
(1990) 11 MAD CK 0058
In the Madras High Court
Case No : C.S. No. 206 of 1982

Indrol Lubricants and Specialities Ltd.	APPELLANT
Vs	
Union of India	RESPONDENT

Date of Decision : 15-11-1990

Acts Referred:

Central Excise Rules, 1944 — Rule 11, 173J
Central Excises and Salt Act, 1944 — Section 11, 11B, 11B(5)
Contract Act, 1872 — Section 72
Limitation Act, 1963 — Section 14

Citation : (1994) ECR 496 : (1991) ECR 417 : (1992) 57 ELT 227

Hon'ble Judges : N. Arumugham, J

Bench : Single Bench

Advocate : Shri T. Dulip Singh, for M/s King and Patridge, for the Appellant; Shri P. Narasimhan, Addl. Central Govt. Standing Counsel, for the Respondent

Judgement

1. This is a suit filed against the defendants to recover a sum of Rs. 2,71,754.40 with further interest at 12% p.a. from 17-5-1977 till the date of realisation.

2. The plaint filed proceeds on the allegations that the plaintiff carries on business in the manufacture of lubricating oils and other types of lubricants and that one among the same is a speciality oil manufactured out of duty paid base mineral oil and that this speciality oil was subject to levy of excise duty on the Tariff Item 11-B of the Central Excise Tariff and that during 1-4-1973 to 31-3-1977 the plaintiff removed the speciality oils after payment of requisite excise duty, and that in or about the second week of May 1977 the plaintiff came to know that the speciality oils were exempted from the Central Excise duty on condition that such speciality oils are if manufactured out of duty paid base mineral oil as per the Trade

Notice No. 175 of 75 dated 3-10-1975 issued by the defendants and that the said notice provides that the primary function of such product should not be by a lubricant. The plaintiff became aware that the speciality oil manufactured by him is not subject to the levy of excise duty and the payment of excise duty was made under a mistake and that therefore, on 17-5-1977 an application was made by the plaintiff for the refund of the said excise duty on the ground that the duty was paid under a mistake, which was received by the first defendant on 21-5-1977. The said application was rejected by the 2nd defendant by its order C. No. V/11D/18/2/77 T2 dated 26-6-1978 and that the request for the refund was rejected on the ground that there was no proof of satisfying the condition of the notification. Consequently an appeal was filed against the order of the second defendant to the Appellate Collector of the Central Excise and that the appellate authority by his order in A. No. 577/78 dated 9-5-1980 remanded the case to the second defendant for re-examination of the claim of the plaintiff and that consequently, the second defendant after such remand, issued a further show cause notice dated 11-9-1980 asking the plaintiff to show cause why the claim should not be rejected as barred under Rule 11 of the Central Excise Rules and that for which the plaintiff replied on 22-10-1980 stating that no excise duty was payable on the manufacture of speciality oil, and that the payment of duty on manufacture of speciality oil was made clearly under a mistake, and that therefore the general law of limitation alone would apply and not Rule 11 of Central Excise Rules, and that upon which the second defendant granted a personal hearing to the plaintiff and rejected the claim for the period prior to 21-5-1976 on the ground that the claim was barred under Rule 11 of the Central Excise Rules and that it was further held that the contention of the plaintiff that Rule 11 cannot be applied is not acceptable for the reasons that the amounts were not paid under mistake and that the payment was only due to inadvertent error or misconstruction since the plaintiff was paying duty on the products even after the notification and hence refund arising out of such contingency will attract the time limit under Rule 11 of the Central Excise Rules and that upon the basis of which the second defendant held that the claim of the plaintiff for the period prior to 21-5-1976 has become time barred under Rule 11 read with Rule 173J and that even so, he sanctioned refund of Rs. 21,512.58 for the period from

22-5-1976 to 31-3-1977 and that the second defendant has found the claim of the plaintiff to the above extent was to be in order and satisfying

the conditions of the Notification No. 175/75 dated 3-10-1975.

3. The plaint proceeds further on the allegations that the order of the Assistant Collector namely the second defendant rejecting the claim of refund

as time barred, is clearly erroneous and contrary to the well settled principles of law relating to payment under mistake as payment of duty of

speciality oil manufactured out of duty paid base mineral oil by the plaintiff was clearly under a mistake and that the very fact that the plaintiff was

paying duty even after the notification clearly established the fact that the payment of excise duty was only under a mistake and that if the plaintiff

was aware of the notification, he would not have paid the excise duty and that as such, the plaintiff is entitled to refund of the excise duty paid

under mistake and the limitation provided under Rule 11 of the Central Excise Rules will have no application and only the general limitation as

prescribed by the Law of Limitation Act will be made applicable for refund of money paid under mistake and that consequently, the plaintiff issued

a notice to the defendants on 9-3-1981 under Sec. 80 of the CPC and that whereupon claiming a refund of Rs. 2,71,754.40 and that even so, the

defendants have not made refund and that upon the basis of which the claim for the refund of Rs. 2,93,266.98 deducting the refund ordered

already, totalling to Rs. 2,71,754.40 with the interest is claimed.

4. The further projection of the case in the plaint is that the suit of the plaintiff is not barred by limitation as the plaintiff is entitled to exclude the

period from 21-5-1977 to 28-11-1980 during which time the plaintiff was prosecuting with due diligence other legal proceedings for the recovery

of the money. On the basis of the above-said allegations, the plaintiff was constrained to file the suit.

5. Both the defendants are resisting the claim of the plaintiff by filing their written statements and their contentions in substratum is gathered from the

written statement are as follows :

It was true that the plaintiffs are the manufacturers of lubricating oils and speciality oils in the manufacturing concern at Madras as was duly licensed

under the Central Excise Rules, 1944, and are functioning under the scheme called ""self removal procedure"". Tariff Item 11-B of the First Schedule

to the Central Excises and Salt Act, 1944 covers only blended or compounded lubricating oils and greases. Lubricating oils as such is taxable

under Entry 11-A and Speciality oils are generally treated as non-lubricants. While so, the manufacturing of compounded lubricating oils clearly

falls under Item 11-B of the Schedule of the Central Excises and Salt Act, 1944. As such the claim of the plaintiff that the speciality oil is subject to

levy of excise duty on the Tariff Item 11-B of Central Excise Tariff is not correct.

6. It was contended by the defendants further that the plaintiffs on their own volition declared the speciality oils manufactured by them as

"compounded lubricating oil" for the reasons best known to them and also filed classification list to that effect, and that by doing so, for the relevant

period the tariff duty under Item 11-B has been paid and that for all the clarity purposes, the Trade Notice No. 175/75 dated 3-10-1975 was

issued for clarification and that the plaintiffs' claim was based mainly on the said Trade Notice and that the presumption of the plaintiff for the said

claim is wrong as no notification was issued in 1975 to exempt the said speciality oils which are manufactured out of duty paid base mineral oil and

that the above trade notice was issued only to clarify the powers with regard to the duty payable on the speciality oils and that as such the same is

only on instrument to provide some useful information and that it was a sort of guidance to the manufacturers and that upon the basis of which the

claim made by the plaintiff, has no legal force and no rights acquired.

7. The defendants contend further that the payment of the excise duty was made by the plaintiff was voluntarily and out of their own volition as the

manufacturers are the best judge to know whether in each case the speciality oils manufactured by them is a non-lubricant, and that therefore, the

so-called payments made due to error in judgment for the reasons best known to the plaintiff cannot be called as a mistake and that even so, that

the plaintiff could have realised their mistake as soon as the trade notice was issued and that the plaintiffs have not explained their delay for the late

claim being made which was received by the second defendant only on 31-5-1977. While admitting the proceedings initiated and conducted by

the 2nd defendant, the defendants contend further that there was no documentary evidence to prove that the products manufactured and cleared

during the relevant period are only speciality oils and not lubricating oils and that

as per the classification list filed by the plaintiffs, they have shown in as compounded lubricating oils falling under 11-B Tariff and that even after the issuance of the trade notice in respect of the speciality oils, the plaintiff was fully aware that what they had manufactured was only lubricating oils and not speciality oils and that no samples had been drawn and tested during the crucial period to prove that the products in question were only speciality oils and that further, even though the Appellate Collector remanded the matter for fresh disposal by the 2nd defendant by his order in A. No. 577/78 dated 9-5-1980, no appeal had been preferred by the plaintiff and that on the remand, the second defendant, Assistant Collector conducted the re-enquiry and sanctioned the refund of Rs. 21,512.58 and rejected the claim pertaining to the period from 1-3-1973 to 21-5-1976 as time barred by his order dated 28-11-1980. The defendants admit the so-called exchanges of show cause notices and replies sent by them before the final enquiry after the remand order. The defendants contend further that since the plaintiffs were working under the scheme called "Self Removal Procedure", they are expected to know under what tariff entry, the goods manufactured by them is leviable to duty and that even after the trade notice, since the plaintiff was paying duty on the Item 11-B for a long time, the payment of duty made by the plaintiff cannot be deemed to be made under mistake and that as such the claim of the plaintiff squarely comes under the category and scope of Rule 11 of the Central Excise Rules, 1944. It was contended further that the special or local law provides for a special forum for adjudication of disputes arising under it, although within a period of limitation from the one prescribed under the Limitation Act, it would not then attract the provisions of Sec. 29(2) or any other provisions of the Limitation Act. Further Sec. 11B of the Central Excise Act specifically stated that any person claiming refund of any duty of excise may make an application for refund of the same to the Assistant Collector of Central Excise before the expiry of six months from the date of payment of duty and that provided that the limitation of six months shall not apply where any duty has been paid under protest and that Sec. 11B(5) of the Act ousts the jurisdiction of the Civil Courts with regard to the 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 not excisable or were entitled to exemption from duty and that while being so, the averment that on the general limitation as prescribed under

the Act, they will be application for refund of monies paid under mistake is not tenable.

8. The defendants contend further that the notice issued under Sec. 80 of the CPC by the plaintiffs is not valid in law and that the plaintiff cannot

maintain the suit as the new Rule 11 of the Central Excise Rules was enlarged to provide for refund in various cases, inclusive of the mistaken

payment of duty and that the claim of the plaintiff accordingly was straightly rejected by the defendant as time barred and further that the suit filed in

1982 for the recovery of payment made during 1-4-1973 to 21-5-1976 has been clearly time barred and that the payments made by the plaintiffs

was made under error, mis-construction or inadvertence and the limitation prescribed under the Central Excise Act squarely apply to the present

case. The defendants claim further that the plaintiff cannot claim any exclusion of the time during the period between 21-5-1977 to 28-11-1980, to

maintain the suit under the law of limitation. The further contention of the defendants are that besides there is no cause of action for the suit, each

payment made by the plaintiff was on the basis of individual gate-passes given to and that as such on the basis of the individual cause of action and

claiming of each of such payment through the suit is clearly barred by limitation, and that further, it was alleged that the plaintiff had not produced

the necessary evidence and relevant duty paid documents in support of their claim at any time during the proceedings. Upon the above-said

contentions, the defendants pray that the plaintiff is to be non-suited.

9. Upon the above-said pleadings, the following issues were settled for the purpose of trial.

1. Whether the products manufactured and cleared by the plaintiffs prior to 21-5-1976 were not speciality oils exempted from excise duty ?

2. Whether the payment of excise duty by the plaintiff for the products cleared prior to 21-5-1976 was not a mistake ?

3. Whether the claim for refund by the plaintiff is barred by time ?

4. To what relief is the plaintiff entitled ?

10. Thiru T. G. Ravi Kumar, working as Accounts Executive of the plaintiff was examined himself as P.W. 1 and he gave evidence on behalf of the

plaintiff and through him six documents were filed and duly proved and they have been marked as Exs. P1 to P6 which are the following :

11. Ex. P1 dated 26-6-1978 is the order of the Assistant Collector of Central Excise, Madras I Division : Ex. P2 dated 9-5-1980 is the order

passed in appeal of the Appellate Collector of Customs and Central Excise, Madras : Ex. P3 dated 11-9-1980 is the show cause notice to M/s.

Castrol Limited, Madras-81 from the office of the Assistant Collector of Central Excise, Madras I Division : Ex. P4 dated 22-10-1980 is the letter

from M/s. Castrol Limited, 52, Rajaji Road, Madras-1 addressed to the Assistant Collector of Central Excise, Madras I Division : Ex. P5 dated

9-3-1981 is the copy of the notice to (1) Union of India, represented by Secretary to Government of India, Ministry of Finance (Department of

Revenue & Banking) New Delhi and (2) the Assistant Collector of Central Excise, Madras I Division by the counsel for M/s. Castrol Limited : and

Ex. P6 dated 28-11-1980 is the order of the Assistant Collector.

12. None was examined on behalf of the defendant, and no oral evidence was adduced for the defendants, but only five documents were

produced and marked on behalf of the defendants through consent by the counsel appearing for the plaintiff, which are the following.

13. Ex. D1 dated 3-10-1975 is the order of the Deputy Collector, Madras Central Excise Collectorate : Ex. D2 dated 17-5-1977 is the

application for refund of the Union Excise Revenue other than the refund of export to the Assistant Collector of Central Excise, Madras I Division

by M/s. Castrol Limited : Ex. D3 dated 17-2-1972 and 1-3-1973 proforma to be accompanied with the classification list as per the Central

Excise General Circular No. 13/72 : Ex. D4 dated 3-5-1974 is the letter from M/s. Castrol Limited addressed to the Assistant Collector of

Central Excise, Madras I Division : and Ex. D5 dated 11-8-1972 and 1-3-1973 proforma to be accompanied with the classification list as per the

Central Excise General Circular No. 86/72 dated 11-8-1972.

14. Findings on Issue Nos. 1 and 2 :

Since the questions to be decided and involved in both the issues are inter-related to each other and form the basis for the plaintiff to make the suit

claim, both the above-said issues can be grouped together and are taken for consideration. It is the common case that the Castrol Ltd., the original

plaintiff was amalgamated by the order of the company Court and that pursuant to, the present plaintiff took over the administration of the same and that by way of amendment as per the order passed by this court, the plaintiff has been amended substituting the present name of the plaintiff and that accordingly, the amended plaintiff has been filed, and that, further the plaintiffs are manufacturers and suppliers of various lubricating oils and the speciality oils and that accordingly during the period 1-4-1973 to 31-3-1977 that the plaintiff has removed the speciality oils manufactured by them after payment of excise duty under Tariff Item No. 11-B and marketed them and that for which period, the excise duty as contemplated was paid which reflects the suit claim in this case. The further fact that the defendant has issued a trade notice dated 3-10-1975 bearing No. 175/75 covered under Ex. D1 and that by which it has been declared that certain specially oils were exempted from Central Excise duty on condition that such speciality oils are manufactured out of duty paid base mineral oil and that also provides further that the primary function of such product should not be by a lubricant was not challenged nor controverted by the defendant in any manner. In short, Ex. D1, the trade notice issued by the defendant and is in force has been admitted by the defendant herein. It was the consistent case of the plaintiff that they have paid the excise duty on the Tariff Item 11-B of the Central Excise Tariff for the speciality oil manufactured by the plaintiff and released during 1-4-1973 to 31-3-1977 that the plaintiff came to know that a sum of Rs. 2,71,754.40 has been paid by the plaintiff under a mistake as per the trade notice issued by the defendants covered under Ex. D1 during the second week of May 1977 and that during the said period only the plaintiff claims that he came to know the trade notice covered under Ex. D1 and that in which it was clarified that certain speciality oils don't fall under Item 11-B of tariff item on condition that such speciality oils were manufactured out of duty paid base mineral oils but subject to the condition that the primary function of such product should not be lubricant and that immediately on coming to know of the above trade notice, the plaintiff has filed a refund application on 17-5-1977 it appears from the order of the Assistant Collector that claiming for the refund of the duty paid under mistake and that the said application has been marked as Ex. D2 in this case. This document was filed on 17-5-1977 before the Assistant Collector of Central Excise,

Madras I Division namely, the second defendant herein. This application was filed on the ground that the duty to the extent of Rs. 2,93,266.98 was paid under mistake and that as such for the refund of the same, the second defendant appears to have considered this refund application filed by the plaintiff and rejected the same stating that there was no satisfactory proof offered and forthcoming in furtherance of the conditions stipulated in the trade notice Ex. D1 as per the order passed by the 2nd defendant on 26-6-1978. Then the plaintiff filed on appeal against the order of the 2nd defendant before the Appellate Collector of Central Excise, Madras and the Appellate Authority after considering the merits of the case in its entirety, remanded the whole matter to the lower authority namely the 2nd defendant herein to re-examine the claim afresh by passing the order on 9-5-1980 under appeal No. 1325/80 covered under Ex. P2. Consequently, the second defendant has issued a show cause notice dated 11-9-1980 covered under Ex. P3 to the plaintiff and thereby called upon him, it appears that, to show cause as to why the application for refund cannot be rejected on the ground that under Rule 11B read with Rule 173J of the Central Excise Rules, 1944, the claim for the refund for the period from 1-4-1973 to 31-3-1978 which was received only on 25-9-1977 was time barred. It appears further that for this show cause notice covered under Ex. P3, the plaintiff has filed their objection which has been marked as Ex. P4 and that, wherein it has been claimed categorically that the excise duty was paid under a mistake and that therefore, the period of limitation prescribed under Rule 11-B will not apply. Consequently, a personal hearing was conducted by the second defendant and that finally by his order dated 21-11-1980, the second defendant hold that since the claim for the refund was filed only on 17-5-1977, the claim relating to the period 1-4-1973 to 21-5-1976 was time barred and that further the claim of the plaintiff for the period 21-5-1976 to 3-3-1977 is within the time under Rule 11B and that thereupon ordered the refund of the sum of Rs. 21,512.58. This order passed by the 2nd defendant after the remand was marked as Ex. P6. Subsequently finding that the demand of the plaintiff for the refund of the said amount was not complied by the defendants, the plaintiff has issued a registered notice under Sec. 80 of the CPC claiming the refund of Rs. 2,71,754.40 being the excise duty after the deduction of the refund of Rs. 21,512.58 under Sec. 72 of the Contract Act

as the same was paid under mistake. The said notice was marked as Ex. P5. There was no reply at all for this registered notice covered under Ex.

P5 by any of the defendants. Consequently the plaintiff has filed the suit on 8-2-1982 for the recovery of the suit claim with interest.

15. P.W. 1 Thiru Ravi Kumar, working as Accounts Executive under the plaintiff company gave evidence in support of the plea made available in

the plaint. During the course of his evidence P.W. 1 categorically claims that what was manufactured and released by the plaintiff from 1-4-1973

to 21-3-1977 was only a speciality oil and not a lubricating oil and that for which the duty has been paid under Tariff Item 11-B of the Central

Excise Tariff Act out of sheer mistake, and that this mistaken payment made by the plaintiff was known to him only after the issuance of Ex. D1

during May 1977 and that immediately after that on 17-5-1977 the plaintiff has filed the application for refund covered under Ex. D2 which was

rejected by the 2nd defendant followed by the appeal, then remanded by the appellate authority and then enquiry conducted by the 2nd defendant

again and then allowing a refund partly and rejecting the quantum of the relevant claim which reflects the suit amount. It is in evidence, both oral

and documentary - that the claim of the plaintiff for the refund of the excise duty paid under Rule 11B for the manufacture and release of a

speciality oil a non-lubricant was exempted under the trade notice Ex. D1 and that the duty has been paid out of sheer mistake and that as such the

plaintiff is entitled to the refund of the duty paid under mistake as contemplated under Sec. 72 of the Contract Act.

16. During the cross examination, P.W. 1 has given a very categorical answer to the searching questions of the learned counsel appearing for the

defendants that what was manufactured was only a speciality oil and not lubricating oil. An attempt was made on behalf of the defendants, that to

show that the plaintiff has not referred to the product of the oil in the classification list submitted by him before releasing the oil for marketing during

the relevant period under Ex. D4 and that as such, the plaintiff is not entitled to claim the refund of the duty paid on the ground that payment was

made under mistake. But, in my view, this attempt made by the learned counsel appearing for the defendants is highly belated and clearly an after-

thought and even if assuming so, it cannot help the defendants to improve their case in the context that the defendants namely, the Assistant

Collector of Central Excise and the Appellate Authority under the Central Excise Act entertained the claim of the plaintiff at once and rendered

their findings which clearly demonstrate that the defendants had admitted that the plaintiff had manufactured only a speciality oil, a non-lubricant as

specified under Ex. D1, trade notice.

17. At this juncture, it has become so relevant to refer the contents of the order passed by the Appellate Collector of Customs and Central Excise,

Madras on 9-5-1980 covered under Ex. P2. In para 2 at page 2 of the said order covered under Ex. P2 which is of much significance are as

follow :

The appellants have contended that they have produced the records to establish that what they manufactured during the period in question was

only speciality oils and not compounded lubricating oils. In the absence of any indication in the impugned order, it is not clear whether the

appellants had produced their records and the Assistant Collector had an opportunity to scrutinize these records. If the production and clearance

records of the appellants could testify that the products for which they are claiming refund were only speciality oils and also if the verification with

their despatch invoices shows that the consignees to whom these oils were sent were not dealing in lubricating oils but were those who catered

such products for use in delicate instruments, refrigeration machinery, compressors, coolant etc., I could see no reason why their claim should not

be admissible. The Assistant Collector has also remarked that during the period in question no sample of the products was drawn and tested.

Samples of the products appear to have been taken and tested by the chemical examiner on 4-10-1977. I do not also see any reason why the

results of the tests conducted by the Chemical Examiner in respect of the samples drawn later should not be applied to the products manufactured

during the period in question provided the records of the appellants would show that the same products were manufactured during the relevant

period also.

Under the above circumstances I am remanding the case to the lower authority to re-examine the claim in the light of the above observations and

sanction the refund to the extent he is satisfied. The appeal is accordingly disposed of.

18. A careful perusal of the operative portion of the order passed by the Appellate Collector as above referred, clinches the fact that a sample of the manufactured product was taken and tested by the chemical examiner on 4-10-1977 apparently for the purpose of ascertaining that what was manufactured and marketed by the plaintiff during the relevant period in question was a speciality oil and was not compounded lubricant oil, but for the reasons known to the authorities concerned, the result of the said test was not taken into account and that it appears that not even an attempt was made to peruse the said report of the chemical examiner. I do not see any reason for the second defendant to exclude such a material factor while rejecting the consistent demand made by the plaintiff for the huge amount paid by them. So also, even the Appellate Authority has directed the 2nd defendant to consider the entire question afresh, but even then in my respectable view, the second defendant has not conducted the enquiry as was directed by the Appellate Authority, but on the other hand, in spite of following the instructions given by the appellate authority, it appears that the second defendant conducted it out of the mode of procedure and thereby rejected the claim of the plaintiff, though allowed in part, which in my view is arbitrary, unreasonable and has not been warranted in the eyes of the law.

19. As I have already observed, the consistent case of the plaintiff from the inception is that his manufactured product was coming under the category of speciality oil as was specified in Ex. D1, the trade notice herein, and that it was known to them only during the month of May 1977

and that realising the mistake, that he has paid the excise duty wrongly and immediately filed the claim application for refund of the said duty on 17-

5-1977. The Appellate Collector of the Central Excise has clearly pointed out the inherent lacuna available in the order passed by the 2nd

defendant and that thereupon he has remanded the entire matter for reconsideration afresh and that even so, the actual question which was now

being raised by the defendants that what was manufactured and marketed by the plaintiff was only the lubricating oil and not the speciality oil so as

to claim the refund of the excise duty paid already, had not been considered by the defendants as the appellate authority directed and that it

impliedly and virtually means, that the defendant has not raised the plea at the earliest point of time. On the other hand, with a view to defeat the

lawful right of the plaintiff to get the refund of the excise duty paid wrongly, that the defendants it appears to me, has taken the above-said

plea in the written statement very belatedly, which under law is not reasonable and justifiable under any circumstances. If the sample of the

manufactured oil was taken and tested by the chemical examiner as early as 4-10-1977, I don't find any reason for the defendants to peruse the

said report of the chemical examiner and to ascertain whether the same is speciality oil made out of the duty paid base mineral oil or merely a

lubricating oil as was now put forth on behalf of the defendants and that why the second defendant and the appellate authority has evaded to give a

clear findings on the said aspect. A careful perusal of the above-said orders passed by the Assistant Collector and the Appellate Collector of

Central Excise, Madras covered under Ex. P1 and P2 and the oral testimony of P.W. 1 which appears to me rather convincing, natural and

satisfactory, consistent from the very beginning itself, clinchingly proves the fact that what was manufactured and marketed by the plaintiff during

the relevant period was only a speciality oil, consequently comes under the exempted items specified under Ex. D1, the trade notice. Adding to

this, the more relevancy in this context comes through the order passed by the second defendant on 28-11-1980, covered under Ex. P6. In

disposing the matters remanded by the Appellate Collector of the Central Excise, Madras and that pursuance thereto a show cause notice was

given to the plaintiff followed by the reply given by the plaintiff and after giving a personal hearing, the Assistant Collector namely the second

defendant herein, it appears had not followed the directions given by the Appellate Collector in disposing the entire matter afresh but, took into

account only the limited aspects of as to whether the claim for refund of the excise duty made by the plaintiff was within the time or not as

contemplated under Rule 11B and 173J of the Central Excise Rules, and that in doing so, it is manifest that the second defendant had accepted the

claim of the plaintiff that what was manufactured and released by him during the relevant period was a speciality oil squarely comes under the

exemption provided under the trade notice and not a lubricating oil as now contended by the defendant, and that therefore allowed the refund of

the excise duty paid by the plaintiff for the period covering from 22-5-1976 to 31-3-1977 to the extent of a sum of Rs. 21,512.58 and that for

which amount a deduction was given by the plaintiff and that the balance amount was reflected in the suit claim. To say more specifically, that the second defendant had rejected the claim of the plaintiff only on the point of limitation for period from 1973-1976. Thus, it has become more clear and pertinent to note that the Assistant Collector, namely the second defendant had accepted that the plaintiffs had manufactured and paid excise duty only on speciality oils which is classified under Tariff 68 and under Item 11-B as claimed by the plaintiff. As such it is futile for the defendants now to contend that the plaintiff himself has agreed their manufactured products is a lubricating oil in the classification list filed by himself; but has not come under the exempted item of speciality oil as claimed by the plaintiff; and that consequently, I am fully satisfied that the defence put forward by the defendants has no force in the above circumstances and not at all sustainable in law. Barring this, under Ex. P5, the plaintiff has caused a registered notice prior to the filing of the suit under Sec. 80 of the Civil Procedure Code. Though the suit notice was received by the defendants there was no reply at all from either of the defendants to substantiate their contention as was made in the written statement very belatedly. But the significant factor available in the pleading was that the plaintiff had based his claim that the payment was made by him only on mistake, which was consistent throughout. In Ex. P4 while submitting the written objection to the show cause notice issued by the second defendant to the plaintiff, the plaintiff had reiterated that what was paid by him was the excise duty on the basis of the classification list was only under mistake and that reiterating the same Ex. P4 was given as the reply to Ex. P3.

20. Regarding the genuineness or the truth or the contents of the Ex. D1 is concerned, it is the common case that it was in existence as issued by the defendants exempting the speciality oil manufactured out of duty paid base mineral oil free from any excise duty and that the said direction and the claim of the plaintiff based on the said trade notice was accepted by the second defendant. In Ex. P6 relating to the refund claim for the period 1976-77 which also was substantiated by the findings of the Appellate Collector of the Central Excise as was referred to above. Thus, having given the due regard and a very careful analysis of the contents of those documents filed on behalf of the plaintiff as well as the orders passed by

the defendants herein, I have no doubt in my mind to conclude that the claim of the plaintiff that what was manufactured by them during 1973-

1977, for which the excise duty was paid wrongly, was only a speciality oil and not a lubricating oil, squarely comes under the exempted category

as provided under Ex. D1 and that the excise duty paid for the above-said items during the period was clearly under a mistake as was clearly

demonstrated by the proved aspects of the plaintiff's case. The defendants on the other hand, though disputing the claim of the plaintiff relating to

the speciality oil has not adduced any evidence; but on the other hand the documents clearly betray their own case as was pointed out earlier.

Under these circumstances, I am inclined to hold that the products manufactured and cleared by the plaintiff prior to 21-5-1976 were only

speciality oil exempted from excise duty as was provided under Ex. D1 trade notice issued by the defendants herein and that accordingly I answer

issue No. 1 in favour of the plaintiff and against the defendants; and that further the payment of excise duty made by the plaintiff for the manufacture

and clearance of the speciality oil prior to 21-5-1976 was under a sheer mistake and that accordingly I answer this issue against the defendants

and in favour of the plaintiff.

21. Then remains the question as to whether the claim for the refund of excise duty paid by the plaintiffs during the period from 1-4-1973 to 31-3-

1976 is barred by time as contended by the defendants in this case. I have already observed that the second defendant has accepted the claim of

the plaintiff and that accordingly refunded the amount of Rs. 21,512.58 covered under the period from 22-5-1976 to 31-3-1976 as within time, as

per the order passed by him under Ex. P6 and that the claim for the previous period namely from 1-4-1973 to 21-5-1976 was time barred. In this

aspect it is pertinent to note the specific plea taken by the plaintiff in paras 4, 6 and 8 of the plaint that wherein the plaintiff claims that he came to

know of the existence of the Trade Notice No. 175/75 dated 3-10-1975 covered under Ex. D1 was only in or about the second week of May

1977 and that whereby he realised the mistaken payment and that accordingly on 17-5-1977 he made the application for the refund of the excise

duty, as was referred to above and that after he came to know the payment of excise duty made in the relevant period on speciality oils

manufactured by him out of duty paid base mineral oil was clearly under a mistake and that his payment of the duty even after the notification covered under Ex. D1 clearly demonstrate the fact that the payment of excise duty made by the plaintiff was not a mistake and that if he was aware of the said notification he would not have paid the excise duty to such a large extent and have come forward with the litigation before the authorities as well as this court and that in the said circumstances, the plaintiff is entitled to the refund of the excise duty paid under mistake and that the limitation provided under Rule 11 or 173J of Central Excise Rules will have no application and only the general law of limitation prescribed under the Limitation Act will apply and that as such the suit is not barred by limitation. On the contrary, the defendants have vehemently resisted the contention by stating that the relevant Rule 11 and 173J of Central Excise Rules squarely applicable to the facts of the present case and that the application for refund of the amount made on 17-5-1977 was clearly out of time and is not coming within the ambit of the above-said general rules and that as such the claim of the plaintiff was hopelessly barred by limitation and that the general law of limitation will not be made applicable to the facts of the present case. In this context, as I have already observed on issue Nos. 1 and 2 that the payment of the excise duty made by the plaintiff was only a mistake and as such I have no difficulty in holding that the suit transaction attracts the provision of Sec. 72 of the Contract Act. Section 72 of the Contract Act has envisaged the two circumstances to be proved to invoke the ambit of the said provision of law, namely that the payment of liability must have been made voluntarily and that further it must entitled the person to recover the money back as the same must have been paid under a mistake or coercion. If these tow ingredients are established, then there cannot be any difficulty for the person who paid the wrong payment to derive the benefits as contemplated under Sec. 72 of the Contract Act. The relevant established circumstances and the facts in this case is that it is seen from Ex. D1, the trade notice that what is required is that the primary function of the speciality oils should be other than lubrication. But there can be a consequential function, that is, a lubricating function which was under these circumstances that the plaintiffs claimed to have filed the classification lists in a mistake, but for which there is no justification in denying the benefit of the trade notice provided under Ex.

D1 merely on the ground that the classification list is also claimed in the oral evidence of P.W. 1.

22. In this context, I may advert to the case law reported in *Ceat Tyres of India Limited Vs. Union of India and others*, , upon the basis of which a

strong reliance was placed by Thiru Dulip Singh, the learned counsel appearing for the plaintiff, wherein the Bombay High Court has held as

follows :

If the mistake was on the part of the petitioner in filing erroneous classification lists and paying excess duty on the basis thereof, the question of the

concerned authority who receiving the amounts on the footing of the petitioner's mistake cannot elevate the receipt of such amounts to the dignity

of a judicial or quasi-judicial order under which such amounts were paid.

It was further held in the said ruling as that,

The term ""mistake"" used in Section 72 of the Contract Act has been used without any qualification or limitation and comprises within its scope a

mistake of law as well as a mistake of fact. Therefore, if the Department received from the petitioner an amount higher than what it was entitled in

law to receive and which it would not have received if the petitioner had not committed bona fide mistake of paying it, the provisions of Section 72

of the Contract Act will come into play and the Department is liable to refund any such excess amount to the petitioner even if the assessee has

himself filed a wrong classification list and paid higher tax than it was required to pay.

This decision has been substantiated by another ruling reported in a case between *Sales Tax Officer, Banaras & Others v. Kanhaiya Lal*

Mukundlal Saraf 1959 Supreme Court Reports 1350. It was held in the above case that voluntary payment of liability was not by itself enough to

preclude recovery of the said amounts under Sec. 72 of the Contract Act the only two circumstances there indicated entitling the party to recover

money back and that money must have been paid under a mistake or under coercion. If mistake of either law or facts have been established, he is

entitled to recover the monies back and the party receiving the same is bound to repay or return them irrespective of any consideration whether the

monies have been paid voluntarily or not.

23. Applying the principles laid down in the above-said rulings, it is perfectly

clear that the proved facts of the present case clearly come under the ambit of Sec. 72 of the Contract Act and that therefore, whether the plaintiff has committed a mistake of fact or law in the proved circumstances in this case it comes squarely within the purview of Sec. 72 of the Contract Act and by which he has filed the suit for the recovery of the suit claim which was wrongly paid to the defendants. But regarding the other issues concerned, it has become necessary to point out the contention made by the defendants and vehemently urged by Thiru P. Narasimhan, the counsel appearing for the defendants that Sec. 11B of the Central Excise Act will apply to the instant case and that as a result of which the refund application should have been filed within 6 months from the date of payment and that therefore the Assistant Collector was right in rejecting the refund application for the period covering from 1-4-1973 to 31-3-1977. In this context I may observe that the plaintiff may file a civil suit within three years from the date of knowledge of the mistake under the General Law of Limitation and this position of law cannot be disputed by the defendants, provided he has to prove that his knowledge of the mistake must be within the period of three years immediately preceding three years. But in respect of the genuinity a clear stand has been taken consistently by the plaintiff from its inception. The defendant further contends that Sec. 11B(5) of the Central Excise Act took away the jurisdiction of this court, and that therefore the suit will not lie for the recovery of the amount. But it is seen that the courts have consistently taken the view that the erroneous payment of the excise duty will have to be refunded, irrespective of bar of limitation provided under Sec. 11B or Rule 11. If the provisions of this section or rule do not apply to the present case, then the question of applying Sec. 11B(5) does not arise for ousting the jurisdiction of this court.

24. In support of this proposition, the learned counsel appearing for the plaintiff Thiru Dulip Singh has made a strong reliance on the basis of the case held between Diamond Shamrock (I) Ltd. Vs. Union of India, wherein it has been held that Sec. 11B(5) or Rule 11 of the Central Excise Act will not apply for the facts upon the basis of which the said reliance was rendered also related to the exemption claim on the basis of a trade notice as was made in this case and consequently, the Bombay High Court had directed the refund of the excise duty within sometime stipulated therein

from the date of judgment.

25. Per contra, the learned counsel Thiru P. Narasimhan stoutly resisted the claim of the plaintiff on the ground that the relevant rule and section

will not apply to the facts of the present case and in support of this contention he has relied on the judgment rendered by the Supreme Court in the

case between Union of India (UOI) Vs. A.V. Narasimhalu, . In this case, while dealing with the identical provision under the Customs Act, the

Supreme Court in the above ruling had upheld the exclusion of jurisdiction of the Civil Court to entertain the suit. But the facts upon the basis of

which the Supreme Court has held in the above case was clearly a different one and that in the circumstances, I am unable to persuade myself to

import the law laid down by the Supreme Court to the facts of the present case. But, even so, it has become necessary and relevant for me to

extract certain passages laid down by the Supreme Court at page 149 in para-3 in the said ruling which are as follows :

We, however, deem it necessary to observe that the civil courts have jurisdiction to examine cases in which the Customs Authority has not

complied with the provisions of the statute or the officer of customs has not acted in conformity with the fundamental principles of judicial

procedure or the Authority has acted in violation of the fundamental principles of judicial procedure or he has made an order which is not within his

competence or the statute which impose liability is unconstitutional, or where the order is alleged to be mala fide. A Civil Suit will lie for obtaining

appropriate relief in these cases.

But the exclusion of the jurisdiction of the Civil Court to entertain a suit does not exclude the jurisdiction of the High Court to issue high prerogative

writs against illegal exercise of authority by Administrative or quasi-judicial tribunals. The finality which may be declared by the statute qua certain

liability either by express exclusion of the jurisdiction of the Civil Court or by clear implication does not affect the jurisdiction of the High Court to

issue high prerogative writs.

26. Keeping in view of the principles of law laid down by the Supreme Court in the above case, I may observe that the present case is a fair

illustration of the position namely that the defendants herein are making a serious attempt to avoid the granting of or awarding the legitimate

payment to the plaintiff for the refund of the excise duty wrongly paid, in sheer mistake. Therefore, even placing a full reliance upon the settled

proposition of law laid down in all the above-cited authorities, I am not convinced with the contention of the learned counsel appearing for the

defendants and that consequently I reject the case of the defendants in toto. On the other hand, Thiru Dulip Singh, the counsel for the plaintiff

strenuously contended before me that the claim of the plaintiff is well within time in filing the present suit as the same is not barred by limitation. If

the gamut of Sec. 14(2) of the Limitation Act is to be taken account of for the purpose of exclusion, i.e., the period covered for the proceedings

initiated from 17-5-1977 onwards till 28-11-1980 covered under Ex. P6 before the second defendant and as well as the Appellate Collector of

Central Excise and then again before the 2nd defendant in computing the period of limitation, for which Thiru Narasimhan, the counsel for the

defendant oppose the said proposition on the ground that in computing the period for the purpose of law of limitation, the period covered by the

proceedings before the authorities cannot be excluded for the purpose of calculating the limitation in furtherance of the relevant section and rules

provided under the Central Excise Act. In this context, I may state that what is necessary and required is of filing a refund application with the

authorities concerned must be within three years from the date of knowledge and that there cannot be dispute that the plaintiff had filed the refund

application on 17-5-1977 i.e., within three years from the date of knowledge of mistake as he has stated that he came to know of the existence of

the trade notice only during the 2nd or third week of May 1977 and that the said application was rejected by the 2nd defendant followed by an

appeal before the Appellate Collector and the remand of the matter back for fresh consideration and the subsequent order passed by the 2nd

defendant refunding a part of the amount and rejected the rest of the same. It is seen that in passing the order under Ex. P6 on 28-11-1980, the

Assistant Collector, namely the 2nd defendant has recognised and approved the excise duty paid by the plaintiff for the relevant period was under

a mistake and that consequently he has allowed part of the claim of the plaintiff namely from 21-3-1976 onwards for the subsequent period. This

order has not been appealed and adjudicated further by either of the parties herein. Under these circumstances, I have no doubt in my mind that

the 2nd defendant has created a right in favour of the plaintiff by recognising that the excise duty paid by the plaintiff was under a mistake. The

proceedings before the Assistant Collector is a quasi-judicial nature and is a civil proceedings in all view and that in which the rights of the parties

have been adjudicated and that accordingly by the order of the Assistant Collector, the second defendant herein dated 28-11-1980 the right for

the plaintiff has come into existence.

27. At this juncture, the observation held by the Supreme Court in a case between S.A.L. Narayan Row v. Ishwarlal Bhagwandas 1966 B.L.R.

85 Vol. 68 at page 88 as was strongly relied on by the learned counsel for the plaintiff Thiru Dulip Singh in support of his case, has become so

appropriate to be quoted here, which are as follows :

The primary object of a taxation statute is to collect revenue for the governance of the State or for providing specific services and such laws

directly affect the civil rights of the tax-payer. If a person is called upon to pay tax which the state is not competent to levy, or which is not imposed

in accordance with the law which permits imposition of the tax, or in the levy, assessment and collection of which rights of the tax-payer are

infringed in a manner not warranting by the statute, a proceeding to obtain relief whether it is from the tribunal set up by the taxing statute, or from

the civil court would be regarded as a civil proceeding. The character of the proceeding, in our judgment, depends not upon the nature of the

tribunal which is invested with authority to grant relief, but upon the nature of the right violated and the appropriate relief which may be claimed. A

civil proceeding is, therefore, one in which a person seeks to enforce by appropriate relief the alleged infringement of his civil rights against another

person or the State, and which if the claim is proved would result in the declaration express or implied of the right claimed and relief such as

payment of debt, damages and so on.

28. The right having coming to existence on 28-11-1980 to the plaintiff by the order passed by the 2nd defendant, the plaintiff had filed the suit,

after giving due notice within the stipulated time under Sec. 80 of the Civil Procedure Code. Since the claim of the plaintiff is partly accepted by the

2nd defendant by his order covered under Ex. P6 has become the final one and the rejection of the part of the claim of the plaintiff has become

agreed that the order allowing the part of the claim made by the Assistant Collector in his order dated 28-11-1980, - It was the contention of the

plaintiff that the period of limitation started only from 28-11-1980 onwards. In support of this position, strong reliance was placed in a case

between Raman Electricals Vs. Union of India (UOI) and Another, by the learned counsel Thiru Dulip Singh during the course of his argument.

Where it has been held that,

that the knowledge of payment under mistake of law gives rise to two remedies, one in the statute which can be enforce within six months and the

other under the general law which can be availed of within three years from the date of knowledge and it is this period which has been held to be

reasonable period within which the payer of duty is entitled to invoke extraordinary jurisdiction of this Court under Article 226.

Per contra, the learned counsel Thiru Narasimhan contended before me that the remedy is available only under Article 226 by way of writ

proceedings and not by way of this suit in this court under the original side. But in view of the said ruling laid down in the abovesaid proposition,

the fact of final disposal rejecting the claim of the plaintiff in part and accepting in part by the second defendant under Ex. P6 on 28-11-1980

assumes much significance and importance in this case. As I have already observed it is the well established proposition by the Apex Court of

India that the Government should not stand on mere technicalities while dealing with the such refund applications. The Supreme Court has held

further in a case between Hindusthan Sugar Mills Vs. State of Rajasthan and Others, and the relevant passage which I would like to extract is as

follows :

There can be no doubt that this statement misled the Assessee into not claiming the amount of sales tax on the freight component of the price from

the Central Government. We think that, in the circumstances, fairness and justice demand that the Central Government should pay to the Assessee

the amount of Sales tax on the freight component of the price in respect of transactions of sale of cement entered into by the Assessee with them

under the provisions of the Control Order. It is true and we are aware that there is no legal liability on the Central Government to do so, but it must

be remembered that we are living in a democratic society governed by the rule

of law and every Government which claims to be inspired by ethical and moral values must do what is fair and just to the citizen, regardless of legal technicalities. We hope and trust that the Central Government will not seek to defeat the legitimate claim of the assessee for reimbursement of sales tax on the amount of freight by adopting a legalistic attitude, but will do what fairness and justice demand. After all, the motto of every civilized State must be : ""Let right be done"".

Keeping the rationale of the above-said observations held by the Supreme Court and the synthesis evolved out therein and the provisions and

Rules referred to above to the proceedings and the period covered before the proceedings the Assistant Collector two times and before the

Appellate Collector from 17-5-1977 to 28-11-1980, I have no hesitation and doubt in my mind to hold that the proceedings are the civil

proceedings as contemplated by the case laws and that if the said view is deployed, then I have no difficulty in bringing the facts of the present case

within the ambit of Sec. 14 of the Limitation Act and that the said period can be excluded for the purpose of limitation.

29. Having given due regard and a careful analysis of all the case laws relied on and cited before me by the counsel for the respective parties, and

the oral and documentary evidence of this case, I am inclined to hold that the plaintiff has proved that his claim made in the suit is perfectly within

the time and not barred by the law of Limitation as contended by the defendant in this case and that there is no force or merits in the defendant's

case that the suit is hit by the law of limitation and that accordingly I answer this issue in favour of the plaintiff and against the defendants.

30. Findings on Issue No. 4 :

It is seen that the suit claim has been made by the plaintiff for the refund of the excise duty paid which reflects 20% of the excise duty paid under

Tariff Item 11B wrongly and that even so as per the classification list and the Central Excise Act, the plaintiff is bound and liable to pay 1% excise

duty under Tariff Item 68 admittedly and that with regard to this, there is no dispute among the parties herein. The learned counsel appearing for

the plaintiff concedes this position of law and accordingly the 1% of the amount comes to Rs. 2718/- had to be paid by the plaintiff and contended

by the defendant in the statement. I accept this position of the matter raised by

the defendant and that accordingly, I am inclined to hold that the plaintiff is entitled to recover the amount of Rs. 2,71,754.40 being the excise duty wrongly paid by them to the defendants and that since has not been paid in spite of the claims being made from 17-5-1977 onwards and the defendants have to repay the said amount with the interest at 12% p.a. till the date of realisation of the same after deducting a sum of Rs. 2718/- payable by the plaintiff to the defendants out of the same.

31. In the result, the suit is decreed in favour of the plaintiff against the defendants herein, for the recovery of a sum of Rs. 2,69,036.40 with interest at the rate of 12% p.a. from 17-5-1977 onwards till the date of decree and at 6% p.a. from the date of decree till the date of realisation with pro-costs.