

IN THE HIGH COURT OF JUDICATURE AT MADRAS
RESERVED ON : 29.01.2018
PRONOUNCED ON : 12.02.2018
CORAM
THE HONOURABLE MR. JUSTICE T.RAVINDRAN
S. A.No.627 of 2003

Collector of Central Excise,
Coimbatore ... Appellant/3rd defendant

Vs.

1. M/s. Textool Company Ltd.,
(Incorporated as a Public Limited Company
under the Companies Act, 1956)
Regd. Office at Ganapathy,
Coimbatore 641 006. ...1st respondent/Plaintiff

2. Union of India,
Rep. By its Secretary,
In charge of Central Excise and Customs
New Delhi.

3. Union of India,
Rep. By its Secretary,
Ministry of Finance,
Government of India,
New Delhi. ...Respondents 2 & 3/
Defendants 1 & 2

(R2 & R3-given up)

Prayer: Second Appeal filed under Section 100 of Civil
Procedure Code, against the judgment and decree made in
A.S.No.168 of 1998 on the file of the Principal District Court,
Coimbatore, dated 17.12.99 confirming the judgment and decree
made in O.S. No.355 of 1990, on the file of the III Additional
Sub Court, Coimbatore, dated 29.06.1998.

For Appellant : Mr.A.P.Srinivas,
Standing Counsel for Customs
and Central Excise

For Respondent No.1: Ms. M.Rekha
for M/s.Rahul Balaji

For Respondent
Nos.2 & 3 : Given up.

JUDGMENT

Challenge in this second appeal is made to the judgment and decree passed in A.S.No.168/98 dated 17.12.99 on the file of the the Principal District Court, Coimbatore, confirming the judgment and decree passed in O.S. No.355 of 1990 dated 29.6.1998 on the file of the III Additional Sub Court, Coimbatore.

2. Parties are referred to as per their rankings in the trial Court.

3. Suit for recovery of money.

4. The case of the plaintiff, in brief, is that the plaintiff is engaged in the manufacture of textile machineries, accessories and spare parts and are manufacturing 63 items of threaded parts, used as components in the manufacture of textile machineries. In 1979, the Excise department proceeded to classify the above 63 items under T.I.52, at an intermediary stage of manufacture erroneously and assessed them to excise duty on cost recovery basis for captive consumption and the plaintiff had also paid the duty so demanded on the mistaken impression that the aforesaid components were assessable to duty under the above mentioned classification. The above said components have to be further processed like machining, cutting, grinding, drilling, tempering, colouring and polishing etc., and then converted the spares to a designed shape and size suitable to the textile machineries and after the completion of the processing, the aforesaid spares were classified under the classification of T.I.68 and on 05.05.1984, the Central Excise department issued a show cause notice that the aforesaid threaded items even after the completion of all further processes ought to be again classified and assessed under T.I.50 and raised a further demand for deferential duty on higher value basis during the period 01.04.1982 to 29.02.1984 and then only the plaintiff came to know of the wrong assessment under T.I.52 basis and the plaintiff therefore sent their objection contending that the aforesaid components ought to have been classified and assessed only after the completion of all the process and the assessment at the intermediary stage was superfluous and the same only led to double taxation and after several protests, representations and series of proceedings, the Central Excise Department conceded that out of 63 items, 42 items are only to be classified and assessed under T.I.68 and that the remaining 21 items of spares alone ought to be classified and assessed under T.I.52, for assessment at an intermediary stage and the revised classification list connecting the erroneous classification was issued and approved by the department on 23.09.1985 and the plaintiff is not therefore liable for the duty under T.I.52 classification for 42

items of components and the mistake came to the knowledge of the defendant only on 05.05.1984, when the show cause notice was issued by the department and after the same was conceded by the department on 23.03.1985 and thereafter, the plaintiff submitted its claim on 18.07.1985 for refund of duty wrongfully collected without jurisdiction as regards the 42 items and the plaintiff preferred the refund of claim collected by the department from the year 1979 to 1985 and the plaintiff was accordingly honestly pursuing its demand in good faith before the appropriate excise authorities, the Appellate Tribunal for the Custom and Excise until December 1988 and by order dated 16.12.1988, the Appellate Tribunal held that it being a creature of statute cannot traverse beyond the confines of law which enables them only to order refund for a period of six months as held by the judgment of the Supreme Court of the year 1988 and as the said judgment also laid down that the duty which has been levied without authority or jurisdiction will be subject to general law and the date of limitation will operate only when the mistake or error comes to light, the plaintiff's remedy for refund of tax wrongfully collected and paid will be in the Civil Court and accordingly, the plaintiff has made the claim for refund and the time taken by the plaintiff to go before the authorities concerned for seeking its remedy should be excluded as provided under Section 14 of the Limitation Act and thus, no part of the suit is barred by limitation. The plaintiff issued a statutory notice and to the same, the third defendant sent a reply containing untenable contentions and hence the suit.

5. The case of the defendant, in brief, is that the suit is not maintainable either in law or on facts. The allegations that the plaintiff's remedy for refund of tax will be in Civil Court is false and denied and the plaintiff's suit is misconceived and without any basis and the procedure for levy, collection and excise duty has been provided under the Central Excise and Salt Act, 1944 as amended and the claim for refund of duty has to be preferred to the authorities under that Act alone and in accordance with Section 11 (B) of the Act and no other forum has any authority in that respect and jurisdiction of the Civil Court is barred and no suit will lie and provisions for appeal and further appeal are provided to the aggrieved parties under the Act above mentioned and the plaintiff having lost its claim before the appropriate authority and preferred appeal before the Tribunal and lost its case throughout and therefore, the plaintiff is not entitled to prefer the suit for the same relief again before the Civil Court and the suit is hit by the principles of res judicata, since, the suit is already decided by the appropriate statutory authorities under the proceedings initiated by the plaintiff. Further, the suit is against the established principles of law and public policy. The plaintiff is not one in reality the person who had paid the tax and they have shifted the burden to the consumers adding the taxes paid

by him in the invoices of sales to the consumers and therefore, the plaintiff is not entitled to the refund of the duty and the plaintiff by way of the suit seeks to get unjust enrichment to itself to which it is not entitled to. The suit laid by the plaintiff is barred by limitation. The plaintiff discovered the mistake that the duty had been levied wrongly on 05.05.1984 ought to have laid within three years i.e., to say on or before 05.05.1987 and the suit having not filed within the time allowed, is hit by law of limitation and the plaintiff is not entitled to claim the benefits under Section 14 of the Limitation Act without any basis. The plaintiff was not prosecuting in a Court which from defect of jurisdiction, was unable to entertain its request and the plaintiff having prosecuting its claim rightfully in the proper forum which had the jurisdiction to entertain its case and therefore, the period from 18.7.1985 to 16.12.1988 could not be excluded in computing the period of limitation for the present suit and the suit therefore laid without any cause of action is liable to be dismissed.

6. In support of the plaintiff's case PW1 was examined and Exs.A1 to Ex.A12 were marked. On the side of the defendants no oral and documentary evidence has been adduced. The Courts below found acceptance with the plaintiff's case and accordingly decreed the suit as prayed for. Impugning the same, the present second appeal has been laid.

7. At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration:

1. "Whether the Courts below are right in not properly considering the judgment of the Hon'ble Supreme Court in Mafatlal Industries Ltd. Vs. Union of India (1997 5 SCC 536), wherein it has been held that where a duty has been collected under a particular order which has become final, the refund of duty cannot be claimed unless the order (an assessment order or Adjudication order) set aside in accordance with law. Consequently the theory of mistake of law and the applicability of period of limitation of 3 years from the date of the discovery of the alleged mistake cannot be invoked.

2. Whether the Courts below failed to consider that as per the law laid down in the Mafatlal case that the writ petitions, writ appeals, suits claiming refund of Excise duty pending as on 19.12.1996, are liable to fail on the ground of maintainability and that

persons who have already taken proceedings for refund under the Act and having failed therein either partly or wholly cannot resort to a civil remedy for refund?"

8. The suit has been laid by the plaintiff seeking for the refund of the duty paid by it on a mistaken assessment of the goods manufactured by the defendant. It is found that and also not disputed by the defendant in respect of the 42 items of spare components manufactured by the plaintiff, duty has been collected twice erroneously by the defendant and hence, according to the plaintiff, inasmuch as it is not liable to pay the duty as regards the above said 42 items under T.I.52 classification and as according to the plaintiff, the said mistake has come to their knowledge only on 05.05.1984 following the show cause notice issued by the defendant, according to the plaintiff, it moved the necessary authorities under the Act i.e., Central Excise and Salt Act, 1944 as amended and as its appeal remedy was rejected by the authorities constituted under the said Act, as being out of time and as the plaintiff left with the remedy to seek the refund of duty only by way of the institution of the Civil suit, hence, according to the plaintiff, after issuing notice to the defendant and as the defendant had repudiated its claim, it is stated that the present suit has been laid and further according to the plaintiff, inasmuch as the plaintiff had been prosecuting before the authorities concerned for the refund of the excise duty paid by it, the time taken by the plaintiff with reference to the same from 18.7.1985 to 16.12.1988 should be excluded as per Section 14 of the Limitation Act and hence, it is stated that the suit is not barred by limitation and necessary reliefs should be granted to the plaintiff.

9. The main defence projected by the defendant is that the suit laid by the plaintiff for the refund of the excess duty cannot be maintained in a Civil forum and the only remedy available to the plaintiff is to move before the authorities concerned under the Central Excise and Salt Act, 1944 as amended and as the plaintiff has failed in its attempts to recover the same from the authorities concerned, the plaintiff cannot resort to Civil action, as the same is barred and further, the plaintiff by way of the Civil action is attempting to obtain unjust enrichment, as the duty payable or paid by the plaintiff would be actually shifted to the consumers and therefore, it is contended that the suit laid by the plaintiff is not maintainable as per law and further, it is also contended that the suit laid by the plaintiff is barred by limitation, even assuming that the Civil action is maintainable, as according to the defendant, the plaintiff cannot invoke Section 14 of the Limitation Act to exclude the time taken by it to obtain the refund of the excise duty paid by it before the appropriate

authorities constituted under the Act and hence, the suit is liable to be dismissed.

10. After hearing the counsel appearing for the respective parties, it is unnecessary to traverse on the facts of the case, as the issues involved in the lis is covered by the decision of the Apex Court reported in 1997 (89) E.L.T. 247 (S.C.) (Mafatlal Industries Ltd Vs. Union of India). From the authoritative pronouncements of the Apex Court, it is found that the suit laid by the plaintiff for the refund of the excise duty paid by it erroneously cannot be maintained and the position of law has been clearly outlined by the Supreme Court in the above said decision as follows:

Refunds of Central Excise and Customs Duties
- All claims for refund except where levy is held to be unconstitutional, to be preferred and adjudicated upon under Section 11B of the Central Excise Act, 1944 or under Section 27 of the Customs Act, 1962 and subject to claimant establishing that burden of duty has not been passed on to third party - No civil suit for refund of duty maintainable - Writ jurisdiction of High Courts under Article 226 and of Supreme Court under Article 32 unaffected by said Section 11 B or Section 27 but writ court to have due regard to the provisions of Central Excises and Customs Act and to refuse grant of relief where burden of duty passed on to third party- Favourable order not to result in automatic refund and claimant to prove burden of duty not passed on to third party. [Per Majority : J.S. Verma, S.C. Agarwal, B.P.Jeevan Reddy, A.S.Anand and B.N.Kirpal, JJ.].

By virtue of sub-section (3) of Section 11 B of the Central Excises and Salt Act, and sub-section (3) of Section 27 as amended by 1991 Amendment Act, all claims for refund (excepting those which arise as a result of declaration of unconstitutionality of a provision whereunder the levy was created) have to be preferred and adjudicated only under the provisions of the respective enactment. No suit for refund of duty is maintainable in that behalf. So far as the jurisdiction of the High Courts under Article 226 of the Constitution - or of this Court under Article 32 - is concerned, it remains unaffected by the provisions of the Act. Even so, the Court would, while

exercising the jurisdiction under the said articles, have due regard to the legislative intent manifested by the provisions of the Act. The writ petition would naturally 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 regime of law and not for abrogating it. Even while acting in exercise of the said constitutional power, the High Court cannot ignore the law nor can it over-ride it. The power under Article 226 is conceived to serve the ends of law and not to transgress them. [paras 68, 96, 99]

Writ petitions/writ appeals/suits claiming refund of excise duties/ customs duties pending as on 19-12-1996 are liable to fail on the ground of maintainability by virtue of the law declared in this judgment- Petitioners/appellants/plaintiffs in such proceedings can file applications for refund under Section 11 B of the Central Excise Act, 1944 within sixty days from 19-12-1996 - Applications so filed shall not be rejected on the ground of limitation and to be dealt with according to law - This benefit not available to persons who have already taken proceedings for refund under the Excise/Customs Act and having failed therein, either partly or wholly, have resorted to writ petition or suit - Section 11 B of the Central Excise act, 1944 - Section 27 of the Customs Act, 1962 - Section 72 of the Contract Act - Articles 32 and 226 of the Constitution of India. [Per Majority : J.S. Verma, S.C. Agrawal, B.P.Jeevan Reddy, A.S.Anand and B.M.Kirpal, JJ.].

- Writ petitions/writ appeals/suit claiming refund of excise duties/customs duties pending as on today are liable to fail on the ground of maintainability by virtue of the law declared herein. Since the law is being declared and clarified by us now, we make the following directions: in cases where writ petitions, writ appeals (by whatever appellation they are called) or

suits (at whatever stage they may be, as on today) are pending as on today, and provided they have not already taken proceedings for refund under the Act, it shall be open to the petitioners/appellants/plaintiffs to file applications for refund under Section 11B within sixty days from today. If the applications are so filed by them, they shall not be rejected on the ground of limitation and shall be dealt with according to law. We make it clear that this direction applies only to petitioners/appellants/plaintiffs in pending writ petitions/writ appeal/suits under Section 11 B shall be disposed of under Section 11 B, as interpreted herein, and in accordance with law. It is obvious that if any of such petitioners/appellants/plaintiffs have already taken proceedings for refund under the Act and having failed therein - either partly or wholly - have resorted to writ petition or suit, they shall not be entitled to the benefit of this direction. [Para 100]

Refund - Section 11 B of the Central Excise Act, 1944 as amended in 1991 has retrospective effect since pending applications are to be treated as made under the amended section - Filing of documents as required under Section 12A of the Central Excise Act, 1944 not to be insisted upon where application filed prior to the amendment though burden of proving that incident of duty has not been passed on to another person is still on the claimant - presumption under Section 12 B ibid not a new presumption - Obligation to prove that incident of duty has not been passed on to others always there - Giving retrospective effect to Section 11 B does not affect any vested or substantive right - Manufacturer has no vested right to refund when he has passed on the incident of duty to other. [Per Majority : J.S.Verma, S.C.Agarwal, B.P.Jeevan Reddy, A.S.Anand and B.N.Kirpal, JJ.].

It is difficult to agree with the proposition that retrospective effect cannot

be given to Section 11 B as amended in 1991 particularly in the light of the specific and clear language of the first proviso to the sub-section (1). The first proviso expressly declares that "where an application for refund has been made before the commencement of the Central Excise and Customs (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that Act". In the face of this proviso, it is idle to contend that sub-sections (1) and (2) of Section 11 B do not apply to pending proceedings. They apply to all proceedings where the refund has not been made finally and unconditionally. Where the duty has been refunded under the orders of the Court pending disposal of an appeal, writ or other proceedings, it would not be a case of refund finally and unconditionally, as explained in Jain Spinners and I.T.C. So far as the difficulty or impossibility of filing the documents referred to in Section 12A is concerned, it is obvious that the said requirement cannot be insisted upon in cases where the application is filed prior to the commencement of the Act or for the period anterior to the commencement of the said Amendment Act, though the burden of proving that the burden of duty has not been passed on by him is still upon the applicant. The obligation to prove that the duty has not been passed on to another person is always there as a pre-condition to claim of refund. It cannot also be said that by giving retrospective effect to Section 11 B, any vested rights or substantive rights are being taken away. The deprivation, if at all, is not real. The manufacturer has already collected the duty from his purchaser and has thus reimbursed itself. A manufacturer had no vested legal right to refund even when he had passed on the burden of duty to others. No law conferred such a right in him - not Article 265, nor Section 11B. [Paras 87, 88]

Refund - Applicability of amended Section 11 B on pending / concluding proceedings - Section 11 B applies to all pending proceedings even if duty already refunded under the orders of the Courts/Tribunal or Authorities - Refund proceedings which are finally terminated and in which appeal period has also expired before 19-9-1991, cannot be re-opened or governed by section 11 B (3) of the Central Excise Act, 1944 - Appellate authority, however, can condone delay in filing appeal in appropriate cases. [Per Majority: J.S.Verma, S.C.Agrawal, B.P.Jeevan Reddy, A.S.Anand and B.N. Kirpal, JJ.]

- Section 11 B applies to all pending proceedings notwithstanding the fact that the duty may have been refunded to the petitioner/plaintiff pending the proceedings or under the orders of the Court/Tribunal/Authority or otherwise. It is, of course, obvious that where the refund proceedings have finally terminated - in the sense that the appeal period has also expired - before the commencement of the 1991 (Amendment) Act (September 19, 1991), they cannot be re-opened and /or governed by Section 11 B(3) (as amended by the 1991 (Amendment) Act). This, however, does not mean that the power of the Appellate authorities to condone delay in appropriate cases is affected in any manner by this classification made by us. [1992 (61) E.L.T. 321 (S.C.); 1993 (67) E.L.T. 3 (S.C.) endorsed]. [Para 99]

Refund of duty paid under mistake of law - Refund of duty collected under an order which attained finality due to decision in appeal/revision or abandoning of litigation - Finality of the proceedings in own case not ignorable just because a similar point decided in favour of other assessee subsequently - Theory for claiming refund within a period of three years from the date of discovery of mistake of law disapproved - Refund of duties to be claimed under Rule 11/Section 11B and not any other provision or before any other forum. [1959 SCR 1350 (SC) and subsequent cases following it overruled] [Per Majority : J.S.Verma,

S.C.Agarwal, B.P.Jeevan Reddy, A.S.Anand and B.N.Kirpal, JJ.]

- Where a duty has been collected under a particular order which has become final, the refund of that duty cannot be claimed unless the order (whether it is an order of assessment, adjudication or any other order under which the duty is paid) is set aside according to law. So long as that order stands, the duty cannot be recovered back nor can any claim for its refund be entertained. It is un-understandable how an assessment/adjudication made under the Act levying or affirming the duty can be ignored because some years later another view of law is taken by another court in another person's case. Nor is there any provision in the Act for re-opening the concluded proceedings on the aforesaid basis. In short, no claim for refund is permissible except under and in accordance with Rule 11 and Section 11 B. An order or decree of a court does not become ineffective or unenforceable simply because at a later point of time, a different view of law is taken. If this theory is applied universally, it will lead to unimaginable chaos. Therefore, the theory of mistake of law and the consequent period of limitation of three years from the date of discovery of such mistake of law cannot be invoked by an assessee taking advantage of the decision in another assessee's case. All claims for refund ought to be, and ought to have been, filed only under and in accordance with Rule 11/Section 11 B and under no other provision and in no other forum. An assessee must succeed or fail in his own proceedings and the finality of the proceedings in his own case cannot be ignored and refund ordered in his favour just because in another assessee's case, a similar point is decided in favour of the manufacturer/assessee. (See the pertinent observations of Hidayatullah, CJ in Tilokchand Motichand extracted in para 37). The decisions of this Court saying to the contrary must be held to have been decided wrongly and are accordingly

overruled herewith. [AIR 1959 SC 135 and 1968 (3) SCR 662 overruled; 1969 (2) SCR 824 followed]. [Paras 70,99].

Refund - Civil suit under Section 72 of the Contract Act - Said section 72 is a rule of equity - Equitable considerations are not a matter of law but depend upon facts of each case - Equitable considerations relevant for refund claim under Section 72 of the Contract Act - Passing on the burden of duty to another also a equitable consideration for refund of indirect taxes - One not to be compensated for what he has not lost. [Per Majority : J.S.Verma, S.C.Agrawal, B.P.Jeevan Reddy, A.S.Anand and B.N.Kirpal, JJ.].

- Section 72 of the Contract Act is a rule of equity. Once it is a rule of equity, it is un-understandable how can it be said that equitable considerations have no place where a claim is made under the said provision. What those equitable considerations should be is not a matter of law. That depends upon the facts of each case. But to say that equitable considerations have no place where a claim is founded upon Section 72 is a contradiction in terms. Therefore, equitable considerations cannot be held to be irrelevant where a claim for refund is made under Section 72. Now, one of the equitable considerations may be the fact that the person claiming the refund has passed on the burden of duty to another. In other words, the person claiming the refund has not really suffered any prejudice or loss. If so, there is no question of reimbursing him. He cannot be compensated for what he has not lost. The loser, if any, is the person who has really borne the burden of duty; the manufacturer who is the claimant has certainly not borne the duty notwithstanding the fact that it is he who has paid the duty. Where such a claim is made, it would be wholly permissible for the Court to call upon the petitioner/plaintiff to establish that he

has not passed on the burden of duty to a third party and to deny the relief of refund if he is not able to establish the same, as has been done by this Court in 1993 (67) E.L.T. 3 (SC). [1969 (2) SCR 824 concurred; Kanhaiyalal's case - 1959 SCR 1350 overruled]. [Paras 71,99]

99. The discussion in the judgment yields the following propositions. We may forewarn that these propositions are set out merely for the sake of convenient reference and are not supposed to be exhaustive. In case of any doubt or ambiguity in these propositions, reference must be had to the discussion and propositions in the body of the judgment.

(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 applying the provisions of the Central Excises and Customs Laws (Amendment) Act, 1991 or thereafter- by mis-interpreting 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 mis-interpreting or mis-applying 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 enactment 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 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 or a 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 emphasis 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.

(ii) Where, however, a refund is claimed on the ground that the provision of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition. This principle is, however, subject to an exception : Where a person approaches the High Court or Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be re-

opened on the basis of a decision on another person's case; this is the ratio of the opinion of Hidayatullah, CJ. In Tilokchand Motichand and we respectfully agree with it. Such a claim is maintainable both by virtue of the declaration contained in Article 265 of the Constitution of India and also by virtue of Section 72 of the Contract Act. In such cases, period of limitation would naturally be calculated taking into account the Principle underlying Clause (c) of Sub-section (1) of Section 17 of the Limitation Act, 1963. A refund claim in such a situation cannot be governed by the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be, since the enactments do not contemplate any of their provisions being struck down and a refund claim arising on that account. In other words, a claim of this nature is not contemplated by the said enactments and is outside their purview.

(iii) A claim for refund, whether made under the provisions of the Act as contemplated in Proposition (i) above or in a suit or writ petition in the situations contemplated by proposition (ii) above, can succeed only if the petitioner/plaintiff alleges and establishes that he has not passed on the burden of duty to another person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so passed on, as the case may be. Whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation but is subject to the above requirement, as explained in the body of the judgment. Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund. But where such person does not come forward or where it is not possible to refund the amount to him

for one or the other reason, it is just and appropriate that amount is retained by the State, i.e., by the people. There is no immorality or impropriety involved in such a proposition.

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 meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched.

(iv) It is not open to any person to make a refund claim on the basis of a decision of a Court or Tribunal rendered in the case of another person. He cannot also claim that the decision of the Court/Tribunal in another person's case has led him to discover the mistake of law under which he has paid the tax nor can he claim that he is entitled to prefer a writ petition or to institute a suit within three years of such alleged discovery of mistake of law. A person, whether a manufacturer or importer, must fight his own battle and must succeed or fail in such proceedings. Once the assessment of levy has become final in his case, he cannot seek to reopen it nor can he claim refund without re-opening such assessment/order on the ground of a decision in another person's case. Any proposition to the contrary not only results in substantial prejudice to public interest but is offensive to the several well established principles of law. It also leads to grave public mischief. Section 72 of the Contract Act, or for that matter Section 17(1)(c) of the limitation Act, 1963, has no application to such a claim for refund.

(v) Article 265 of the Constitution has to be construed in the light of the goal and

the ideal set out in the Preamble to the Constitution and in Articles 38 and 39 thereof. The concept of economic justice demands that in the case of indirect taxes Central Excises duties and Customs duties, the tax collected without the authority of law shall not be refunded to the petitioner-plaintiff unless he alleges and establishes that he has not passed on the burden of duty to a third party and that he has himself borne the burden of the said duty.

(vi) Section 72 of the Contract Act is based upon and incorporates a rule of equity. In such a situation, equitable considerations cannot be ruled out while applying the said provision.

(vii) While examining the claims for refund, the financial chaos which would result in the administration of the State by allowing such claims is not an irrelevant consideration. Where the petitioner plaintiff has suffered no real loss or prejudice, having passed on the burden of tax or duty to another person, it would be unjust to allow or decree his claim since it is bound to prejudicially affect the public exchequer. In case of large claims, it may well result in financial chaos in the administration of the affairs of the State.

(viii) The decision of this Court in *Sales Tax Officer, Benaras V. Kanhaiyalal Mukundlal Saraf* (1959 S.C.R. 1350) must be held to have been wrongly decided insofar as it lays down or is understood to have laid down propositions contrary to the propositions enunciated in 9i0 to 9vii0 above. It must equally be held that the subsequent decisions of this Court following and applying the said propositions in *Kanhaiyalal* have also been wrongly decided to the above extent. This declaration - or the law laid down in propositions 9i0 to 9vii0 above - shall not however entitle the State to recover the taxes/duties already refunded and in respect whereof no proceedings are pending before any Authority/Tribunal or Court as on this date. All pending matters shall, however, be governed by the law

declared herein notwithstanding that the tax or duty has been refunded pending those proceedings, whether under the orders of an Authority, Tribunal or Court or otherwise.

(ix) The amendments made and provisions inserted by the Central Excises and Customs Law (Amendment) Act, 1991 in the Central Excises and Salt Act and Customs Act are constitutionally valid and are unexceptionable.

(x) By virtue of sub-section (3) to Section 11 B of the Central Excises and Salt Act, as amended by the aforesaid Amendment Act, and by virtue of the provisions contained in sub-section (3) of Section 27 of the Customs Act, 1962 as amended by the said Amendment Act, all claims for refund (excepting those which arise as a result of declaration of unconstitutionality of a provision whereunder the levy was created) have to be preferred and adjudicated only under the provisions of the respective enactment. No suit for refund of duty is maintainable in that behalf. So far as the jurisdiction of the High Courts under Article 226 of the Constitution or of this Court under Article 32 - is concerned, it remains unaffected by the provisions of the Act. Even so, the Court would, while exercising the jurisdiction under the said articles, have due regard to the legislative intent manifested by the provisions of the Act. The writ petition would naturally be considered and disposed of in the light of and in accordance with the provisions of Section 11 B. This is for the reason that the power under Article 226 has to be exercised to effectuate the regime of law and not for abrogating it. Even while acting in exercise of the said constitutional power, the High Court cannot ignore the law can it over-ride it. The power under Article 226 is conceived to serve the ends of law and not to transgress them.

(xi) Section 11 B applied to all pending proceedings notwithstanding the fact that the duty may have been refunded to the petitioner/plaintiff pending the proceedings

or under the orders of the Court/Tribunal/Authority or otherwise. It must be held that Union of India V. Jain Spinners [1992 (61) E.L.T 321 (SC)=1992(4) S.C.C.389] and Union of India V. I.T.C [1993 (67) E.L.T. 3 (SC) =1993 Suppl. (4) S.C.C.326] have been correctly decided. It is, of course, obvious that where the refund proceedings have finally terminated - in the sense that the appeal period has also expired - before the commencement of the 1991 (Amendment) Act [September 19, 1991], they cannot be re-opened and/or governed by that the power of the Appellate Authorities to condone delay in appropriate cases is affected in any manner by this clarification made by us.

(xii) Section 11 B does provide for the purchaser making the claim for refund provided he is able to establish that he has not passed on the burden to another person. It therefore, cannot be said that Section 11B is a device to retain the illegally collected taxes by the State. This is equally true of Section 27 of the Customs Act, 1962.

100. We take note of the fact that writ petitions/writ appeals/suits claiming refund of excise duties/customs duties may be pending as on today. They are liable to fail on the ground of maintainability by virtue of the law declared herein. Since the law is being declared and clarified by us now, we make the following directions: in cases where writ petitioners, writ appeals (by whatever appellation they are called) or suits (at whatever stage they may be, as on today) are pending as on today, and provided they have not already taken proceedings for refund under the Act, it shall be open to the petitioners/appellants/plaintiffs to file applications for refund under Section 11 B within sixty days from today. If the applications are so filed by them, they shall not be rejected on the ground of limitation and shall be dealt with according to law. We make it clear that this direction applies only to petitioners/appellants/plaintiffs in pending writ petitions/writ appeals/suits (pending as on today), as explained herein

above, and not to any others. The The applications so filed under Section 11 B shall be disposed of under Section 11 B, as interpreted herein, and in accordance with law. It is obvious that if any of such petitioners/appellants/plaintiffs have already taken proceedings for refund under the Ac and having failed therein - either partly or wholly - have resorted to writ petition or suit, they shall not be entitled to the benefit of this direction.

The principles of law outlined in the above said decision would go to show that the claim for refund except where levy is held to be unconstitutional, to be preferred and adjudicated upon under Section 11 B of the Central Excise and Salt Act, 1944 as amended and subject to the claimant establishing that the burden of duty has not been passed on to third parties.

11. The counsel for the plaintiff contended that the question with regard to captive consumption was left open by the Apex Court in the decision reported in 1997 (89) E.L.T. 247 (S.C.) (Mafatlal Industries Ltd Vs. Union of India) and therefore, it is stated by her that her case does not fall with in the decision of the above cited decision of the Apex Court. However, the standing counsel for the Customs and Central Excise contended that the captive consumption was also covered under the above decision of the Apex Court and this has been reiterated by the Supreme Court in the decision reported in 2000 (116) E.L.T. 401 (S.C.) (Union of India Vs. Solar Pesticide Pvt Ltd) and the above said position has been elaborated by the Supreme Court as follows:

19. Even though in Mafatlal's case (supra) the question with regard to captive consumption was left open, this Court was called upon to interpret Section 27 of the Act. After discussing and deciding the various contentions which had been raised, the majority judgment of Jeevan Reddy, J. under para 108 at page 631 for the sake of convenience set out the propositions which flowed from the judgment. With regard to claim for refund, at page 633 it was observed as follows:

"(iii) A claim for refund, whether made under the provisions of the Act as contemplated in Proposition (i) above or in a suit or writ petition in the

situations contemplated by Proposition (ii) above, can succeed only if the petitioner/plaintiff alleges and establishes that he has not passed on the burden of duty to another person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so passed on, as the case may be. Whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation but is subject to the above requirement, as explained in the body of the judgment, Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund. But where such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that that amount is retained by the State i.e. by the people. There is no immorality or impropriety involved in such a proposition.

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 meant to be exercised for unjustly enriching a person, The doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched."

20. We are of the opinion that the aforesaid observations would be applicable in the case of captive consumption as well. To claim refund of

duty it is immaterial whether the goods imported are used by the importer himself and the duty thereon passed on to the purchaser of the finished product or that the imported goods are sold as such with the incidence of tax being passed on to the buyer. In either case the principle of unjust enrichment will apply and the person responsible for paying the import duty would not be entitled to get the refund because of the plain language of [Section 27](#) of the Act. Having passed on the burden of tax to another person, directly or indirectly, it would clearly be a case of unjust enrichment if the importer/seller is then able to get refund of the duty paid from the Government notwithstanding the incidence of tax having already been passed on to the purchaser.

12. Accordingly, it is found that following the Apex Court decision in 1997 (89) E.L.T. 247 (S.C.) (Mafatlal Industries Ltd Vs. Union of India), the principles laid down therein had been subsequently followed by the Supreme Court in the decision reported in 1997 (90) E.L.T. 260 (S.C.) (Assistant Collr. Of Cus. Vs. Anam Electrical Manufacturing Co.) and also by our High Court in the decision reported in 1999 (106) E.L.T. 29 (Mad.) (Union of India Vs. Indrol Lubricants & Specialities ltd.) wherein our High Court has dismissed the suit laid for refund of duty as not maintainable and further it is found that the question of unjust enrichment principles would also be applicable in the case relating to captive consumption as per the decision of the Apex Court reported in 2000 (116) E.L.T. 401 (S.C.) (Union of India Vs. Solar Pesticide Pvt. Ltd.) and the above principles had been followed by the Apex Court in the decision reported in 2001 (134) E.L.T. 11 (S.C.) (Commissioner of Customs, Chennai Vs. Borax India Ltd.). In the light of the authoritative pronouncements of the Apex Court and our High Court in the various decisions aforesaid, it is evident that the present suit laid by the plaintiff is clearly not maintainable and barred and the only remedy available to the plaintiff is to approach the authorities concerned for the refund of the duty. It is further seen that the plaintiff has to exhaust the remedy before the authorities constituted under the Act and in such view of the matter, as rightly contended by the Standing Counsel for the Customs and Central Excise, the plaintiff cannot circumvent the provisions of the Act for the collection of the Excise duty paid by it, though erroneously, by way of a Civil action.

13. In the light of the above decision, it is found that the Courts below erred in holding that the plaintiff's Civil action is maintainable following the decision of our High Court

reported in 1991 (52) E.L.T. 381 (Mad.) Accordingly, it is found that the decisions relied upon by the plaintiff's counsel reported in (1975) 1 SCC 636 (M/s. D.Cawasji & Co. and others Vs. State of Mysore and another), 1959 SCR 713 (Commissioner of Income tax, Bombay Vs. Amritlal Bhogilal & Co.) and (2008) 7 SCC 169 (Consolidated Engineering Enterprises Vs. Principal Secretary, Irrigation Department and others) (Hatti Gold Mines Company limited Vs. Vinay Heavy Equipments) as such would not be useful to the plaintiff's case for holding that the Civil action laid by the plaintiff for the refund of the duty paid by it is maintainable.

14. Even assuming for the sake of arguments that the Civil action laid by the plaintiff is maintainable, as rightly putforth by the standing counsel appearing for the Customs & Central Excise, it is found that the present lis is barred by limitation. The plaintiff in order to save the question of limitation has invoked Section 14 of the Limitation Act, as according to the plaintiff, inasmuch as it had been prosecuting its remedy before the authorities constituted under the Act for the refund of the duty for period from 18.7.1985 to 16.12.1988 bonafidely and hence, the said period should be excluded and in such view, according to the plaintiff, the suit laid by it is not barred by limitation. However, when it is found that the remedy sought for by the plaintiff before the authorities concerned is for the refund of the entire amount of duty paid by it and when it is found that the plaintiff had been granted the remedy by the authorities concerned only for the period falling within the point of limitation as provided under above said Act and accordingly, the authorities concerned had rejected the claim of the plaintiff in other aspects, it is found that the action initiated by the plaintiff before the authorities concerned constituted under the Act had not come to be rejected for want of jurisdiction or other cause of like nature and on the other hand, it is found that the authorities constituted under the Act had rejected the plaintiff's action on merits holding that it cannot grant the relief sought for by the plaintiff on the point of limitation following the decision of the Apex Court and in such view of the matter, as rightly putforth by the standing counsel for the Customs and Central Excise, the conditions for applicability of Section 14 (1) of the Limitation Act not having been satisfied by the plaintiff and when the plaintiff has failed to establish that its action before the authorities constituted under the Act for seeking the refund of the duty had come to be rejected for the defect of jurisdiction or other cause of a like nature and on the other hand, the same had come to be rejected on merits, it is found that the plaintiff cannot be allowed to exclude the time taken by it in exhausting the remedies taken by it for the purpose of saving the point of limitation for the institution of the present suit. In this connection, as per the decision of the

Apex Court reported in (1977) 1 SCC 791 (Gurdit Singh and others Vs. Munsha Singh and others), it is found that unless and until the plaintiff establishes that the earlier proceedings initiated by it had come to be dismissed as per the conditions stipulated under Section 14 (1) of the Limitation Act and when it is further seen that the scope of the words "or other cause of a like nature" which follow the words "defect of jurisdiction" has to be determined according to the rule of ejusdem generis and as per the said rule, the above said words take their colour from the preceding words "defect of jurisdiction" which means that the defect must have been of an analogous character barring the Court from entertaining the previous action, the same is found not applicable to the plaintiff's action laid before the authorities constituted under the Act. It is therefore found that the plaintiff is disentitled to invoke the provisions of Section 14 (1) of the Limitation Act to save its suit on the point of limitation. As rightly contended by the standing counsel appearing for the Customs and Central Excise, the plaintiff's action before the authorities constituted under the Act was not rejected on the question of defect of jurisdiction or other cause of a like nature and on the other hand, it is found that the same had been come to be rejected by the authorities on merits and in such view of the matter, it has to be held that even if it is to be determined that the plaintiff's suit is maintainable for the sake of arguments, the suit is found to be barred by time and on that ground also the plaintiff is not entitled to seek the relief sought for.

15. As regards the plea of unjust enrichment projected by the defendants, it is found that the plaintiff has failed to establish the essential ingredients in the present suit for obtaining the amount claimed and when the plaintiff has failed to establish that it had not gained any unjust enrichment and particularly, it is found that the plaintiff will be shifting the burden of the payment of taxes to the consumers and when with reference to the above position, there is nil material on the part of the plaintiff and when it is further seen that the Courts below had erroneously shifted the burden on the defendants as regards the said issue, it has to be determined that there is failure on the part of the plaintiff to prove that it is not attempting to seek unjust enrichment by way of seeking refund of the duty claimed in the lis.

16. In the light of the above discussions, the Courts below erred in not properly considering the judgment of the Supreme Court in 1997 (89) E.L.T. 247 (S.C.) (Mafatlal Industries Ltd Vs. Union of India) aforestated that where the duty has been collected under a particular order which has become final and when the same had not been declared to be unconstitutional, it is found that the Courts below had erroneously determined that the suit laid by the plaintiff is maintainable and it is further

found that in the light of the above said Apex Court decision, the Civil remedy initiated by the plaintiff for seeking refund is not legally sustainable and accordingly, it is held that the civil action laid by the plaintiff is barred.

17. The substantial questions of law formulated in the second appeal are accordingly answered in favour of the defendants and against the plaintiff.

18. At the end, the judgment and decree made in A.S.No.168 of 1998, on the file of the Principal District Court, Coimbatore, dated 17.12.99, confirming the judgment and decree made in O.S. No.335 of 1990, on the file of the III Additional Sub Court, Coimbatore, dated 29.06.1998 are set-aside and resultantly, the suit laid by the plaintiff is dismissed with costs. Accordingly, the second appeal is allowed with costs. Consequently connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

sli
To

1. The Principal District Judge, Coimbatore.
2. The III Additional Subordinate Judge, Coimbatore.

copy to
The Section Officer
VR Section
High Court Madras

+1 cc to Mr.A.P.Srinivas Advocate sr 10654

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S. A.No.627 of 2003

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