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THE DEPUTY COMMISSIONER ETC.

v.

CONSUMER CO-OPERATIVE STORES LTD.

DECEMBER 9, 1998

B

'[SUJATA V. MANOHAR AND G.B. PATTANAİK, JJ.]

C

*Excise—Refund—Doctrine of 'unjust enrichment'—Applicability of—Notification prescribing excise duty to be payable by licencees on the vending of Indian made foreign liquor issued by Chief Commissioner under R.29 of Andaman Excise Rules, 1934—Licencees paying the duties in advance—High Court, on challenge, set aside the said notification and directing the Department to pass final orders on application for refund in certain other cases as well—But before the refund of the duty, President promulgating Andaman & Nicobar Islands (Amendment) Regulation, 1984 authorising levy of duty on such goods retrospectively—High Court struck down Section*

D

*31A of the Amended Regulation and held Section 6(1) & (2) also invalid and directed the Department to refund the duty with observation that in this case the doctrine of 'unjust enrichment' was not applicable as it was nobody's case that the duty paid in advance was recovered by the licencees from purchasers—High Court's view upheld—Andaman Excise Rules, 1934, R*

E

*29—Andaman & Nicobar Islands (Amendment) Regulations, 1984—Sections 31A and 6(1) & (2).*

F

The respondent had obtained licence to vend Indian made foreign liquor on the basis of a public auction. The State issued a notification in exercise of powers conferred under Rule 29 of Andaman Excise Rules, 1934 prescribing the rate of excise duty payable by the licensees-respondents on such liquor. Respondents filed a writ petition challenging the aforesaid notification. High Court held that the notification was invalid as the Chief Commissioner had no power to levy the excise duty in question. On appeal before the Division Bench, the order was confirmed. As the duties were being paid in advance, the High Court directed the department to refund the

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duty to the licencees and to some other applicants as well. But before the refund could be made in the other cases the President promulgated the Andaman & Nicobar Islands (Amendment) Regulation 1984, authorising imposition of excise duty with retrospective effect. Respondents again moved to the High Court challenging the legality of the amended provision and for

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refund of alleged illegal duties. The Divisions Bench of the High Court held

Section 31A of the Amended Regulation as *ultra vires*. Sections 6(1) and 6(2) of the Regulation were also held to be invalid and directed refund of duty with the further observation that the doctrine of 'unjust enrichment' was not applicable as it was no body's case that the duty paid in advance was recovered by the licencees from the purchasers. Hence this appeal. A

It was contended by the appellant that in view of the non-obstante clause in Section 6 of the Amended Regulation, the duty which had been collected can be held to be a valid levy as special duty under Section 31A of the Amended Regulation. It was also contended that even if the levy can be held to be not authorised the same could not be refunded applying the principle of 'unjust enrichment'. B

Dismissing the appeal, this Court C

HELD : The principles underlying the doctrine of 'unjust enrichment' will have no application to the case in hand, in view of the findings arrived by the High Court on consideration of the entire material on record that it is no body's case that excise duty was recovered from the purchaser by the wine merchants. Since the burden has not been passed on to purchaser as found by the High Court and the levy having been held to be unconstitutional, the State would not be entitled to resist the claim of refund by application of the doctrine of 'unjust enrichment'. [458-D-E] D

*State of Madhya Pradesh v. Vyankatlal Anr.*, [1985] 2 SCC 544 and *Mafatlal Industries Ltd. v. Union of India*, [1997] 5 SCC 536, distinguished. E

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9170 of 1994 Etc.

From the Judgment and Order dated 31.1.94 of the Calcutta High Court in C.O.No 5188 (W) of 1983. F

WITH

C.A. Nos. 1803-1804 of 1996.

A.S. Nambiar (S.W.A. Qadri) and P. Parmeswaran for the Appellants.

M.L. Verma, Imtiaz Ahmad, Anup Banerjee, E.C. Vidyasagar and A. Sharan for the Respondents. G

The Judgment of the Court was delivered by

PATTANAİK. J. In these appeals the Judgment of the Division Bench of Calcutta High Court dated 31st of January, 1994 is under challenge and the H

A question for consideration is whether in view of the Andaman & Nicobar Islands (Amendment) Regulation, 1984 the respondents are entitled to claim refund of the excise duty levied and paid. The further question which arises for consideration is whether by application of the principle of 'unjust enrichment' the said respondents can be denied of getting the refund in question.

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The respondents had obtained licence to vend Indian made foreign liquor on the basis of a public auction. The Chief Commissioner of Andaman & Nicobar Islands issued a notification purporting to be one in exercise of powers conferred under Rule 29 of Andaman Excise Rules, 1934 prescribing the rate of excise duty payable by the licensees-respondent on such Indian made foreign liquor. A licensee, Jagannath of Middle Point, Port Blair filed a writ petition challenging the aforesaid notification and the notification was held to be invalid as the Chief Commissioner had no power to levy the excise duty in question. Against the Judgment of the learned Single Judge, an appeal was preferred to the Division Bench but the said appeal was dismissed and the judgment of the learned Single Judge was confirmed. The Excise Authorities did raise a contention before the Division Bench of the High Court that the licensees have realised the amount from the customers and as such should not get the refund in question but the said contention was negatived by the High Court. After the appeal was dismissed, the amount realised from said licensee Jagannath was refunded. In view of the aforesaid Judgment of the Division Bench of Calcutta High Court the other licensees also applied for refund to the Excise Authorities but as no action was taken thereon, writ petitions were filed. Those writ petitions were disposed of with a direction to the Excise Authorities to pass final orders on the application for refund. The Excise Authorities then took steps for refunding the amount collected after complying with the formalities but before the refund vouchers could be finally signed, a notification was issued on 1st of September, 1984 by the President of India, promulgating the Andaman & Nicobar Islands (Amendment) Regulation 1984, authorising imposition of excise duty w.e.f. 24th of October, 1973 on Indian made foreign liquor notwithstanding any judgment, decree or order of any court. In view of the aforesaid amendment of the Excise Regulation, the Excise Authorities of Andaman & Nicobar Islands rejected the prayer for refund of the duty and the respondents then moved the High Court in writ petitions challenging the legality of the amended provision and seeking a writ of mandamus to the appellant to refund the alleged illegal levy collected by the Excise Authorities. The Division Bench of the Calcutta High Court by the impugned judgment came to hold that

Section 31A of the Andaman & Nicobar Islands (Amendment) Regulation, 1984 is ultra vires and Section 6(1) and 6(2) of the Regulation are also invalid. On the question of applicability of the principle of 'unjust enrichment' the High Court came to the conclusion that there is absolutely no materials to show whether the excise duty that was paid in advance was consumed by the dealers by their margin of profits or not and it is nobody's case that the excise duty was recovered as such from the purchaser by the wine merchants. Consequently, the principle of 'unjust enrichment' has no application. With these conclusions, writ applications were allowed with the direction that the amount collected as excise duty from the licensees be refunded.

Mr. Nambiar, the learned Senior Counsel, appearing for the appellants contended that in view of Section 31A of the Amendment Regulation, 1984, the excise duty which have been collected can be held to be a special duty under the amended provisions and in view of the non obstante clause in Section 6 of the Amendment Regulation, notwithstanding the earlier judgment of the High Court striking down the notification dated 24th of October, 1973, the duty which had been collected can be held to be a valid levy as special duty under Section 31A and, therefore, the Excise Authorities had rightly refused the refund application and High Court committed error in allowing the Writ Petition. Though the learned counsel had raised the aforesaid contention while beginning his arguments but later on did not pursue the same being faced with the problem that subsequent to insertion of Section 31A, no notification has been issued by the Administrator in the Andaman & Nicobar Islands Gazette, specifying the levy of special duty. Since issuance of a notification by the Administrator in the Andaman & Nicobar Islands Gazette is a pre-condition for making any levy under Section 31A and the said pre-condition has not been satisfied, Mr. Nambiar, the learned Senior Counsel, did not pursue his argument that the levy in question can be held to be a valid levy as special duty contemplated under Section 31A of the Amended Regulation of 1984.

Mr. Nambiar, the learned Senior Counsel, however, vehemently argued that even if the levy can be held to be not authorised by law but the same having been collected, the licensees are not entitled to refund of the same and the said relief can be rejected by applying the principle of 'unjust enrichment.' In support of his contention he placed reliance on the decision of this Court in *State of Madhya Pradesh v. Vyankatal* and Anr. [1985] 2 SCC 544 and the Constitution Bench decision of this Court in *Mafatlal Industries Ltd., v. Union of India*, [1997] 5 SCC 536. In the first case the Court held that the

A burden of paying the amount in question was transferred by the respondents to the purchasers and, therefore, the respondents were not entitled to get refund and only the persons on whom lay the ultimate burden to pay the amount would be entitled to get a refund of the same. In the aforesaid case under the Madhya Bharat Sugar Control Order, 1949, the supply price of sugar had been fixed higher than its ex-factory price and the sugar factories were

B directed to credit the difference to a fund called "sugar fund". The validity of the said notification could not be sustained in the Supreme Court but all the same no refund was allowed on the finding that the burden in question had been transferred to the purchasers. In *Mafatlal's case* [1997] 5 SCC 536, the majority judgment dealing with the question of unjust enrichment held :

C "The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not

D meant to be exercised for unjustly enriching a person."

The principles underlying the doctrine of 'unjust enrichment' as culled out from the aforesaid two decisions will have no application to the case in hand, in view of the findings arrived at by the High Court on consideration of the entire materials on record that it is nobody's case that the excise duty was recovered from the purchaser by the wine merchants. Since the burden has not been passed on to the purchaser as found by the High Court and the levy having been held to be unconstitutional, the State would not be entitled to resist the claim of refund by application of doctrine of 'unjust enrichment'. We, therefore, do not find any infirmity with the directions of the

E High Court to refund the illegal levy collected from the respondents. The

F appeals, accordingly, fail and are dismissed, but in the circumstances of the case, there will be no order as to costs.

It was submitted before us that the entire amount has been deposited in Court. If that be so, the respondent-licensees will be entitled to receive the

G amount from the High Court.