

(2014) 04 RAJ CK 0042
In the Rajasthan High Court
Case No : Civil Writ Petition No. 2813/1999

Alok Chitra Mandir

APPELLANT

Vs

Dy. Commissioner (Admn.)

RESPONDENT

Date of Decision : 04-04-2014

Acts Referred:

Constitution of India, 1950 — Article 226, 265, 32
Contract Act, 1872 — Section 72
Customs Act, 1962 — Section 27
Juvenile Justice (Care and Protection of Children) Act, 2000 — Section 35, 49, 53
Limitation Act, 1963 — Section 17(1)(c)

Citation : (2014) 3 CDR 1492 : (2014) 2 WLN 328

Hon'ble Judges : Pratap Krishna Lohra, J

Bench : Single Bench

Advocate : Vinay Kothari, Advocate for the Appellant; D.K. Godara, Advocate for Mr. V.K. Mathur, Advocate for the Respondent

Judgement

Pratap Krishna Lohra, J.—Petitioner, a proprietorship concern, owns a Cinema House situated at Churu, which is exhibiting feature films. In the year 1982, State Government in exercise of powers under Sec. 6(3)(a) of the Entertainment Tax Act 1957 (for short, "Act") floated a scheme for composition of entertainment tax on 08.07.1982. The petitioner vide its letter dt. 28.12.1994 opted for the composition scheme w.e.f. 01.01.1995 but later on made endeavour to alter the date of composition as 01.02.1995. Acknowledging the same, the first respondent solicited requisite information from Commercial Taxes Officer, Circle Churu by its letter dt. 28.01.1995. Be that as it may, when the requisite order of the first respondent in this behalf under the composition scheme was awaited, the petitioner started paying tax on adhoc basis as per the composition scheme w.e.f. 01.02.1995. Thereafter, on 09.03.1995, the petitioner sent a reminder to first respondent for passing requisite orders under the composition scheme. In the interregnum, an amendment was made in the composition scheme vide Notification No. F-10(31)FD/GR. IV/87 dt. 23.02.1995 and the gist of which was circulated by the Commissioner, Commercial Taxes vide

its letter dt. 14.03.1995. As no specific order for composition scheme was made uptill issuance of the amendment Notification dt. 23.02.1995, the petitioner harboured the impression that composition scheme as amended by Notification dt. 23.02.1995 would govern his case. However, to petitioner's dismay the first respondent passed an order subject to approval of the Commissioner, Commercial Taxes on 05.04.1995 ordering composition for the period 01.02.1995 to 31.01.1996 at a sum of Rs. 29,830 in accordance with the old unamended scheme and not in accordance with the Notification dt. 23.02.1995. In adherence of the order, the requisite amount was paid by the petitioner and subsequent thereto also in terms of the orders passed by the first respondent requisite amount was remitted by the petitioner. The petitioner submitted an application on 09.01.1997 seeking rectification under Rule 32 of the Rajasthan Entertainment & Advertisement Tax Rules 1957 (for short, "Rules of 1957"). Rule 32 of the Rules of 1957 envisages a provision for rectification of mistakes. For the same prayer, petitioner also approached the Commissioner, Commercial Taxes, Jaipur seeking rectification of mistake. Taking cognizance of the application for rectification of mistake submitted by the petitioner, the Addl. Commissioner, Commercial Taxes issued a notice to the petitioner on 07.02.1997 for personal hearing with records. The petitioner attended the hearing and made his submissions. After conclusion of the hearing, nothing was heard by the petitioner thereafter, nor any order was passed in this behalf and according to petitioner the application for rectification of mistake remained pending and inconclusive. The petitioner has very specifically stated in the writ petition that although no order was passed on his application for rectification of mistake, but the clerical staff of the first respondent orally informed that the application has been rejected. The petitioner has specifically averred in the writ petition that respondents are bound to give effect to amendment Notification dt. 23.02.1995 and thus are under an obligation to recalculate the monthly amount of composition in accordance with the same which would give rise to substantial refund/credit in favour of the petitioner. In the petition, figure of difference of amount was also incorporated with a prayer for refund of the same with interest thereon as per Section 9A of the Act. Setting out a specific case in the petition that instead of refunding the amount and paying interest on the difference of amount, the CTO has imposed interest on the petitioner by its order dt. 11.09.1996 and has denied the similar relief to the petitioner on refund in accordance with the judgment of the Rajasthan Taxation Tribunal, Bench at Jodhpur dt 22.12.1998 by citing the reason that there is no provision under the Act for giving interest on the refund due under the Act. The petitioner has also placed on record the copy of the judgment of the Tribunal and submitted that petitioner became entitled for refund in a different context. In the writ petition, the petitioner has also made endeavour to challenge the validity of Section 9A of the Act by urging that State cannot be allowed to take interest and deny the same on the refund due to the assessee. Once again reiterating that the copy was not endorsed to the petitioner while rejecting the application for rectification of mistake, the petitioner has pleaded that its entitlement to consequential relief

in the composition amount fixed in terms of Notification dt. 23.02.1995 wherein tax payable compounded for the first year money amount of composition was envisaged 25% but subsequently by amendment Notification it was altered as 10% over the average collection of past three years. With this submission, the petitioner has prayed for modification of orders Annex. 8 & 18 and for quashing order dt. 11.09.1996 (Annex. 13) and order dt. 22.12.1998 (Annex. 14) respectively. At the threshold, the petitioner approached the Rajasthan Taxation Tribunal by laying Original Application but after repealing of the Rajasthan Taxation Tribunal Act 1995, the file was transferred to this Court. The matter came up before the Division Bench as vires of Section 9A was under challenge. Ultimately, the vires of Section 9A was upheld by the Division Bench of this Court by its order dt. 10.03.2003 and therefore Division Bench ordered for listing this matter before the learned Single Judge for adjudication on the surviving issues on merits.

2. The writ petition was contested by the respondents and reply to the same was submitted. In the return, the respondents have submitted that the order of composition of entertainment tax from 01.02.1995 to 31.01.1996 was passed by the Deputy Commissioner (Admn.) Commercial Taxes Department, Bikaner on 05.04.1995 wherein the order of composition was made w.e.f. 01.02.1995 and therefore the petitioner has been rightly assessed at the rate prescribed under the old Scheme of 1982. With this submission, the respondents have defended the orders Annex. 13 and Annex. 7 respectively and urged that both these orders are in consonance with the provisions of the Act and the composition scheme itself. While referring to application under Rule 32 of the Rules of 1957 submitted by the petitioner for rectification of mistake, the respondents have categorically averred in the reply that for deciding such an application it was not necessary to afford any opportunity of hearing to the petitioner. It is further submitted that despite the settled position, notices were issued and the petitioner was called upon and an authorized representative of the petitioner also appeared before the competent authority clearly goes to show that requisite opportunity was afforded to the petitioner. The respondents have also stated in the reply that after hearing the authorized representative of the petitioner, a detailed report was provided by the Deputy Commissioner (Administration) Bikaner dt. 22.08.1997 wherein it was clarified that the order of composition do not suffer from any defect. Once again reiterating that the order of composition dt. 05.04.1995 was passed for the period anterior to the amendment Notification i.e. From 01.02.1995 subject to approval of the Commissioner, Commercial Taxes, there was absolutely no infirmity in the assessment of the petitioner under the old composition scheme. As regards the rejection of the application of petitioner for rectification of mistake, it is averred in the reply that as the composition order was just and proper, the said application was rightly turned down without affording opportunity of hearing to the petitioner.

3. After submission of reply on behalf of the petitioner, rejoinder is submitted wherein the contents averred in the petition were reiterated. In the rejoinder, the

petitioner has specifically pleaded that although the period of composition was from 01.02.1995 i.e. before amendment of the Scheme, but the composition order itself was made on 05.04.1995 when the amended composition scheme was in vogue, it was desirable from the competent authority to pass composition order in terms of the amendment notification dt. 23.02.1995. In alternative, the petitioner has also pleaded that the period anterior to the amendment notification i.e. 01.02.1995 to 23.02.1995 can be occupied by the old composition scheme but from 23rd February onwards the department as well as Cinema Hall were obliged to apply and adhere to the amendment in the Scheme for the period starting from April to March (financial year). With these submissions, the petitioner has urged with full emphasis that the respondents ought to have applied the said amendment in Scheme w.e.f. 23.02.1995 itself.

4. Highlighting the basic principles of natural justice, the petitioner has averred with full emphasis in the rejoinder that, while passing the order of rejection of the application for rectification of mistake, the principles of natural justice were flagrantly violated by the respondents.

5. Learned counsel for the petitioner Mr. Vinay Kothari has strenuously argued that the Scheme for composition of entertainment tax which was notified on 08.07.1982 for which the petitioner submitted option w.e.f. 01.02.1995 was amended vide notification dt. 23.02.1995 to petitioner-assessee's advantage but while passing the composition order the respondents have ordered composition for entertainment tax vis-?-vis the petitioner in accordance with old unamended scheme without any rhyme and reason. Mr. Kothari would contend that a benefit which has accrued to the assessee as a consequence of amendment in the scheme cannot be denied to him merely because when he opted for composition of entertainment tax the Scheme in vogue was an old unamended scheme, Mr. Kothari submits that the Scheme for composition of entertainment tax is floated by the State Government in exercise of powers under Sec. 6(3)(a) of the Act of 1957 which is optional in character and therefore an incumbent opting for the scheme is well within his rights to be governed by the scheme which is in vogue. Learned counsel submits that the scheme, which was originally mooted by the State Government in the year 1982 has provided some relaxation for an optee for the composition scheme w.e.f. 23.02.1995 then depriving the petitioner from the advantage of this amendment by the respondents is per-se arbitrary, unreasonable, discriminatory and in clear negation of the intent of the scheme itself. Invoking the principles of statutory interpretation, for this proposition, learned counsel has urged that in relation to taxing statutes legislative intent is required to be gathered on the basis of express language of the statute and something which is not clearly expressed by the statute even the Court have no authority to impute to the legislature an intention which is not clearly expressed in the language of the statute. Learned counsel, in this behalf has placed reliance on the judgment of Hon''ble Apex Court in case of The Federation of Andhra Pradesh Chambers of Commerce and Industry and Others Vs. State of Andhra Pradesh and Others Etc. Etc., . In this verdict, speaking for the Court, Justice

Bharucha, while construing Section 3 of the A.P. Non-agricultural Lands Assessment Act 1963, has held as under:

6. Section 3 of the said Act speaks of "land is used for any industrial purpose", "land is used for any commercial purpose" and "land is used for any other non-agricultural purpose". The emphasis is on the words "is used". For the purposes of levy of assessment on non-agricultural lands at the rate specified in the Schedule for land used for industrial purposes, therefore, there has to be a finding as a fact that the land is in fact in presenti in use for an industrial purpose. The same would apply to a commercial purpose or any other non-agricultural purpose.

7. It is trite law that a taxing statute has to be strictly construed and nothing can be read into it. In the classic passage from *Cape Brandy Syndicate* which was noticed in the judgment under appeal, it was said:

In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can look fairly at the language used.

This view has been reiterated by this Court time and again. Thus, in *State of Bombay vs. Automobile and Agricultural Industries Corporation*, this Court said:

But the Courts in interpreting a taxing statute will not be justified in adding words thereto so as to make out some presumed object of the Legislature... If the Legislature has failed to clarify its meaning by the use of appropriate language, the benefit thereof must go to the taxpayer. It is settled law that in case of doubt, that interpretation of a taxing statute which is beneficial to the taxpayer must be adopted.

8. On behalf of the respondents State, learned counsel drew our attention to the judgment of this Court in *CED vs. Kantilal Trikamlal*. That judgment also is to the same effect and does not avail the respondents. It said: (SCC p. 650, para. 8)

The sweep of the Sections which will be presently set out must, therefore, be informed by the language actually used by the Legislature. Of course, if the words cannot apply to any recondite species of property, Courts cannot supply new logos or invent unnatural sense to words to fulfill the unexpressed and unsatisfied wishes of the Legislature.

9. We are in no doubt whatever, therefore, that it is only land which is actually in use for an industrial purpose as defined in the said Act that can be assessed to non-agricultural assessment at the rate specified for land used for industrial purposes. The wider meaning given to the word "used" in the judgment under challenge is untenable. Having regard to the fact that the said Act is a taxing statute, no Court is justified in imputing to the legislature an intention that it has not clearly expressed in the language it has employed.

6. Mr. Kothari has also urged that the endeavor made by the petitioner for rectification of mistake in the composition order has not been decided in accordance with law and therefore the impugned orders Annex. 8 & 18 cannot be sustained. Assailing both these orders, Mr. Kothari has argued that while passing these orders, the petitioner has been denied opportunity of being heard and therefore these orders are in gross violation of principles of natural justice. Inviting attention of the Court towards power conferred on the competent authority under Rule 32 of the Rules of 1957, learned counsel submits that the authority can rectify the mistake which is apparent on the face of record and the jurisdiction therefore is not akin to that of correcting clerical mistake only. Submission of Mr. Kothari is that rectification sought for was for the mistake which was apparent on the face of record and therefore it was expected of the competent authority to have examined the same objectively. Mr. Kothari further submits that denial of reasonable opportunity of hearing by the authority to the petitioner has prejudiced the cause of the petitioner assessee. Learned counsel submits that the order rejecting the request of the petitioner for rectification of mistake has visited it with evil and civil consequences and therefore it was necessary for the competent authority to have adhered to principles of natural justice while passing adverse order against the petitioner. In support of his contentions, learned counsel for the petitioner has placed reliance on the following judgments:

1. Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, .
2. Babloo Pasi Vs. State of Jharkhand and Another, .
3. Union of India (UOI) and Another Vs. P.N. Natarajan and Others, .
4. Mahipal Singh Tomar Vs. State of Uttar Pradesh and Others, .

7. In Maneka Gandhi's case (supra), the seven Judges Bench of Hon'ble Apex Court, while examining the principles of natural justice, in the matter of impounding of passport of an individual, has held as under in Para. 9 and 10 of the verdict:

9. We may commence the discussion of this question with a few general observations to emphasise the increasing importance of natural justice in the field of Administrative law. Natural justice is a great humanising principle intended to invest law with fairness and to secure justice and over the years it has grown into a widely pervasive rule affecting large areas of administrative action. Lord Morris of Borth-y-Gest spoke of this rule in eloquent terms in his address before the Bentham Club:

We can, I think, take pride in what has been done in recent periods and particularly in the field of administrative law by invoking and by applying these principles which we broadly classify under the designation of natural justice. Many testing problems as to their application yet re-remain to be solved. But I affirm that the area of administrative action is but one area in which the

principles are to be deployed. Nor are they to be invoked only when procedural failures are shown. Does natural justice qualify to be described as a "majestic" conception? I believe it does. Is it just a rhetorical but vague phrase which can be employed, when needed, to give a gloss of assurance? I believe that it is very much more. If it can be summarised as being fair-play in action - who could wish that it would ever be out of action? It denotes that the law is not only to be guided by reason and by logic but that its purpose will not be fulfilled; it lacks more exalted inspiration.

And then again, in his speech in the House of Lords in *Wiseman vs. Borneman* the learned Law Lord said in words of inspired felicity:

... that the conception of natural justice should at all stages guide those who discharge judicial functions is not merely an acceptable but is an essential part of the philosophy of the law. We often speak of the rules of natural justice. But there is nothing rigid or mechanical about them. What they comprehend has been analysed and described in many authorities. But any analysis must bring into relief rather their spirit and their inspiration than any precision of definition or precision as to application. We do not search for prescriptions which will lay down exactly what must, in various divergent situations, be done. The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only "fair play in action". Nor do we wait for directions from Parliament. The common law has abundant riches: there may we find what Byles, J., called "the justice of the common law".

Thus, the soul of natural justice is "fairplay in action" and that is why it has received the widest recognition throughout the democratic world. In the United States, the right to an Administrative hearing is regarded as essential requirement of fundamental fairness. And in England too it has been held that "fair-play in action" demands that before any prejudicial or adverse action is taken against a person, he must be given an opportunity to be heard. The rule was stated by Lord Denning, MR in these terms in *Schmidt vs. Secretary of State for Home Affairs* - "where a public officer has power to deprive a person of his liberty or his property, the general principle is that it has not to be done without his being given an opportunity of being heard and of making representations on his own behalf". The same rule also prevails in other Commonwealth countries like Canada, Australia and New Zealand. It has even gained access to the United Nations (vide *American Journal of International Law*, Vol. 67, p. 479). Magarry, J., describes natural justice "as a distillate of due process of law" (vide *Fontaine vs. Chastarton*). It is the quintessence of the process of justice inspired and guided by "fairplay in action". If we look at the speeches of the various Law Lords in *Wiseman* case it will be seen that each one of them asked the question "whether in the particular circumstances of the case, the Tribunal acted unfairly so that it could be said that their procedure did not match with what justice demanded", or, was the procedure adopted by the Tribunal "in all the

circumstances unfair?" The test adopted by every Law Lord was whether the procedure followed was fair in all the circumstances and "fair-play in action" required that an opportunity should be given to the taxpayer "to see and reply to the counter-statement of the Commissioners" before reaching the conclusion that "there is a prima facie case against him". The inquiry must, therefore, always be: does fairness in action demand that an opportunity to be heard should be given to the person affected?

10. Now, if this be the test of applicability of the doctrine of natural justice, there can be no distinction between a quasi-judicial function and an administrative function for this purpose. The aim of both administrative inquiry as well as quasi-judicial inquiry is to arrive at a just decision and if a rule of natural justice is calculated to secure justice, or to put it negatively, to prevent miscarriage of justice, it is difficult to see why it should be applicable to quasi-judicial inquiry and not to administrative inquiry. It must logically apply to both. On what principle can distinction be made between one and the other? Can it be said that the requirement of "fair-play in action" is any the less in an Administrative inquiry than in a quasi-judicial one? Sometimes an unjust decision in an administrative inquiry may have far more serious consequences than a decision in a quasi-judicial inquiry and hence the rules of natural justice must apply equally in an administrative inquiry which entails civil consequences. There was, however, a time in the early stages of the development of the doctrine of natural justice when the view prevailed that the rules of natural justice have application only to a quasi-judicial proceeding as distinguished from an Administrative proceeding and the distinguishing feature of a quasi-judicial proceeding is that the authority concerned is required by the law under which it is functioning to act judicially. This requirement of a duty to act judicially in order to invest the function with a quasi-judicial character was spelt out from the following observation of Atkin, L.J. in *Rex vs. Electricity Commissioners*, "wherever anybody of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King Bench Division...". Lord Hewart, C.J., in *Rex vs. Legislative Committee of the Church Assembly* read this observation to mean that the duty to act judicially should be an additional requirement existing independently of the "authority to determine questions affecting the rights of subjects"-something super-added to it. This gloss placed by Lord Hewart, C.J., on the dictum of Lord Atkin, L.J., bedeviled the law for a considerable time and stultified the growth of the doctrine of natural justice. The Court was constrained in every case that came before it, to make a search for the duty to act judicially sometimes from tenuous material and sometimes in the services of the statute and this led to over subtlety and over refinement resulting in confusion and uncertainty in the law. But this was plainly contrary to the earlier authorities and in the epoch-making decision of the House of Lords in *Ridge vs. Baldwin* which marks a turning point in the history of the development of the doctrine of natural justice, Lord Reid pointed out how the

gloss of Lord Hewart, C.J., was based on a misunderstanding of the observations of Atkin, L.J., and it went counter to the law laid down in the earlier decisions of the Court. Lord Reid observed: "If Lord Hewart meant that it is never enough that a body has a duty to determine what the rights of an individual should be, but that there must always be something more to impose on it a duty to act judicially, then that appears to me impossible to reconcile with the earlier authorities". The learned Law Lord held that the duty to act judicially may arise from the very nature of the function intended to be performed and it need not be shown to be super-added. This decision broadened the area of application of the rules of natural justice and to borrow the words of Prof. Clark in his article on "Natural Justice, Substance and Shadow" in Public Law Journal, 1975, restored light to an area "benighted by the narrow conceptualism of the previous decade". This development in the law had its parallel in India in the Associated Cement Companies Ltd. vs. P.N. Sharma where this Court approvingly referred to the decision in Ridge vs. Baldwin and, later in State of Orissa vs. Dr. Binapani Dei observed that: "If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power". This Court also pointed out in A.K. Kraipak vs. Union of India Another historic decision in this branch of the law, that in recent years the concept of quasi-judicial power has been undergoing radical change and said:

The dividing line between an Administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. For determining whether a power is an Administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised.

The net effect of these and other decisions was that the duty to act judicially need not be super-added, but it may be spelt out from the nature of the power conferred, the manner of exercising it and its impact on the rights of the person affected and where it is found to exist, the rules of natural justice would be attracted.

8. In Babloo Pasi's case (supra), Hon'ble Apex Court while examining Sections 49 and 53 of the Juvenile Justice (Care & Protection of Children) Act 2000, held that conclusion of the Juvenile Board that accused is above 18 years of age, without notice to the accused is violative of principles of natural justice. The Court made following observations in Para. 23 & 24:

23. Therefore, on facts at hand, in the absence of evidence to show on what material the entry in the Voters List in the name of the accused was made, a mere production of a copy of the Voters List, though a public document, in terms of Section 35, was not sufficient to prove the age of the accused. Similarly, though a reference to the report of the Medical Board, showing the age of the accused as 17-18 years, has been made but there is no indication in the order

whether the Board had summoned any of the members of the Medical Board and recorded their statement. It also appears that the physical appearance of the accused, has weighed with the Board in coming to the afore-noted conclusion, which again may not be a decisive factor to determine the age of a delinquent. Insofar as the High Court is concerned, there is no indication in its order as to in what manner Rule 22(5)(iv) has been ignored by the Board. The learned Judge seems also to have accepted the opinion of the Medical Board in terms of the said Rule as conclusive. Therefore, the afore-stated ground on which the High Court has set aside the opinion of the Board and holding the accused to be a juvenile, cannot be sustained.

24. In our judgment, apart from the fact that the impugned order suffers from the basic infirmity of being violative of the principles of natural justice, it cannot be sustained on merits as well. At the same time, we are also convinced that the order of the Board falls short of a proper enquiry as envisaged in Section 49 of the Act.

9. On the other hand, Mr. D.K. Godara, learned counsel for the respondent Revenue has argued that option submitted by the petitioner for composition scheme w.e.f. 01.02.1995 was pending before the authority and in the interregnum amendment was carried out in the composition scheme vide Notification dt. 23.02.1995 and therefore the learned Deputy Commissioner while passing the order dt. 05.04.1995 for composition of entertainment tax qua the petitioner for the period from 01.02.1995 to 31.01.1996 has rightly pressed into service unamended scheme. Mr. Godara would contend that the petitioner has volunteered to be governed by the unamended scheme w.e.f. 01.02.1995 and therefore the subsequent amendment w.e.f. 23.02.1995 cannot be applied qua it and as such the competent authority has not committed any error much less an error apparent on the face of record warranting interference by this Court. Learned counsel Mr. Godara has argued that the application for rectification of alleged mistake submitted by the petitioner in accordance with amending Notification which envisage increase of only 10% over the average collection of past three years is against the increase of 25% applied in the present case in accordance with the old scheme was decided after issuing show cause notice to the petitioner containing appropriate reasons. With these submissions, Mr. Godara has argued that the contention of the petitioner about violation of principles of natural justice vis-?-vis order dt. 28.08.1997 is not at all tenable. Learned counsel for the Revenue has also urged that virtually the petition has gone infructuous because now the controversy regarding validity of Section 9-A of the Act of 1957 is no more res-integra and therefore nothing survives for adjudication in the writ petition. Mr. Godara has submitted that the petitioner has misled this Court that by stating that it has not been communicated the order passed by the competent authority while rejecting prayer for rectification of mistake. Mr. Godara has submitted that the order was communicated to the petitioner and the same was passed after issuing proper notice to the petitioner which is evident from the averments contained in Para. 10 of the writ petition.

With these submissions, learned counsel has urged that the order is just and proper and in consonance with Rule 32 of the Rules of 1957 warranting no interference. Learned counsel for the Revenue, while resisting the claim of the petitioner for refund of the amount of tax collected, has urged that if the amount is refunded then it would be a clear case of unjust enrichment inasmuch as the petitioner has already collected tax from ultimate consumers. Defending the action of the Revenue in retaining the amount, Mr. Godara has submitted that the State Government can make use of the money for public welfare and contrary to it if the money is refunded back to the petitioner it will enrich the coffers of assessee in an unjust manner which is contrary to law. Lastly, the learned counsel for Revenue has argued that the petitioner has opted for unamended composition scheme and never applied for amended composition scheme and has even collected tax from the consumers under the old unamended composition scheme, its claim for refund is de hors the doctrine of unjust enrichment. For substantiating his contention about unjust enrichment, learned counsel for the Revenue has placed reliance on an Authoritative pronouncement of nine Judges Bench of the Hon"ble Apex Court in case of Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, . Speaking for the majority, Justice Jeevan Reddy vis-?-vis a claim for refund of tax/duty, held in sub-Para. (iii) & (iv) of Para. 108 as under:

(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.

10. I have heard the learned counsel for the parties and perused the materials available on record.

11. Upon perusal of the materials available on record in the light of submissions made by the learned counsels for the parties at Bar, it has become imperative for this Court to examine the true purport of the composition scheme of entertainment tax. The original scheme which was floated by the State on 08.07.1982 contains following recitals in Para. 4 under the caption "Money Amount of Composition".

4. MONEY AMOUNT OF COMPOSITION

The amount of money for which tax payable shall be compounded for the first year shall be at least 25% more in the case of towns with population upto 1 lac and in the case of other Cinemas in towns having higher population it shall be at least 15% more than the amount of tax admitted for assessed for the previous year as may be determined by the compounding authority for the purpose of composition. For the subsequent year or part thereof, the increase shall not be less than 10% thereof.

12. The aforesaid scheme remained in vogue with the same terms till 1995. However, by a Notification dt. 14.03.1995 Para. 4 of the Scheme was amended w.e.f. 23.02.1995 and composition of entertainment tax for the first year was reduced from 25% to 10% Para. 1 of the Notification dt. 14.03.1995 showing aforesaid amendment is reproduced as under:

13. In the background of the amendment in the Scheme for composition of entertainment tax, admittedly, the petitioner has opted for the same w.e.f. 01.02.1995 and the Amendment was brought in within a span of 22 days, there appears to be no justifiable reason to deprive the petitioner assessee from

benefit of the amended scheme which came into effect w.e.f. 23.02.1995. On the face of it, the contention of the revenue that the petitioner has opted for the Scheme from 01.02.1995, his case would be governed by the old unamended scheme is per-se not satisfying the test of interpretation of a taxing statute. If this interpretation of the Revenue is to be accepted, the same is bound to occur dichotomy inasmuch as the incumbent opted for composition scheme after 23.02.1995 would be governed by the said Scheme whereas the petitioner or other incumbents who had opted under the old scheme would continue to be governed by the old unamended scheme. This sort of variance in composition of entertainment tax appears to be quite unreasonable and the same is also not satisfying the intent of the amendment in the scheme and the true purport of Section 6(3)(a) of the Act of 1987. Therefore, the contention of revenue in this behalf cannot be accepted.

14. The crucial question which has emerged for judicial scrutiny is the impugned order whereby prayer of the petitioner for rectification of mistake was declined. The petitioner has precisely assailed the same on the anvil that it is violative of principles of natural justice. I have considered the legal precedents relied upon by the learned counsel for the petitioner in the backdrop of facts of the instant case.

15. Well it is true that Rule 32 of the Act of 1957 has not laid down the prescribed procedure for dealing the application for rectification of mistake and sub-Rule (3) simply envisage giving notice to the proprietor in the event of enhancing an assessment order, reducing a refund or otherwise increasing the liability of the proprietor. However, on properly construing the amended scheme which was in vogue after 23.02.1995, specially qua the petitioner for composition of entertainment tax in terms of unamended Scheme of 08.07.1982 make it amply clear that it has jettisoned the right of the petitioner i.e. eventual aversion to its valuable right for being governed by the Amended Scheme for composition of entertainment tax. Therefore, requisite order on application for rectification of mistake ought to have satisfied the requirement of audi alteram partem. In absence of adherence of principles of natural justice, the order which has visited petitioner with evil and civil consequences is per-se vulnerable and cannot be approved.

16. Now adverting to the issue relating to refund of the amount of composition of entertainment tax allegedly paid by the petitioner-assessee in excess, the same requires consideration on the touchstone of doctrine of unjust enrichment.

17. In Mafatlal's case (supra) on which the Revenue has placed reliance, the Apex Court has held in sub-Para. (i) of Para. 108 that refund can be claimed by the assessee under certain contingencies, the same reads as under:

(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 Art. 226 - and of this Court under Art. 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 Art. 226 has to be exercised to effectuate the rule of law and not for abrogating it.

The said enactments including Section 11B 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 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 emphasize 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.

18. The power to claim refund is circumscribed on the strength of doctrine of unjust enrichment. From the facts pleaded by the rival parties and the materials placed on record, it is not at all clear as to whether the petitioner has collected the tax in terms of unamended scheme for composition of entertainment tax or as per the amended provision which came into force from 23.02.1995. The reply of the revenue in this behalf is also conspicuously silent and unspecific. During the course of arguments, this contention has been canvassed with full emphasis but there is no cogent evidence available on record from either side to decide this factual aspect of the matter. If the petitioner has realized tax in terms of old unamended scheme, then obviously the doctrine of unjust enrichment would come into play and if the situation is otherwise, there may be some justification for the claim of refund of the petitioner. After thrashing out the matter in its

entirety, in the backdrop of facts and circumstances of the instant case and the position of law emerged out from various authoritative pronouncements of the Hon"ble Apex Court, in my view, the matter requires re-examination by the competent authority in strict adherence of principles of natural justice so that the matter can be thrashed out in its entirety. Thus, viewed from any angle, the impugned orders (Annexs. 8 & 18) cannot be sustained and are hereby annulled and the matter is remitted back to Deputy Commissioner, Commercial Taxes, Bikaner for deciding application of the petitioner for rectification of mistake submitted under Rule 32 of the Rules of 1957 afresh.

19. The upshot of the above discussion is that this writ petition is allowed, the matter is remitted back to Deputy Commissioner (Admn.) Commercial Taxes, Bikaner, for examining the application of the petitioner under Rule 32 of the Rules of 1957 de novo and deciding the same in accordance with law while adhering to principles of natural justice. The matter is pending since long, therefore, it is expected from the concerned authority to decide the same as expeditiously as possible preferably within a period of two months from the date of production of certified copy of this order.