***'REPORTABLE'***

**IN THE SUPREME COURT OF INDIA**

**CIVIL APPELLATE JURISDICTION**

**CIVIL APPEAL NO. 3600 OF 2006**

COMMISSIONER OF CENTRAL EXCISE, TIRUCHIRAPALLI .....APPELLANT(S)

VERSUS

M/S. DALMIA CEMENT (BHARAT) LTD. .....RESPONDENT(S)

# J U D G M E N T

**A.K. SIKRI, J.**

On an application under Section 35G(3) of the Central Excise Act, 1944 (hereinafter referred to as the 'Act'), the Customs Excise and Gold (Control) Appellate Tribunal (hereinafter referred to as the 'CEGAT') referred the following question to the High Court of Delhi for its opinion :-

> "Whether Section 11B of the Central Excise Act, as amended, applies to cases where though an order has been passed directing refund, implementation of the order is pending?"

2) The High Court has answered the aforesaid question in favour of assessee holding that since the proceedings under the old Section 11B of the Act had attained finality, the amended

provision of Section 11B of the Act, in particular, proviso to sub-section (1) shall not apply. In other words, the principle of 'unjust enrichment' which was introduced by way of amendment of Section 11B in the year 1991 shall not be attracted in the instant case as the proceedings under the unamended Section stood finalised with the direction in the application filed under unamended Section 11B of the Act to refund the excise duty that was paid by the respondent/assessee. To put it pithily, the High Court has held that merely because implementation of the aforesaid order was pending, in the sense that direction to refund the amount had not been carried out, the authority could not go into the question of unjust enrichment by invoking the proviso to sub-section (1) of Section 11B of the Act that had been introduced by that time by way of amendment in Section 11B of the Act. Therefore, it was not open to the concerned officer, who was only supposed to carry out the implementation of the order, to go into the question as to whether there was any unjust enrichment on the part of the assessee or not. In coming to this conclusion, the High Court has extensively referred to a 9-Judge Bench of this Court in the case of ***Mafatlal Industries Ltd. and Others*** v. ***Union of India and Others***[1].

1 (1997) 5 SCC 536

3) It is not disputed before us that the law laid down in the aforesaid judgment would be applicable. However, the appellant contends that there is a small window left open in the said judgment which would cover the situation that has arisen in the present case. As per the case set up by the appellant, even where order is yet to be implemented, though passed under the unamended provision, at this stage of implementation as well the question of unjust enrichment can be gone into by the concerned authority.

4) We may point out at this stage itself that Section 11B, as it existed prior to its amendment in the year 1991, did not contain any provision of unjust enrichment. Thus, if the assessee was entitled to refund of duty under the Act, it could make an application for such a refund to the Assistant Collector of Central Excise before the expiry of six months from the refund date and the procedure how such application is to be dealt with was stipulated in the said provision. This Section was amended with effect from 20.09.1991 by Central Excise and Customs Laws (Amendment) Act, 1991. Under the amended provision, while considering the application for refund, the Assistant Collector of Central Excise is empowered to go into the question as to whether incidence of such duty has been passed on by the person claiming refund to any other

person. If the claimant has passed on the incidence of excise duty to other person then the application for refund can be rejected on the ground that it would amount to unjust enrichment to that person who is not out of pocket even when the excise duty was paid in excess etc. Proviso to this sub-section (1) further provides that even when application for refund was filed before the amendment of this Section and still pending, it shall be deemed that such an application made under amended sub-section (1) of Section 11B of the Act and is to be dealt with in accordance with the provisions of sub-section (2), substituted by the amendment. Thus, the applications even filed under the unamended Act, if not disposed of and still pending, are to be treated as filed under the amended Section 11B and the consequence thereof is that even in respect of such applications doctrine of "unjust enrichment" would be applicable. In this scenario, when an application was not pending, in the sense that orders thereon had already been passed directing refund but the amount had not been refunded so far, we have to determine as to whether such a situation has also to be dealt with under the amended section thereby bringing into operation the doctrine of "unjust enrichment"? As mentioned above, the High Court has answered this question in the negative and this Court is called upon to decide the veracity of the said

view taken by the High Court in the instant appeal.

5) The facts which need to be noted for the purposes of this appeal do not need a large canvass and are recapitulated in brief, as under:

6) The period involved for which the respondent wanted refund of the excise duty paid by it is 1970-1978. It may be mentioned that there was a dispute regarding the assessable value of cement cleared by the assessee during the aforesaid period, when excise duty of cement was *ad valorem.* The dispute related to freight involved in the dispatch of the cement to various destinations. The Department had included the cost of freight as well while determining the assessable value in terms of Section 4 of the Central Excise and Salt Act, 1944 (hereinafter referred to as the 'Act'). It was decided in favour of the assessee vide order dated 06.06.1989 passed by the CEGAT. In spite of this decision, amount was not refunded. This prompted respondent to file Civil Writ No. 3225 of 1991 in the High Court of Delhi seeking writ, order or direction for initiating contempt of court proceedings against the Collector of Central Excise, Tiruchirapalli and Assistant Collector of Central Excise, Tiruchirapalli for not granting the refund despite the order of the CEGAT. The said writ

petition was disposed of on 18.07.1995. Taking note of the statement of counsel for both the parties that a date may be fixed before the Collector/Assistant Collector to go into the question if the appellant should be granted refund in spite of Section 11B of the Act, direction was given to appear before the Collector/Assistant Collector on 22.09.1995 and the writ petition was disposed of. Pursuant to the said direction, hearing was granted by the Assistant Commissioner who passed orders dated 28.03.1996 holding that assessee was not eligible to get the refund as per amended provisions of Section 11B of the Act and directed that this amount be credited to the Consumer Welfare Fund established under Section 12C of the Act. The reason for rejecting the claim of the assessee was that the case of the respondent fell within the four walls of the concept of "unjust enrichment". Feeling aggrieved by this order, appeal was filed before the Commissioner of Customs and Central Excise (Appeal) which was dismissed on 20.12.1996. Further, appeal was preferred before the CEGAT and in this attempt the assessee triumphed inasmuch as Tribunal decided the case in favour of assessee holding that since no proceedings were pending before the Assistant Commissioner as far as application for refund is concerned and it was only the execution of the order of refund

that was passed much prior to 1991, amended provision of Section 11B would not be attracted. The appellant filed rectification application which was dismissed by the Tribunal on 20.02.2002. Thereafter, appellant filed reference application before the High Court of Delhi in terms of 35G(3) of the Act raising the question of law which has already been reproduced in the earlier part of this judgment. Again, as pointed out above, the High Court has answered this question in favour of assessee, recording the following findings:

> "(a) It has been held that there are no merits in this reference, as the question involved is clearly settled by the 9-Judge Bench decision of this Hon'ble Court in the case of Mafatlal Industries Ltd. (supra) wherein this Hon'ble Court held that if an application for refund has been disposed off, and the order had become final before the 1991 amendment to Section 11B came into force, the principles of unjust enrichment will not apply.
>
> (b) Section 11-B, after the 1991 amendment, stated that the party applying for refund had to establish that the incidence of such duty had not been passed on by him to any other person. It follows, therefore, that Parliament did not apply the principles of unjust enrichment to cases covered by the unamended Section11B and it was the reason that the amendment was made in Section 11-B in 1991."

7) On the basis of what is pointed out above, it is clear that the exercise to be undertaken is to find out the ratio laid down in ***Mafatlal Industries Ltd.*** (supra) in the given situation. Before we

advert to the same, we deem it appropriate to refer to, at this stage, unamended and amended provisions of Section 11B.

> "**Section 11B: Claim for refund of duty** (1) Any person claiming refund of any duty of excise may make an application for refund of such duty to the Assistant Collector of Central Excise before the expiry of six months from the relevant date.
>
> Provided that the limitation of six months shall not apply where any duty has been paid under protest.
>
> (2) If on receipt of any such application, the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty of excise paid by the applicant should be refunded to him, he may make an order accordingly.
>
> (3) Where as a result of any order passed in appeal or revision under this Act refund of any duty of excise becomes due to any persons the Assistant Collector of Central Excise may refund the amount to such person without his having to make any claim in that behalf.
>
> (4) Save as otherwise provided by or under this act, no claim for refund of any duty of excise shall be entertained.
>
> (5) Notwithstanding anything contained in any other law, the provisions of this Section shall also apply to a claim for refund of any amount collected as duty of excise made on the ground that the goods in respect of which such amount was collected were no excisable or were entitled to exemption from duty and no court shall have any jurisdiction in respect of such claim."

8) After 1991 amendment, the material part of Section 11B reads as follows:

> "11B. Claim for refund of duty and interest, if any, paid on such duty.—(1) Any person claiming refund

of any duty of excise and interest, if any, paid on such duty may make an application for refund of such [duty and interest, if any, paid on such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of one year from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of duty of excise and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person:

Provided that where an After 1991 amendment, the material part of Section 11B reads as follows:application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991 (40 of 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) as substituted by that Act:

Provided further that the limitation of one year shall not apply where any duty and interest, if any, paid on such duty has been paid under protest.

(2) If, on receipt of any such application, the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:

Provided that the amount of [duty of excise and interest, if any, paid on such duty as determined by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central

Excise under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to--

(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant's account current maintained with the Commissioner of Central Excise or Commissioner of Central Excise;

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued,After 1991 amendment, the material part of Section 11B reads as follows: under this Act;

(d) the duty of excise and interest, if any, paid on such duty paid by the manufacturer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(e) the duty of excise and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(f) the duty of excise and interest, if any, paid on such duty borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify:

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty and interest, if any, paid on such duty has not been passed on by the persons concerned to any other person.

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court in any other provision of this Act or the rules made

thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).

(4) Every notification under clause (f) of the first proviso to sub-section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its reassembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

(5) For the removal of doubts, it is hereby declared that any notification issued under clause (f) of the first proviso to sub-section (2), including any such notification approved or modified under sub-section (4), may be rescinded by the Central Government at any time by notification in the Official Gazette.

Explanation.--For the purposes of this section,--

(A) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(B) "relevant date" means,--

(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods,--

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or

(ii) if the goods are exported by land, the date on which such goods pass the frontier, or

(iii) if the goods are exported by post, the date of dispatch of goods by the Post Office concerned to a place outside India;

(b) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid;

(c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;

(d) in a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;

(e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;

(ea) in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 5A, the date of issue of such order;

(eb) in case where duty of excise is paid provisionally under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;

(ec) in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgment, decree,

order or direction;

(f) in any other case, the date of payment of duty."

9) We have already narrated the facts and events in the instant case in detail above. However, it is pertinent to keep in mind that applications for refund of excise which were preferred by the assessee had already been allowed finally by the orders of CEGAT dated 01.06.1989 and 06.06.1989. This obviously happened before the amendment in the Section in the year 1991. At the same time, the refund had not been actually paid to the assessee till 1991 when the provisions of Section 11B came to be amended. We now advert to the decision in the case of ***Mafatlal Industries Ltd.*** (supra).

10) It is a nine Judge Bench decision. Majority opinion was delivered by B.P. Jeevan Reddy, J. for himself and on behalf of four other Judges. K.S. Paripoornan, J. and S.C.Sen, J. wrote their separate opinions. Hansaria, J. agreed with the conclusions and reasoning of Paripoornan, J. However, insofar as issue at hand is concerned, they concurred with the majority opinion rendered by B.P. Jeevan Reddy, J. Thus, eight out of nine Judges have taken the same view. A.M. Ahmadi, the then Chief Justice, was the only dissenting Judge, who took contrary view on this particular issue.

With this background in mind, we reproduce the following relevant portions from the opinion of B.P. Jeeven Reddy, J.:

> "57. The first decision of this Court to consider the amended Section 11-B is in *Union of India* v. *Jain Spinners Ltd* (1992) 4 SCC 389 The validity of the 1991 (Amendment) Act was, however, neither raised nor considered by the court. The impugned orders of the High Court, made before the coming into force of the 1991 (Amendment) Act, directing refund of the excess duty collected to the manufacturers, this Court held, would defeat the provisions of amended Section 11-B which had come into force during the pendency of the refund proceedings. The Court held that so long as the refund proceedings are pending, the amended provisions get attracted and disentitle the manufacturer-payer from claiming any refund contrary to the said provisions. In other words, the contention of the manufacturers that the amended Section 11-B applies only to claims of refund arising after the coming into force of the said Amendment Act was rejected.
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> **96.** There is yet another circumstance: Section 12-B does not create a new presumption unknown till then; it merely gives statutory shape to an existing situation, as explained hereinbefore. At the most, it can be said that there were two views on the subject and Section 12-B affirms one of them. Even without Section 12-B, the true position is the same, as held by us in the earlier part of this judgment. The obligation to prove that duty has not been passed on to another person is always there as a precondition 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. By applying for refund yet, he is trying to reap a windfall; deprivation of that cannot be said to be real or substantial prejudice or loss. 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 11-B. It was only on account of an incorrect view of law taken in *Kanhaiya Lal* 1959 SCR 1350 : AIR 1959 SC 135 : (1958) 9 STC 747 and that cannot be treated as a vested legal right. *Correction of judicial error does not amount to deprivation of vested/substantive rights, even though a person may be deprived of an unwarranted advantage he had under the overruled decision*. In cases, where the burden is not passed on, there is no prejudice; he can always get the refund.

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98. A major attack is mounted by the learned

counsel for petitioners-appellants on Section 11-B and its allied provisions on the ground that real purpose behind them was not to benefit the consumers by refusing refund to manufacturers (on the ground of passing on the burden) but only to enable the Government to retain the illegally collected taxes. It is suggested that the creation of the Consumer Welfare Fund is a mere pretence and not an honest exercise. By reading the Rules framed under Section 12-D, it is pointed out, even a consumer, who has really borne the burden of tax and is in a position to establish that fact, is yet not entitled to apply for refund of the duty since the Rules do not provide for such a situation. The Rules contemplate only grants being made to Consumer Welfare Societies. Even in the matter of making grants, it is submitted, the Rules are so framed as to make it highly difficult for any consumer organisation to get the grant. There is no provision in the Act, Shri Nariman submitted, to locate the person really entitled to refund and to make over the money to him. "We expect a sensitive Government not to bluff but to hand back the amounts to those entitled thereto", intoned Shri Nariman. It is a colourable device — declaimed Shri Sorabjee — "a dirty trick" and "a shabby thing". The reply of Shri Parasaran to this criticism runs thus: It ill-becomes the manufacturers/assessees to espouse the cause of consumers, when all the while they had been making a killing at their expense. No consumers' organisation had come forward to voice any grievance against the said provisions. Clause (*e*) of the proviso to sub-section (2) of Section 11-B does provide for the buyer of the goods, to whom the burden of duty has been passed on, to apply for refund of duty to him, provided that he has not in his turn passed on the duty to others. It is, therefore, not correct to suggest that the Act does not provide for refund of duty to the person who has actually borne the burden. There is no vice in the relevant provisions of the Act. Rules cannot be relied upon to impugn the validity of an enactment, which must stand or fall on its own strength. The defect in the Rules, assuming that there is any, can always be corrected if the experience warrants it. The Court too may indicate the modifications needed in the

Rules. The Government is always prepared to make the appropriate changes in the Rules since it views the process as a "trial and error" method — says Shri Parasaran.

105. It would be evident from the above discussion that the claims for refund under the said two enactments constitute an independent regimen. Every decision favourable to an assessee/manufacturer, whether on the question of classification, valuation or any other issue, does not automatically entail refund. Section 11-B of the Central Excises and Salt Act and Section 27 of the Customs Act, whether before or after the 1991 Amendment — as interpreted by us herein — make every refund claim subject to proof of not passing on the burden of duty to others. Even if a suit is filed, the very same condition operates. Similarly, the High Court while examining its jurisdiction under Article 226 — and this Court while acting under Article 32 — would insist upon the said condition being satisfied before ordering refund. Unless the claimant for refund establishes that he has not passed on the burden of duty to another, he would not be entitled to refund, whatever be the proceeding and whichever be the forum. Section 11-B/Section 27 are constitutionally valid, as explained by us hereinbefore. They have to be applied and followed implicitly wherever they are applicable.

**108.** 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 and Customs Laws (Amendment) Act, 1991 or thereafter — by misinterpreting 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 misinterpreting or misapplying 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 enactments 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 11-B. 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 11-B of the 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 11-B 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 emphasise 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 the 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 reopened on the basis of a decision on another person's case; this is the ratio of the opinion of Hidayatullah, C.J. in *Tilokchand Motichand* (1969) 1 SCC 110 : (1969) 2 SCR 824 : AIR 1970 SC 898 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 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 or levy has become final in his case, he cannot seek to

reopen it nor can he claim refund without reopening 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 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 ideals 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 like 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 *STO* v. *Kanhaiya Lal Mukundlal Saraf*–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 (*i*) to (*vii*) above. It must equally be held that the subsequent decisions

of this Court following and applying the said propositions in *Kanhaiya Lal* have also been wrongly decided to the above extent. This declaration — or the law laid down in Propositions (*i*) to (*vii*) 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 the provisions inserted by the Central Excises and Customs Law (Amendment) Act, 1991 in the Central Excises and Salt Act and the 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 635claims 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 enactments. 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 nor can it override it. The power under Article 226 is conceived to serve the ends of law and not to transgress them.
>
> (*xi*) 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 must be held that *Union of India* v. *Jain Spinners* and *Union of India* v. *ITC* 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 (19-9-1991), they cannot be reopened 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 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 11-B is a device to retain the illegally collected taxes by the State. This is equally true of Section 27 of the Customs Act, 1962."

11) It is clear from the above that in no unambiguous terms and with utmost clarity and certainty, the majority interpreted amended provisions of Section 11B including proviso to sub-section (1) thereof to hold that so long as refund proceedings are pending, the amended provision would get attracted and would disentitle the manufacturer/payer from claiming any refund contrary to the said proviso. However, in those cases where the refund proceedings had finally been terminated, in the sense – that the

appeal period has also expired – before the commencement of the amended provision, these cannot be re-opened and/or governed by the amended provision. Concurring with the aforesaid view, K.S. Paripoornan, J. expressed his opinion in the following manner:

> "342……Sections 11-B(2) and (3) cannot be made applicable to refunds already ordered by the court or the refund ordered by the statutory authorities which have become final. It follows from a plain reading of Section 11-B, clauses (1), (2) and (3) of the Act. The provisions contemplate the pendency of the application on the date of the coming into force of the Amendment Act or the filing of an application which is contemplated under law to obtain a refund after the Amendment Act comes into force. I am of the opinion that if the said provisions are held applicable, even to *matters concluded by the judgments or final orders of courts*, it amounts to stating that the decision of the court shall not be binding and will result in reversing or nullifying the decision made in exercise of the judicial power. The legislature does not possess such power. The court's decision must always bind parties unless the condition on which it is passed are so fundamentally altered that the decision could not have been given in the altered circumstances....."

12) The same view has been expressed by S.C. Sen, J.:

> "255. I shall now examine the other provisions of the newly-added sections. Sub-section (1) of Section 11-B requires an application for refund to be made. Sub-section (2) requires the Assistant Commissioner to pass an order of refund provided the conditions set out therein are fulfilled. Sub-section (3) merely lays down that no refund shall be made except as provided in sub-section (2). There is a non obstante clause that this will operate notwithstanding anything to the contrary contained in any judgment, decree, order etc. It is

> obvious that new provisions will apply in cases where applications for refund were made before the new provisions came into force and also subsequently. Sub-section (3) has no retrospective effect. When a case has been finally heard and disposed of and no application for refund need be made, sub-section (3) cannot apply. If there is a judgment, decree or order which has to be carried out, the legislature cannot take away the force and effect of that judgment, decree or order, except by amending the law retrospectively on the basis of which the judgment was pronounced."

13) Notwithstanding, the aforesaid dicta, Mr. Panda, learned senior counsel appearing for the appellant, still sees some light coming through a small window as he wants pending proceedings to include a situation where refund had not been granted, even when the order was passed, with the submission that the Assistant Commissioner even at this stage was competent to go into the question of unjust enrichment as order regarding grant of refund was post 1991 event. To buttress this submission, he argued that the principle of unjust enrichment was in the domain of public interest and intention by incorporating provisions like proviso to sub-section (1) of Section 11 was clear, namely, so far as amount is not actually refunded, the authorities were competent to invoke this doctrine of "unjust enrichment". It was argued that it will be totally inequitable and unfair to the public as the party (assessee herein) would be unjustly enriched. He also relied upon the orders dated 18.07.1995 by the High Court in Civil

Writ No. 3225 of 1991 specifically permitting the Assistant Collector to go into the question whether the assessee is to be granted the refund in spite of amended Section 11B of the Act with the following observation :

> "Both the Counsel agree that a date may be fixed when the petitioner shall appear before the collector/Assistant Collector, Central Excise, Trichiapalli, to go into the question if petitioner should be granted the refund in spite of Section 11B of the Central Excise and Salt Act. We, accordingly, direct that petitioner shall appear before the concerned Collector/Assistant Collector, Central Excise, Trichirapalli on 22nd September 1995. no further orders are required in this petition, which stands disposed of."

14) After examining the matter in its entirely, we find that it is not possible to countenance the aforesaid submission of Mr. Panda. In the first instance, it requires to be remarked that only after amendment in Section 11B of the Act in the year 1991, any person applying for refund has to establish that incidence of such duty has not been passed on by him to any other person. The unamended provision did not contain any such stipulation. Therefore, under the old provision, the only obligation of the person claiming refund was to make such an application before the expiry of six months from the relevant date and to show how the refund was admissible to the applicant. In such a case, the Assistant Collector of Central Excise was to only examine as to

whether excise duty was paid in excess etc. and was refundable to the claimant as a result of adjudication of the dispute or otherwise. It is only in the amended provision that additional stipulation is provided as per which the claimant is required to file, along with application for refund, such documentary or other evidence including documents referred to any Section 12A of the Act to establish that the amount of duty of excise was collected from the claimant or paid by the claimant and that "incidence of such duty had not been passed on by him to any other person". It clearly follows from the above that before the amendment of Section 11B of the Act, principle of unjust enrichment was not incorporated under the unamended provision. In fact that was precisely the reason for amending the provision so that this doctrine of "unjust enrichment" is incorporated, viz., to take care of the mischief that was prevailing under the unamended provision which was removed by making amendment, popularly known as Heydon's Mischief Rule.

15) Proviso to sub-section (1) of Section 11B, as amended, would be applicable in a situation where an application for refund made before the said amendment was still pending at the time when the provisions of Section 11B were amended. This is how the said

proviso is interpreted by this Court in ***Mafatlal Industries Ltd.*** (supra).

16) Once we find that no such application was pending and the orders on the said application had already been passed, the proviso ceases to have any application. The reason, even otherwise, is very obvious. Section 11B relates to claim for refund of duty and the procedure for such a refund is stipulated in this section. As per sub-section (1) thereof, any person claiming refund of any duty of excise has to move an application for refund of such duty to the Assistant Commissioner of Central Excise. Once such an application is made, the same is to be considered in accordance with this provision. As already pointed out above, under the unamended provision, the Assistant Commissioner was not required to go into the question as to whether incidence of such duty had been passed on by the applicant claiming refund to any other person or not. However, if the application was not decided till the time amendment was incorporated in the year 1991, as per the proviso, while dealing with such an application for refund, the Assistant Commissioner is still empowered to go into this question even when the application was filed before the commencement of the amended provision. This situation would prevail only when

there is a pending application before the Assistant Commissioner of Central Excise, which is yet to be decided. If the order for refund on such an application had already been passed before coming into force the amended provision and no application was pending at the commencement of the Central Excise and Customs Laws (Amendment) Act, 1991 before the Assistant Commissioner and, therefore, question of applying the said proviso and going into the issue as to whether incidence of such duty had been passed by the applicant to any other person or not would not arise. Thereafter, order passed on the application is only to be implemented by giving the refund as per that order. By no stretch of imagination, the Officer, at the time of carrying out the orders for refund, which have already been passed, can be invested with the powers to go into the question of unjust enrichment by invoking the proviso to sub-section (1) of Section 11B. In the instant case, the order on the refund application of the respondent had been passed on 06.06.1989, which was much before the amended provision came into operation. In fact, even after the order of refund was passed, the appellant had not refunded the amount and it is in these circumstances that writ petition was filed in the High Court for initiation of contempt proceedings against the defaulting officers. In such proceedings,

the High Court had passed the order dated 18.07.1995. In this order, no doubt, the Court observed that the Assistant Commissioner would go into the question if the respondent should be granted the refund in spite of Section 11B of the Act. However, merely because of such observations, it cannot be said that the Assistant Commissioner was entitled to look into the issue of unjust enrichment when if, otherwise, he he was otherwise had no jurisdiction to do so in the facts of the present case. Such observations were given in view of the statement of the counsel for the Government who brought to the notice of the Court the amended provisions contained in sub-section (3) of Section 11B of the Act. The High Court did not go into the issue as to whether such a course of action was permissible or not. Another pertinent aspect which needs to be kept in mind is that the interpretation that is to be accorded to the amended provision had not been decided by this Court till that time and the law on this issue came to be settled in the year 1997 only when the judgment in ***Mafatlal Industries Ltd.*** (supra) was pronounced by this Court.

17) Thus, when the order of the Assistant Commissioner was challenged and the matter came before the Tribunal, the Tribunal was duty bound to apply the law laid down in ***Mafatlal Industries***

***Ltd.*** (supra), which it did. Similar exercise is done by the High Court in the impugned judgment. We find that the view taken by the High Court is in consonance with the law laid down by this Court in the aforesaid case.

18) We find that there is no scope to interfere with the impugned decision of the High Court and, accordingly, dismiss this appeal.

No costs.

**.....J.**
**(A.K. SIKRI)**

**.....J.**
**(ROHINTON FALI NARIMAN)**

**NEW DELHI;**
**SEPTEMBER 02, 2015.**