IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO.114 OF 2006

M/s. Swan Mills Ltd.,
A Company incorporated under the
Companies Act, 1956 and having
its Registered Office at 15,
Tokersey Jivraj Road, Sewree,
Mumbai – 400 015. .... Appellants

- Versus -

Commissioner of Central Excise
Mumbai-I Commissionerate,
New Central Excise Building,
115, M.K. Road, Churchgate,
Mumbai – 400 020. .... Respondent

Mr. M.H. Patil with Mr. Sachin Chitnis for the Appellants.

Mr. Swapnil Bangur i/by Mr. Vipul A. Bajpayee for the Respondent.

CORAM: S.C. DHARMADHIKARI &
B.P. COLABAWALLA, JJ.

DATE : FEBRUARY 13, 2017

ORAL JUDGMENT (Per Shri S.C. DHARMADHIKARI, J.):

1. By the present Appeal which is directed against the Order dated 25-2-2005, passed by the Customs, Excise & Service

Tax Appellate Tribunal, West Regional Bench at Mumbai, the appellants submit that the substantial questions of law on which this Appeal is admitted would require a remand of this case back to the Tribunal.

2. The Appeal has been admitted on the following two substantial questions of law:-

> *(1) Whether the Tribunal was correct to hold in Appeal No.E/4020-R/99 that, unjust enrichment is applicable, in a case where, duty paid on yarn captively used was available as credit of Modvat and hence such credit is not hit by the doctrine of unjust enrichment, in view of its coverage under clause (c) to first proviso to sub-section (2) of Section 11B of the Central Excise Act, 1944, and in a case where the Revenue in its Appeal had not challenged the findings of the Commissioner (Appeals)'s Order-in-Appeal dated 28.3.2002 (at Exhibit-'J') holding that unjust enrichment is not applicable and further, Assistant Director (Cost), in his report dated 12.9.2000 has categorically reported that refund is not hit by unjust enrichment?*

> *(2) Whether the Tribunal was correct to hold in Appeal Nos.E/3142/02 & E/3143/02 that the Refund Claims are barred by limitation, in a case where, the limitation would start from the finalisation of provisional assessment, based on the Hon'ble Supreme Court judgment in SAMRAT INTERNATIONAL [1992 (58) ELT 561 (SC) and in*

> *any case limitation was not the ground before Original Authority for denial of refund?*

3. Very few facts are required to be noted for appreciating the argument of Mr. Patil, learned counsel appearing for the appellants. The appellants are engaged in the manufacture of textile yarn and fabrics and at their factory in Mumbai. They are registered with the Central Excise Department. Further, setting out the products which were manufactured during the relevant period (April, 1994 to March, 1995), it is contended that the assessable value approved by the Assistant Director (Cost) was found to be less than the value, on which, the appellants were paying duty on the said yarn cleared by them for captive consumption and sale during the said period. Therefore, a Refund Application was filed on 22-6-1996 claiming a refund in the sum of Rs.28,80,595/- and claiming to be the alleged excess duty paid.

4. After elaborating the claim for refund in two Refund Applications what the appellants point out is receipt of Show Cause Notices arising out of these refund claims. The

Department was of the opinion that the claims could be rejected on the ground of unjust enrichment.

5. The initial Orders were passed rejecting the two Refund Applications. Against the two Orders-in-Original, dated 14-9-1998 and 30-10-1998, two Appeals were filed before the First Appellate Authority. The First Appellate Authority was of the opinion that certain clarifications will have to be made and they are not to be found in the impugned Orders and hence restored the refund claim and for reconsideration by the Competent Authority. However, the Revenue was aggrieved by this direction of the First Appellate Authority and it approached the Tribunal. In the meantime, on remand, the Authority in-charge of sanctioning the refund issued such directions which required the appellants to file a detailed written submissions and which came to be accordingly filed. Thereupon, further Orders-in-Original and on remand came to be made in the month of January, 2001. The refund claims were rejected on the ground that the principle of unjust enrichment which was invoked has been rightly invoked by the Department. Therefore, there was an

Order passed. But it appears that the Department filed Review Appeals against the two Orders-in-Original and that is on the assumption that the two Orders-in-Original grant partial relief. In these Appeals and which were disposed of on 28-3-2002, the Order-in-Original was set aside and the Appellate Authority granted refund by this Order. But he also held that the Departmental objection on the point of limitation deserves to be upheld. Therefore, two separate Appeals were filed by the appellants. In the meanwhile, even the Department's Appeals were found to be ripe for hearing. A common Order was passed deciding the Department's Appeals as well as the appellants' Appeals. The Tribunal has concentrated itself on the plea of limitation and held that the refund claims are barred by limitation.

6. However, the appellants pointed out certain basic and fundamental errors in the Order of the Tribunal by filing applications for rectification of mistakes. These applications have also been rejected on 2-12-2005.

7. Against the above two Orders, the present Appeal is filed by the assessee.

8. We have found from a reading of the Tribunal's Order and it is difficult to make out as to what prevailed upon the Tribunal to pass a cryptic order and by holding that there is substance in the Departmental objection on the point of limitation.

9. The Tribunal concluded that the doctrine of unjust enrichment can be invoked but that aspect was not elaborated further. Midway the Tribunal holds that there is substance in the Department's objection on the point of limitation and therefore concentrated its entire attention towards that point. In dealing with that also, in sub-paras (ii) to (d) of para 5, the Tribunal committed serious errors of law apparent on the face of the record. The Tribunal did not elaborate as to how, in this case, the question of limitation can be said to be a pure legal issue. Our normal and ordinary understanding is that such a plea raises a mixed question of law and facts and it is only after the

applicable facts attract a bar and those facts are admitted, but the issue raised is whether the interpretation of the legal provision bars the remedy, then, it could be, in a given case, said to be a pure legal issue. Ordinarily, however, it is a mixed question. It is only when Tribunals like CESTAT in the present case arrive at a definite conclusion that on the facts and as deduced from the records the claim is time barred, that such findings should be rendered. We are unhappy at the manner in which the Tribunal has dealt with the Appeals. We do not think that we should conclude the issue on both points, namely, whether there is a period of limitation prescribed and at the relevant time which is attracted and that the doctrine of unjust enrichment can be invoked and applied to the facts and circumstances of the present case.

10. We have been left with no alternative but to remand the Appeals back to the Tribunal. We accordingly set aside the impugned Order. We restore the Appeals to the file of the Tribunal for a decision afresh on merits and in accordance with law. The Tribunal should not be influenced by any of its earlier

findings and conclusions. It should decide the matters afresh. We equally clarify that beyond referring to the legal position and ordinarily to be found, we have not expressed any opinion on the rival contentions. The Appeal is allowed accordingly. There will be no order as to costs.

(B.P. COLABAWALLA, J.) (S.C. DHARMADHIKARI, J.)