshal, J. observed that where public bodies under colour of public laws recover people's money, later discovered to be
B erroneous levies, the dharma of the situation admits of no equivocation. There was no law of limitation especially for public bodies on the virtue of returning what was wrongly recovered to whom it belongs. In our jurisprudence it is not palatable to turn down the prayer for high prerogative writs on the negative plea of alternative remedy, since the root principle of law married to justice, is *ubi jus ibi remedium*. His
C Lordship observed as follows:

"Since the root principle of law married to justice, is *ubi jus ibi remedium*. Long ago Dicey wrote:

D "The law *ubi jus ibi remedium*, becomes from this Point of view something more important than a mere tautological proposition. In its bearing upon constitutional law, it means that the Englishmen whose labours gradually formed the complicated set of laws and institutions which we call the Constitution, fixed their minds far more intently on providing remedies
E for the enforcement of particular rights or for averting definite wrongs, than upon any declarations of the Rights of Man or Englishmen...The Constitution of the United States and the Constitutions of the separate States are embodied in written or printed documents, and contain declaration of rights. But the
F statesmen of America have shown an unrivalled skill in providing means for giving legal security to the rights declared by American Constitutions. The rule of law is as marked a feature of the United States as of England.

G Another point. In our jurisdiction, social justice is a pervasive presence; and so, save in special situations it is fair to be guided by the strategy of equity by asking those who claim the service of the judicial process to embrace the basic rule of distributive justice, while moulding the relief, by consenting to restore little sums, taken in little transactions, from little persons, to whom they belong."
H

We are in respectful agreement with this approach.

In *State of Madhya Pradesh and others etc. etc. v. Nandlal Jaiswal and others etc. etc.*, A.I.R. 1987 S.C. 251 this principle was reiterated by Bhagwati, C.J. that it was well settled that the power of the High Court to issue an appropriate writ under Article 226 of the Constitution was discretionary and the High Court in the exercise of its discretion did not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. If there was inordinate delay on the part of the petitioner in filing a writ petition and such delay was not satisfactorily explained, the High Court might decline to intervene and grant relief in the exercise of its writ jurisdiction. The evolution of this rule of laches or delay was premised upon a number of factors. The High Court did not ordinarily permit a belated resort to the extraordinary remedy under the writ jurisdiction because it was likely to cause confusion and public inconvenience and bring in its train new injustices. It was emphasised that this rule of laches or delay is not a rigid rule which can be cast in a straitjacket formula. There may be cases where despite delay and creation of third party rights the High Court may still in the exercise of its discretion interfere and grant relief to the petitioner. But where the demand of justice is so compelling that the High Court would be inclined to interfere in spite of delay or creation of third party rights would by their very nature be few and far between. Ultimately it would be a matter within the discretion of the Court; *ex hypothesi* every discretion must be exercised fairly and justly so as to promote justice and not to defeat it. We are in respectful agreement with this approach also.

In this case looked at from one point of view, it is only on the delivery of the judgment in *Loong Soong's* case in 1973, the appellant realised the right to claim the relief of refund as a consequential relief, setting aside the assessment and the assessment was set aside by the very order itself in this case. That right has been granted by the High Court, the High Court has not refused the setting aside on the ground of delay. It would be inconsistent for the High Court to refuse to grant consequential relief after setting aside the assessment. If the realisation was without the authority of law and that was declined by the High Court by the judgment in this case which claimed also the consequential relief, that relief must automatically follow and the High Court was wrong in taking the view that a triable issue of limitation arises in this case. In the absence of any averment to the contrary, the averment of the appellant in the petition that they came to know only after the *Loong Soong's* case must be accepted. The High Court was wrong in

A contending that they should have been more diligent. After all the discretion must be fair and equitable. In the facts of this case, we are of the opinion that the High Court was in error in the approach it took. We, therefore, set aside the judgment and order of the High Court and direct refund of the tax illegally realised by the respondent.

B The appeals are allowed. We set aside the judgment and order to the extent that it refused refund of the tax illegally realised. In the facts of this case the parties will pay and bear their own costs.

S. RANGANATHAN J. I agree with the order proposed by my learned brother but would like to add a word of reservation.

C 2. In view of the judgment of this Court in *Superintendent of Taxes v. Onkarmal Nathmal Trust*, [1975] Supp SCR 365, there can be no doubt that the assessments on the appellants were illegal and that the taxes demanded on the basis thereof had been collected without the authority of law from the appellants. The appellant's contention is
D that they had paid the taxes under a mistake of law and are entitled to seek refund thereof. It is difficult to see how the High Court could have allowed the appellant's prayer for quashing the assessments but refused the prayer for the refund of the illegally collected taxes. The appeals have, therefore, to be allowed.

E 3. Counsel for the respondents, however, places strong reliance on the following observations of a Constitution Bench of this Court in *State of M.P. v. Bhailal Bhai*, [1964] 6 SCR 261:

F "Though the provisions of the Limitation Act do not, as such, apply to the granting of relief under Art. 226, the maximum period fixed by the Legislature as the time within which relief by a suit in a Civil Court must be claimed may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Art. 226 could be measured
X X X X

G Where the delay is more than that period it will almost always be proper for the Court to hold that it is unreasonable."

H He also relies on *Cawasji & Co. v. State*, [1975] 2 SCR 511 and drawn our attention to the decision in *Vallabh Glass Works v. Union*, [1984] 3 SCR 180 where the claim for refund in respect of a period beyond

three years was rejected. He contends, on the strength of the above decisions, that the High Court rightly rejected the appellants' claims for refund.

4. On the other hand, it is contended for the appellants that a writ petition seeking refund of taxes collected without the authority of law cannot be rejected on the ground of limitation or delay unless such delay can be said to amount to laches or has caused some irreparable prejudice to the opposite party or some other like forceful reason exists. Counsel refers in this context to *Venkateswaran v. Ramchand*, [1962] 1 SCR 75; *Chandra Bhushan v. Deputy Director*, [1967] 2 SCR 286; *Tilokchand Motichand v. Munshi*, [1969] 2 SCR 824; *Ramachandra S. Deodhar v. State*, [1974] 2 SCR 216; *Joginder Nath v. Union*, [1975] 2 SCR 553; *Shiv shankar Dal Mills v. State*, [1980] 1 SCR 1170 and *State of M.P. v. Nandlal Jaiswal*, AIR 1987 SC 251 and contends that these decisions have qualified the observations of Das Gupta, J. in *Bhailal Bhai's case*.

5. As pointed out by my learned brother, in the present case, the appellants' averment that they realised their mistake only when they came to know about the decision in the *Loong Soong Tea Estate case* in July 1973 stands uncontroverted. There is nothing on record either to show that the appellants had realised their mistake even earlier, at about the time when the writ petition in the *Loong Soong Tea Estate case* was filed or at the time when the earlier decision of 1966 referred in the *Loong Soong Tea Estate case* judgment was rendered. On this finding of fact, the writ petitions, filed by the appellants in November 1973, were filed within the period of limitation prescribed in Article 113 read with s. 23 of the Limitation Act, 1963. Thus the petitions were within time even by the test enunciated in *Bhailal Bhai's case*.

6. I think, therefore, that, for the purposes of the present case, it is unnecessary to consider the larger question whether the bar of limitation should be considered as fatal to a writ petition as to a suit for recovery or whether it is only a relevant but not conclusive factor that should be taken into account by the court in exercising a discretion.

P.S.S.

Appeals allowed.