

ITEM NO.22

COURT NO.16

SECTION XVI-A

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

SPECIAL LEAVE PETITION (CIVIL) Diary No(s). 18051/2023

(Arising out of impugned final judgment and order dated 23-05-2022 in CEA No. 131/2020 passed by the High Court Of Jammu & Kashmir And Ladakh At Jammu)

COMMISSIONER OF CGST AND CENTRAL EXCISE (J AND K) Petitioner(s)

VERSUS

M/S SARASWATI AGRO CHEMICALS PVT. LTD.

Respondent(s)

(IA No.102450/2023-CONDONATION OF DELAY IN FILING and IA No.102451/2023-EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT)

WITH

Diary No(s). 17624/2023 (XVI-A)

(FOR ADMISSION and I.R. and IA No.116515/2023-CONDONATION OF DELAY IN FILING and IA No.116516/2023-EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT)

Date : 04-07-2023 This petition was called on for hearing today.

CORAM :

HON'BLE MRS. JUSTICE B.V. NAGARATHNA

HON'BLE MR. JUSTICE PRASHANT KUMAR MISHRA

For Petitioner(s) Mr. N. Venkataraman, A.S.G.
Mr. Arijit Prasad, Sr. Adv.
Mr. Mukesh Kumar Maroria, AOR
Mr. V.C. Bharathi, Adv.
Mr. Ashok Panigrahi, Adv.
Mr. Navanjay Mahapatra, Adv.

For Respondent(s)

UPON hearing the counsel the Court made the following
O R D E R

Delay condoned.

We have heard Mr. N. Venkataraman, learned ASG appearing for the petitioner(s) in *extenso*. He pointed out that this Court in the case of SRD Nutrients (P) Limited vs. CCE reported

in (2018) 1 SCC 105, gave a ruling contrary to the judgment previously rendered by a three Judge Bench of this Court in the case of Modi Rubber Ltd. And Anr. vs. Union of India and Others reported in (1986) 4 SCC 66. In a subsequent decision namely, M/s Unicorn Industries vs. Union of India reported in (2020) 3 SCC 492, the judgment passed in SRD Nutrients (P) Limited (supra) was overruled and it was held that the exemption from payment of excise duty under a notification granted would not exempt the payment of education cess and secondary education cess. It was also observed in the said judgment that the judgment passed in SRD Nutrients (P) Limited vs. CCE (supra) was *per incuriam*.

Learned ASG during the course of his submissions has brought to our attention an order passed on 27.09.2021 referring the very decision passed in M/s SRD Nutrients (P) Limited (which has been overruled) to a larger Bench having regard to the fact that the said decision was *per incuriam* inasmuch as it had not considered the earlier judgment of this Court in Modi Rubber Ltd. (supra). Therefore, he submitted that this matter has to be connected with the said matter and the judgment to be passed in line with M/s Unicorn in M/s SRD Nutrients (P) Limited when the Reference is answered would follow in this case also.

We have given our anxious consideration to the submissions made by the learned ASG in light of what has been stated by the High Court in paragraph '74' of the impugned judgment.

In SRD Nutrients (P) Limited (supra) it was held that when payment of Excise Duty is exempt under the Central Excise Act, then the 2% Education Cess and Secondary and Higher Education Cess payable on the aggregate duties of excise will also be exempted. However, later in the case of M/s Unicorn Industries Vs. Union of India reported in (2020) 3 SCC 492, the aforesaid judgment in SRD Nutrients (P) Limited vs. CCE (supra) was overruled and it was held that although the exemption from payment of excise duty under a notification is granted, there is no exemption from payment of education cess. Therefore, the assessee who had paid the excise duty and education cess was not entitled to a refund of the education cess which had been paid. Also where refund had been made pursuant to the judgment in M/s SRD Nutrients (P) Limited, was no longer valid.

With regard to the reference order made on 27.09.2021 on a miscellaneous application filed by the Revenue seeking to undo the judgment in M/s SRD Nutrients (P) Limited which was overruled in the subsequent judgment of this Court in M/s Unicorn Industries (supra), the question is whether there was a need at all to refer the matter to a larger Bench. This is for two reasons: firstly, such an application could not have been filed after a review petition in M/s SRD Nutrients (P) Limited had been dismissed by this Court. Thus, in substance, by filing the miscellaneous application the revenue was seeking a second review of the said judgment which is impermissible in law (Order XLVII Rule 9 CPC). Secondly, by ignoring the Explanation to Order XLVII Rule 1 of the CPC and the principle that emerges

from the same, what is sought to be contended by learned ASG is that if a judgment is overruled by this Court by a subsequent judgment, then the overruled judgment will have to be reopened and on reopening the said judgment will have to be brought in line with the subsequent judgment which had overruled it. This is not permissible in law for two reasons: firstly, there has to be finality in litigation and that is in the interest of State. Secondly, a person cannot be vexed twice. This is epitomized by the following maxims:

- (i) Nemo debet bis vexari pro una et eadem causa (No man should be vexed twice for the same cause);
- (ii) Interest reipublicae ut sit finis litium (It is in the interest of the State that there should be an end to a litigation); and
- (iii) Res judicata pro veritate occipitur (A judicial decision must be accepted as correct).

These maxims would indicate that there must be an end to litigation otherwise the rights of persons would be in an endless confusion and fluid and justice would suffer.

That is why the explanation to Order XLVII Rule 1 which is a wholesome provision has been inserted to the Code of Civil Procedure. It states that once there is a subsequent judgment overruling an earlier judgment on a point of law, the earlier judgment cannot be reopened or reviewed on the basis of a subsequent judgment.

The contention of the Revenue is that in view of the subsequent judgment of this Court in M/s Unicorn Industries, recoveries could be made from the assesseees with regard to the refund of education cess made by the Department or if not paid by the assesseees following the judgment in SRD Nutrients (P) Limited. In the above circumstances, appeals were filed before the High Court by the assesseees. In the instant case, the High Court had raised the following question of law and answered it against the Revenue:-

"Whether the assessee is liable to return the Education Cess and Secondary & Higher Education Cess on the changed view of law as subsequently laid down by the Full Bench of the Supreme Court in Unicorn Industries vs. Union of India reported in (2020) 3 SCC 492, overruling SRD Nutrients (P) Ltd. vs. CCE (Supra) on the basis of which the aforesaid cess was refunded to the Assessee."

In our view the High Court has rightly answered the aforesaid question. The High Court in the impugned order while considering the judgment passed by this Court in SRD Nutrients (P) Limited (supra) as well as in M/s Unicorn Industries (supra) has observed in Paragraph 74 as under:

"Applying the aforesaid principle in the cases at hand, since the assessee has been held entitled to the refund of the Educational cess and Secondary & Higher Educational cess on the basis of a judgment and order of the Supreme Court in case SRD Nutrients which was in vogue at the relevant time, the appellants are not entitled to make recovery of the said refunded amount on the basis of the subsequent decision of the Supreme Court rendered in the case of Unicorn Industries. If such an action is permitted, it will open a Pandora box and the lis between the parties which had attained finality will never come to an end. This would be against the public policy which envisages providing quietus to litigation at some stage."

In substance, the High Court has stated that the decision in SRD Nutrients (P) Limited (supra) had attained finality and was binding on the parties thereto. Therefore, the subsequent decision of this Court overruling SRD Nutrients (P) Limited (supra) in the case of M/s Unicorn Industries cannot have a bearing on past decisions which had attained finality although they had followed SRD Nutrients (P) Limited (supra), which was subsequently overruled in M/s Unicorn Industries. Otherwise a pandora's box would be opened and there would be no end to litigation, which is against public policy.

That is exactly what is sought to be done by the reference order dated 27.09.2021. When we read the reference order in light of the what has been discussed, we find that the reference order was unnecessary.

In the circumstances, the Special Leave Petitions are dismissed.

Pending application(s), if any, shall stand disposed of.

(RADHA SHARMA)
COURT MASTER (SH)

(MALEKAR NAGARAJ)
COURT MASTER (NSH)