

(1987) 04 CAL CK 0013

In the Calcutta High Court

Case No : Appeal No. 69 of 1985 in Matter No. 1035 of 1984

Assistant Collector of Central Excise and Others

APPELLANT

Vs

Madura Coats Ltd.

RESPONDENT

Date of Decision : 29-04-1987

Acts Referred:

Central Excise Rules, 1944 — Rule 11, 9(2)

Central Excises and Salt Act, 1944 — Section 14A, 23A

Constitution of India, 1950 — Article 136, 14, 226, 227

Citation : (1988) 15 ECC 287 : (1988) 17 ECR 440 : (1989) 33 ELT 29

Hon'ble Judges : Satya Brata Mitra, J; Bimal Chandra Basak, J

Bench : Division Bench

Judgement

Bimal Chandra Basak, J.—This appeal by the Assistant Collector of Central Excise and Union of India is directed against a judgment and order dated 3rd December, 1984 passed by a learned Single Judge in an application under Article 226 of the Constitution of India.

FACTS

2. The facts of this case lie in a short compass. The writ petitioner at all relevant time carried on the business of the manufacture, inter alia, of cotton and blended yarns at factories at Madurai and Serampore. Apart from the manufacture of yarn, the writ petitioner was required by some of its customers, such as Dunlop India Ltd., to arrange nylon and rayon yarn supplied by the petitioner. It is stated that such arrangement of rayon or nylon cords was called a Tyrecord Warpsheet. It was the contention of the .petitioner that no manufacturing process is involved in making warpsheets and no new commodity known to commerce or industry came into being when yarn was arranged or assembled to form a warpsheet. Further, according to the petitioner, nylon and rayon yarn are liable to a duty of Central Excise under the Central Excises and Salt Act, 1944 (hereinafter referred to as the said Act). According to the petitioner, warpsheets being yarn and not any other commodity were not further excisable. Despite the aforesaid

contention the excise authorities in West Bengal demanded Excise duty on such warpsheet on the ground that a nylon or rayon tyre record warpsheet was a separate item of manufacture and liable to Central Excise under Item No. 68 of the First Schedule to the said Act. There is no dispute that for this period the petitioner paid ad valorem duty amounting to Rs. 1,05,114.94. Between 10th March, 1975 and 28th June, 1976 the petitioner paid duty amounting to Rs. 52,132.67 P. Further, the admitted position is that all the duty paid as aforesaid was paid under protest. Under these circumstances, on the 31st May, 1976 the petitioner moved this Court under the provisions of Article 226 of the Constitution of India against the same. A rule was issued and it was numbered C.R. No. 7883 (W) of 1976 wherein under the interim order made, the petitioner deposited the amount of duty claimed by the excise authorities in an account with the State Bank of India. The said Rule was made absolute by G.N. Roy; J. by an order dated 1st September, 1978. [1980 ELT 582 (Cal.)] It was held that no duty of excise was to be levied on tyre record warpsheets. The appellant preferred an appeal before a Division Bench of this Court against the said judgment (Appeal No. A.O. No. 275 of 1979). This was ultimately dismissed by a judgment and order dated 28th February, 1980. The SLP under Article 136 of the Constitution of India preferred by the Excise authorities was dismissed by a judgment and order dated 11th April, 1983.

The petitioners applied for refund of the said duty being a total sum of Rs. 1,57,251.96 P. which was refused by the Excise authorities. On such refusal being made, this writ petition was filed for directing refund to the petitioner of the said sum of Rs. 1,57,251.95 P. forthwith with interest on the said sum at the appropriate bank rate with effect from 1st September, 1979. In the said writ petition an affidavit-in-opposition was affirmed. It is not necessary to refer to the same in details. It was inter alia contended that the petitioner already realised the said amount from its customers and should not be permitted to enrich itself unjustly at the cost of the public exchequer. In reply to the same, the petitioner took the stand that the petitioner will in the cases where the refundable Excise duty had been paid by the petitioner's customers, return the same to such customers. It was stated that such customers are few in number and the petitioner had complete records of Excise duty paid by such customers.

3. By a judgment and order dated 3rd December, 1984 the said writ petition was allowed and the respondent No. 3 was directed to refund the said sum of Rs. 1,57,251.95 P. and the matter was disposed of accordingly. Being aggrieved by the same, Union of India and the Assistant Collector of Central Excise have preferred this appeal.

ARGUMENTS :- On behalf of the Appellants :

4. The only substantial contention raised in support of this appeal is that though, generally, having regard to the fact that such collection of duty was found to be illegal, such amount is to be refunded, but having regard to the fact that the said petitioner not having borne the burden of the same but distributed it to its

customers, no such return should be directed because that would amount to unjust enrichment by the writ petitioner. In support of this contention the following decision was relied on State of Madhya Pradesh Vs. Vyankatlal and Another, . It was submitted that, in any event, the Court shall not be inclined to direct such refund to the petitioners but that such refund should be directed in favour of the persons who had ultimately borne the burden. It was also sought to be contended in support of the Appeal that the claim of the petitioner is barred by delay and laches. The payment was made long time back between 24th March, 1975 and 28th Dune, 1976, whereas this writ petition was moved in August, 1984.

ARGUMENTS :- On behalf of the Respondents :

5. Mr. Ginwalla appearing for the respondents at first referred to the decision of the Supreme Court in the case of Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others, where certain directions were given for similar ground of "enrichment". On the question of delay he has referred to the facts of the case. Afterwards Mr. Ginwalla submitted that in the case of Excise duty, the principle of "unjust enrichment" by the petitioner did not apply. He has submitted that it is a question of "integrated price" and no Excise duty was charged separately. Accordingly the question of passing the burden to any one also does not arise. Next he has submitted that such Excise duty was realised by the petitioner only in some cases and not all. In support of his contention Mr. Ginwalla has relied on the following decisions. Khardah Co. Ltd. v. Union of India - 1983 ELT 2159 which is a Division Bench judgment of this Court; Union Carbide Co. Ltd. v. Assistant Collector of Central Excise and Customs 1978 ELT180 which is a Single Bench judgment of this Court. He has relied on paragraph 33 of this judgment. He had also relied on I.T.C. Ltd. v. M.K. Chilkar and Ors - 1985 (2) ELT 334. He has relied on paragraph 58 of this judgment.

DECISION :

6. Before dealing with merits of the respective contention raised before us, we shall refer to the decisions cited before us. At first we shall deal with the decision cited on behalf of the appellants. In the case of State of Madhya Pradesh Vs. Vyankatlal and Another, the facts were as follows. The respondents before the Supreme Court were the owners of Jaora Sugar Mills situated at Jaora in the earlier State of Madhya Bharat. The erstwhile State of Jaora merged in the State of Madhya Bharat. After the merger the Madhya Bharat Essential Supplies (Temporary Powers) Act, 1948 came into force. By a Notification No. 5163/XXX/(49), dated 5th September, 1949 the Madhya Bharat Government in exercise of the powers vested under the said Act included "Sugar" in the list of articles as an essential commodity. By another Notification No. 5166/XXX/(49), dated the 5th September, 1949 the Madhya Bharat Government delegated its powers to issue orders under the said Act in favour of the Director, Civil Supplies, Madhya Bharat. In exercise of the powers conferred on him under the Madhya Bharat Sugar Control Order, 1949 the Director of Civil Supplies issued a Notification No. 7 C.S.

15/50, dated the 14th January, 1950 fixing ex-factory prices for different sugar factories. Under the said notification all sugar factories in Madhya Bharat were to supply and despatch sugar of Grade E-27 at Rs. 32.40 per annum F.O.R. destination. The supply price was a little higher than the ex-factory price. The difference between the supply price and the ex-factory price was to be credited to Madhya Bharat Government Sugar Fund. The appellant made several demands on the respondents, the proprietors of the Jaora Sugar Mills, to credit such difference in the account of Madhya Bharat Government Sugar Fund and the respondents ultimately deposited Rs. 50,000/- under protest. On the 10th September, 1953 the respondents instituted a suit in the Court of Fifth Additional District Judge, Indore against the erstwhile State of Madhya Bharat for the refund of the sum of Rs. 50,000/- which the respondents had deposited towards Sugar Fund and Rs. 10,000/- towards interest at the rate of the aforesaid sum of Rs. 50,000/-. The suit continued against the newly formed State of Madhya Pradesh as provided by law. The Trial Court decided all the issues against the plaintiffs and consequently dismissed the suit. On appeal by the plaintiffs, the High Court set aside the judgment and decree of the Trial Court and decreed the suit for refund of Rs. 50,000/- deposited by the plaintiffs under protest and Rs. 10,000/- as interest thereon calculated at the rate of 6 percent from the date of suit till realisation. Feeling aggrieved by the same the State came up in appeal before the Supreme Court. It vainly tried to support its stand that the recovery of Rs. 50,000/- from the respondents was perfectly lawful and proper and there was no discrimination as contemplated by Article 14 of the Constitution of India. On the question of refund of the amount to the plaintiffs-respondents reliance was placed on *The Orient Paper Mills Ltd. Vs. The State of Orissa and Others*, . In *Orient Paper Mills* case the Supreme Court held that u/s 14A of the Act incorporated by the Orissa Sales Tax (Amendment) Act, 1958 refund of tax which the dealer was not liable to pay, could be claimed by the person from whom the dealer has actually realised it whether as Sales Tax or otherwise and not by the dealer. By the said amended Act it was provided that refund could be claimed only by the person from whom the dealer had realised the amount by way of Sales Tax or otherwise. The Supreme Court then referred to the case of *Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others*, . We shall deal with the same in detail later. Next case referred to by the Supreme Court was the case of *Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf*, , where the levy of Sales Tax on forward transactions was held to be ultra vires. There after the respondents applied for a fund of the amounts paid by a petition under Article 226 of the Constitution of India.

7. The next case referred to by Supreme Court was *Amar Nath Om Prakash and Others Vs. State of Punjab and Others*, and the Supreme Court relied on the following passage :-

"We do not see how a mere declaration that the levy and collection of fee in excess of Rs. 2/- per hundred would automatically vest in the dealer the right to get at the excess amount when in fact he did not bear the burden of it and when

the moral and equitable owner of it was the consumer public to whom the burden had been passed on.

The primary purpose of Section 23A is seen on the fact of it; it prevents the refund of license fee by the market committee to dealers, who have already passed on the burden of such fee to the next purchaser of the agricultural produce and who want to unjustly enrich themselves by obtaining the refund from the market committee. Section 23A in truth, recognises the consumer-public who have borne the ultimate burden as the persons who have really paid the amount and so entitled to refund of any excess fee collected and therefore directs the market committee representing their interests to retain the amount. It has to be in this form because it would, in practice be a difficult and futile exercise to attempt to trace the individual purchasers and consumers who ultimately bore the burden. It is really a law returning to the public what it has taken from the public, by enabling the committee to utilise the amount for the performance of services required of it under the Act. Instead of allowing middlemen to profiteer by ill-gotten gains, the legislature has devised a procedure to undo the wrong that has been done by the excessive levy by allowing to committees to retain the amount to be utilised hereinafter for the benefit of the very persons for whose benefit the marketing legislation was enacted." [para 13]

8. Under these circumstances the Supreme Court held as follows :-

"The principles laid down in the aforesaid cases were based on the specific provisions in those acts but the same principles can safely be applied to the facts of the present case inasmuch as in the present case also the respondents had not to pay the amount from their coffers. The burden of paying the amount in question was transferred by the respondents to the purchasers and, therefore, they were not entitled to get a refund. Only the persons on whom lay the ultimate burden to pay the amount would be entitled to get a refund of the same. -The amount deposited towards the Fund was to be utilised for the development of sugarcane. If it is not possible to identify the persons on whom had the burden been placed for repayment towards the Fund, the amount of the Fund can be utilised by the Government for the purpose for which the Fund was created, namely, development of sugarcane. There is no question of refunding the amount to the respondents who had not eventually paid the amount towards the Fund. Doing so would virtually amount to allow the respondents unjust enrichment." [para 14]

9. In the case of Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others, the writ petitioners (the appellants) had paid market fees at the increased rate of 3 per cent raised from the original - 2 per cent under Haryana Act, 22 of 1977. Many dealers challenged the levies as unconstitutional and the Supreme Court in a series of appeals, namely, C.A. No. 1083 of 1977 etc. Kewal Krishan Puri and Others Vs. State of Punjab and Another, , ruled that the excess of 1 per cent over the original rate of 2 per cent was ultra vires. It was held that

this cast a consequential liability on the market committed to refund the illegal portion. The petitioners who had, under mistake, paid larger sums which, after the decision of the Supreme Court holding the levy illegal have become refundable, demanded a direction to that effect to the market committees concerned. The Supreme Court held that where public bodies under colour of public laws recovered people's money later discovered to be erroneous levies, the Dharma of the situation admits of no equivocation. There is no law of limitation especially for public bodies, on the virtue of returning what was wrongly recovered to whom it belongs. The Supreme Court further held that it was not palatable to our jurisprudence to turn down the* prayer for high prerogative writs, on the negative plea of "alternative remedy" since the root principle of law married to justice is ubi jus ibi remedium. However the Supreme Court pointed out as follows :-

"Another point. In our jurisdiction, social justice is a pervasive presence; and so, save in special situations it is fair to be guided by the strategy of equity by asking those who claim the service of the judicial process to embrace the basic rule of distributive justice, while moulding the relief by consenting to restore little sums, taken in little transactions, from little persons, to whom they belong."

10. It was further pointed out by the Supreme Court that the procedure adopted in the -Nawabganj Sugar Mills case might usually be adopted to the case before the Supreme Court. It was observed that Article 226 grants an extra ordinary remedy which is essentially discretionary, although founded on legal injury. It was held that it. was perfectly open for the Court exercising this flexible power to pass such order such as public interest dictates and equity projects. Accordingly the following directions were given :-

"I. Subject to the directions given below, all the sums collected by the various market committees who are respondents in these various writ petitions or appeals shall be liable to be paid into the High Court of Punjab and Haryana within one week of intimation by the Registrar of the amount so liable to be paid into the Court.

II. A statement of the amounts collected in excess (1%) shall be put into this Court by" the dealers with copies to the various market committees aforesaid and furnished to the writ petitioner and appellants within 10 days from today and if there is any difference between the parties it shall be brought to the notice of this Court in the shape of miscellaneous petitions. On final orders, if any passed thereon by this Court, those amounts, as to determined, shall be treated as final.

III. The Registrar of the High Court shall issue public notice and otherwise given due publicity to the fact that dealer who have not passed on the liabilities to others and others who have contributed to or paid the excess one per cent covered by these writ petitions and appeals may make claims for such sums as are due to them from him within one months or such other period as he may fix. The Registrar shall scrutinise such claims and ascertain the sums so proved. He

will thereupon demand of all the market committees concerned payment into the Registry of such sums in regard to which proof of claims have been made. On such intimation, the market committees shall pay into the Registry the amounts so demanded by the Registrar within one week of such intimation. The amount shall be paid together with interest at 10 per cent per annum from today upto the date of deposit with the Registrar.

IV. It shall be open to the Registrar to make such periodical claims on appropriate proof by claimants on the line stated above.

V.

VI. If any further directions regarding the mechanics of the claim of refund or otherwise are found necessary from this Court, the High Court will report about such matter to this Court and orders made thereon will bind the parties.

VII. If parties eligible for repayment of amounts do not claim within one year from today the Registrar will not entertain any further claims. It will be open to such parties to pursue their remedies for recovery for any sums that may be due to them.

VIII. Each State Marketing Board will deposit within 10 days from today a sum of Rs. 5,000/- before the Registrar for the preliminary expenses of publicity and other incidentals for the implementation of the directions given above. Any unexpended amount, at the end of one year, will be repaid to the respective State Marketing Board.

IX. We further direct that the unclaimed amount's if any, shall be permitted to be used by the respective Marketing Committees for the purposes falling within the statute as interpreted by this Court in C.A. No. 1083/77." [para 6]

11. We shall now deal with the cases cited by Mr. Ginwala appearing on behalf of the respondent. In the case of *Khardah Company Ltd. v. Union of India*, (ibid) it was held by a Division Bench of this Court that excess duty not paid through any inadvertence, error or misconstruction but under compulsion due to the assessing authorities demanding the higher rate of duty pending finalisation of the classification by the Government itself, was liable to refund being unauthorised in law, Rule 11 of the Central Excise Rules not being applicable. On the question of refund it was held that it is settled principle that if the claim of refund of any amount realised without any authority of law is not barred by any specific statutory provision, it is enforceable in law. It was further held that a "claim of refund" could not be rejected on the ground that the party has already recovered the amount from its customers and would result in their unjust enrichment. In this context the Division Bench held as follows :-

"Before we conclude we have to dispose of an incidental objection to the claim of refund realised by Mr. Banerjee. According to Mr. Banerjee the petitioners having passed on the incidence of enhanced assessment of the Excise duty to their customers the refund, if ordered, would only result in unjust enrichment of the

petitioners and hence such an order should not be made. Reliance is placed by Mr. Banerjee on a Bench decision of the Bombay High Court in the case of *Ogale Glass Works Ltd. v. Union of India and Ors* - 1979 E.L.T. (J 468) and a single Bench decision of this Court in the case of *Hindusthan Pilkington Glass Works v. Central Excises* - 1977 (2) C.L.J. 408. It, however, appears that the Bombay High Court in a later Bench decision in the case of *Associated Bearing Co. v. Union of India* - 1980 E.L.T. 415 (Bom) did not share the earlier view when it was expressly held that a claim of refund cannot be rejected on the ground that the company may already have recovered the amount from its customers." [para 21]

"In considering the issue raised by Mr. Banerjee, one must refer to the nature of the liability resulting from the levy and see on whom the liability is fixed. In the case of *Tata Iron and Steel Company Ltd. v. State of Bihar* - AIR 1958 S.C. 452, Supreme Court was considering the validity of imposition of a Sales Tax with retrospective effect. In meeting an argument that such retrospective imposition would deny an opportunity to the assessee to pass on the liability to its purchasers and as such would be inconsistent with the very nature of the levy, it being an indirect tax, the Supreme Court observed: "From the point of view of the economist and as an economic theory Sales Tax may be an indirect tax on the consumers but legally it need not be so.... This also makes it clear that the Sales Tax need not be passed on the purchasers and this fact does not alter the real nature of the tax which by express provision of law is cast upon the sellers". In the case of *Chhotabhai Jethabhai Patel and Co. Vs. The Union of India and Another*, the position in law in the case of excise levy was held to be the same. If the liability imposed is of the assessee alone and if the assessee is liable to pay irrespective of whether he can pass on the liability to his customers, for the very same reason he can demand refund of all unauthorised levy irrespective of whether he had actually borne the burden himself or not, unless the statute provides it otherwise. The answer to the objection raised by M . Banerjee is to be found in the observations of the Supreme Court in the case of *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, relied on by the Bombay High Court in its later decision, which though obiter appear to enunciate the true legal principle which follows from their earlier decisions referred to hereinbefore." [para 22]

"However, it appears to be the consistent view of all Courts that all realisations made by the Government without authority of law must be reimbursed Supreme Court has recognised the position that High Courts exercising their writ jurisdiction have power for the purpose of enforcement of fundamental as well as statutory rights to give consequential relief by ordering repayment of money so realised without any authority of law; though at the same time it has been made clear that the special remedy under Article 226 is not intended to supersede completely the other normal remedies or to deny defences legitimately open in such an action. In the present case it should be noted that the petitioners had moved the authorities under the statute for the refund and the order refusing such a prayer as made by those authorities have been challenged under Article

227 and alternatively under Article 226 of the Constitution. No order for refund having been sought for from this Court in exercise of its writ jurisdiction, there is also no scope for an objection as raised by Mr. Banerjee. Hence, the objection raised by Mr. Banerjee is overruled." [para 23]

12. In respect of Union Carbide Co. Ltd. v. Assistant Collector of Central Excise and Ors - 1978 ELT (J 180) (ibid) reliance was placed on paragraph 33 of the judgment. In that case it was contended that the refund should be refused to the petitioner on the ground of unjust enrichment because excise being essentially an indirect tax the manufacturer must have passed on the liability to the consumers and must have realised the duties from the consumers. Therefore the petitioner would be doubly enriched if there was order for refund. Dealing with the same, the learned Single Judge held as follows :-

"In this case as I have mentioned before, one of the main contentions was that there deliberate attempt on the part of the petitioner to avoid payment of higher duty on zinc sheets and strips. I have held that there is no material for the issue of notice under Rule 9(2) of the Central Excise Rules on the aforesaid basis, still I cannot ignore this as an aspect to be considered in a claim for refund. On the question of undue enrichment reliance was placed on the observations of Masud J. in the case of Electric Lamp Manufacturers India Private Ltd. v. Collector of Central Excise, Calcutta - 1978 E.L.T. (3 84). Of course the facts of the instant case are different from the facts in that case, inasmuch as there was positive evidence that the manufacturer had realised duties from the consumers, such evidence is not available in the instant case but it may be presumed that though as a matter of law Excise duty is payable by the manufacturer as a matter of fact it is passed on to the consumers. But that in my opinion is no ground to invoke the theory of unjust enrichment. If unjust enrichment is not to be permitted to a litigant, it should not also be permitted to the State. The State has no right to collect unauthorised tax or illegal tax. Good fiscal administration enjoins that all lawful taxes should be properly collected and taxes which are not due if realised by the State should be refunded. Such fiscal administration alone ensures the atmosphere of tax compliance. But a question of limitation also arises in this case, quite apart from the question of Rule 11 which in my opinion is not applicable, in the facts and circumstances under which the claim for refund has arisen as was pointed out by the Division Bench of the Patna High Court in the case of Rohtas Industries Ltd. Vs. Union of India (UOI),

13. The third case relied upon by Mr. Ginwalla was the case of I.T.C. Limited Vs. M.K. Chipkar and others, . It is a Bombay High Court judgment. The reported judgment was of a learned Single Judge P.S. Shah, J. who concurred with Lentin, J. on difference of opinion between Lentin, J. and Sawant, J. - I.T.C. Ltd. Vs. M.K. Chipkar and others, . In this case the writ petitioner I.T.C. discovered, as a result of judgment of the Supreme Court in A.K. Roy and Another Vs. Voltas Limited, , that for certain period it has paid excess Excise duty which represented the over-paid duty on prices charged by the I.T.C.'s wholesalers to the secondary

wholesale dealers. Refund applications made by I.T.C. were rejected by the Assistant Collector. Appeals against the same were rejected. Thereafter the I.T.C. filed a writ petition for mandamus directing the respondent to carry out the orders in appeal and refund for a sum of Rs. 23 lakhs and odd. By his judgment and order dated 6th April, 1977 a learned Single Judge dismissed the writ petition on the preliminary contention urged by the respondents that the I.T.C.'s proper remedy was by way of a suit. I.T.C. preferred an appeal. One of the contentions raised on behalf of the respondent was that the writ jurisdiction should not be exercised in favour of I.T.C. as they have already collected the excess Excise duties from their distributors and hence they were guilty of unjust enrichment. There was a difference of opinion between the two learned Judges of the Division Bench. On this point Lentin, J. held that since I.T.C. had an integrated price which includes excise duty payable in law and not any specific amount of Excise duty, the question of unjust enrichment would not arise. He held that assuming that there was unjust enrichment, having regard to the various decisions of the Supreme Court and also of the Bombay High Court, the petitioners were entitled to relief. Accordingly he purported to allow the appeal and set aside the judgment and order of the learned Single Judge and also set aside the impugned orders and directed the respondent to refund to I.T.C. such sum as on calculations was ascertained as Excise duty. Sawant, J. disagreed with Lentin, J. and he dismissed the appeal on two grounds viz. that the petitioners were not entitled to invoke the equitable and discretionary jurisdiction under Article 226 of the Constitution of India and also that the claim was barred by limitation. Under these circumstances the matter was referred to the learned third Judge P.S. Shah.

14. On the question of unjust enrichment Shah, J. went in details into the facts of the case and held that as I.T.C. had an integrated price for its product which included Excise duty, payable in toto and not the specific amount of excise, it was not possible to uphold the contention of the Department that it would amount to unjust enrichment if refund was directed in its favour. In our opinion, having regard to such finding it was not necessary for the learned third Judge further to go into the broader question of law as to whether the principle of unjust enrichment by the assessee can at all be raised in respect of Excise duty collected by the Department without the authority of law. However, the learned Judge chose to go into the merits of such obstruct question of law and held ultimately that there was considerable substance in the contention urged by and on behalf of I.T.C. that the theory of "unjust enrichment" cannot be invoked in case of claim of excise refund recovered from the manufacturer without the authority of law. Accordingly Shah, J. concurred with the views of Lentin, J. and concurred with the final order proposed by Lentin, J.

15. In our opinion there is no reason why the principles of "unjust enrichment" by the assessee cannot be extended in the case of Excise duty. Excise duty is an indirect tax and generally it is passed to the buyer. The law is well settled that in a case where collection of duty or tax is ultimately found to be illegal and without

jurisdiction, the Government cannot hold on to the same and the Government is bound to refund the same. Otherwise it would amount to "unjust enrichment" by the Deptt. However, the principles of "unjust enrichment" is to be applied not only against the Deptt. only but against the assessee also e.g. where though assessee had paid the fee or duties initially, but he had passed the burden to his purchaser and he himself has not suffered any loss or prejudice in fact. As decided in Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others, , the course of action taken wherein, has been affirmed by the recent Supreme Court decision in the case of State of Madhya Pradesh Vs. Vyankatlal and Another, , merely because the assessee has paid the money, that by itself is no ground for directing payment to the assessee, if in fact the assessee has not paid out of his own pocket but ultimately passed it on to its purchaser. In the present case, as we have already pointed out, in the affidavit-in-reply it is not the case of the assessee that they have not passed the burden to its purchaser. On the other hand, they have stated that in case refund being made, they would ultimately refund it back to their purchasers. No such absolute contention was raised therein as sought to be raised before us now by Mr. Ginwalla which in our opinion is inconsistent with the stand taken in the affidavit by his clients.

16. The Bombay decision in I.T.C. Limited Vs. M.K. Chipkar and others, , is not binding on us. In any event there is nothing in the said judgment which prevents us from passing the order as we ultimately propose to pass having regard to the decisions of the Supreme Court referred to above and the averment made in the affidavit-in-reply by the assessee referred to above. We ought to point out that this judgment of the learned third Judge was delivered on 9th April, 1985. The decision of Supreme Court in the case of State of M.P. v. Vyankatlal (ibid), relied upon by Mr. Mitra, was decided on 23rd March, 1985 and obviously the same could not have been taken into consideration by the learned Third Judge of the Bombay High Court while delivering his judgment. We should point out further, as we have said earlier, in that case it was not necessary for the learned third Judge to go into the general question as to whether in the case of Excise duty, the principle of unjust enrichment applied or not, having regard to his finding that there being an integrated system or price, the question of unjust enrichment could not and did not arise. In the light of such finding it was not necessary for the learned third Judge to go into the broader principle of law in question. In any event, in our opinion though the State of M.P. v. Vyankatlal (ibid) was not a case of Excise duty, there is no reason why the principles laid down therein would not be equally applicable in respect of Excise duty also. Accordingly, we are unable to agree with the finding of the learned third Judge in the Bombay decision, which was merely an obiter dictum.

17. So far as the decision in Khardah Co. v. Union of India (ibid) [1983 ELT 2159], is concerned, it may be pointed out that this case did not and could not consider the decision of the Supreme Court in the case of State of Madhya Pradesh Vs. Vyankatlal and Another, because this Division Bench judgment of this Court was delivered on 1st of October, 1980 i.e. much earlier to the Supreme

Court judgment which was delivered in 1985. However, it is to be pointed out that this Division Bench judgment did not also consider the case of Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others, wherein the judgment was delivered on 9th November, 1979. The reason may be that by that time it was not reported in any Journal and even if reported the learned Advocates appearing did not draw the attention of the learned Judge to the same.

17. So far as Union Carbide case (ibid) - [1978 E.L.T. (J 180)], is concerned such judgment was delivered on 10th May, 1976, that is, long before the two Supreme Court judgments referred to above and obviously the law laid down therein by Supreme Court could not be taken into consideration by the learned Single Judge.

18. On the question of integrated price, which was raised by Mr. Ginwalla at a Tiuch later stage, we are unable to accept such contention. No contention was raised in their petition or affidavit-in-reply as to whether the sale by the respondent was on the basis of integrated price. This is a question of fact and the same was not raised in the affidavit of the assessee inspite of such question being specifically raised by the defendant. . On the other hand averments made by the assessee was to the effect that if refund was made to them, they will refund the same to their purchaser. It is contrary to the case of so-called "integrated price" sought to be raised for the first time before us. No such point was argued before the trial Court. Moreover, we were not shown that any such point was taken in the Memorandum of Appeal. This is now sought to be raised obviously in view of the contention raised and the finding made to that effect in I.T.C. case in the Bombay Judgment. Not only that; unlike the Bombay case there is no material before us to that effect to enable us to go into the same. This belated contention is contrary to the stand taken in their own affidavit. This is a question of fact. Accordingly we reject this contention.

19. Accordingly, keeping in mind the guidelines and direction given in the case of Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others, we give the following directions :-

I. The appellants are directed to refund the sum of Rs. 1,57,251.96 P. collected by them from the respondents in the following manner and subject to the following directions. Such sums are to be paid to the Receiver/Special Officer appointed by us by this order within a period of two months from this date. The Receiver/Special Officer shall hold the said amount subject to further order of this Court and shall deal with the same in the following manner :-

We direct the amount to be deposited with the Receiver because if it is deposited with the Registrar, Original Side of this Court, that would involve deduction of some amount on account of commission.

II. A statement of the amounts collected as Excise duty shall be prepared by the respondent giving all particulars including the names of the purchasers. A similar statement shall be prepared by the purchasers of the respondent. It is made clear that this relates to the goods in respect of which payments have been made

between 24th March, 1975 and 9th May, 1975 being ad valorem duty amounting to Rs. 1,05,114.94 P. and payments made between 10th May, 1975 and 28th June, 1976 being Rs. 52,137.01 P. referred to in paragraph 3 of the writ petition.

Such statements are to be filed with the Special Officer within a period of four weeks from this date. If there is any difference or dispute regarding the same it shall be decided by the Special Officer at the first instance and parties shall have the liberty to bring the same to the notice of this Court by way of mentioning or as may be directed by this Court.

III. The Special Officer shall issue a Public Notice and otherwise give due publicity to the fact that the purchaser of Tyrecord Warpsheets in respect of the said period who has paid Excise duty may made their claim for refund ,of such sum paid by them on account of Excise duty.

The Special Officer shall scrutinise such claims and ascertain the sums so proved upon notice to the parties and on the basis of materials produced by the parties and give a personal hearing for this purpose.

IV. It shall be open to the Special Officer to make such periodical claims on appropriate proof of claims on the lines stated above.

V. He will devise the mechanism of claim as best as he may do and in the event of any dispute he may refer to this Court for its decision of such dispute, if he thinks it so necessary. Otherwise he may dispose of the objections finally.

VI. If any further directions regarding mechanics of the claim of refund or otherwise are found necessary, he shall refer the matter to this Court.

VII. If the parties eligible to repayment of the amounts do not makes claim within six months from the date of publication of the Notice, the Special Officer will not entertain any further claim unless such time is extended by this Court. It will be open to such parties to pursue their ordinary remedies for recovery of any sum that may be due to them.

VIII. The appellants shall deposit a sum of Rs. 2,000/- within a period of fortnight from this date with the Special Officer/ Receiver for preliminary expenses of publicity and other incidental expenses for the implementation of the directions given herein. Any unexpended amount at the end of the disposal of claim will be paid back to the respondents or otherwise dealt with as may be directed by this Court.

For this purpose, Mr. Pradip Kumar Ghosh, Barrister-at- Law of 25, Harish Mukherjee Road, Calcutta-25 is appointed Special Officer/Receiver. Let it be recorded that we are appointing a Special Officer in this matter in order to expedite the proceeding. The remuneration of the Special Officer/ Receiver is to be fixed later.

20. The appeal is disposed of accordingly. Interim order if any is vacated. There will be no order as to costs. Liberty to apply.

21. All parties concerned, including the Receiver/Special Officer, to act on a signed copy of the operative portion of the judgment and order made herein on the usual undertaking.

B.C. Basak

Satya Brata Mitra, J.

22. I agree.