
(1985) 04 BOM CK 0059

In the Bombay High Court

Case No : Appeal No. 108 of 1977 in Miscellaneous petition No. 1151 of 1975

I.T.C. Limited

APPELLANT

Vs

M.K. Chipkar and others

RESPONDENT

Date of Decision : 09-04-1985

Acts Referred:

Central Excise Rules, 1944 — Rule 11, 173C, 173F, 2
Central Excises and Salt Act, 1944 — Section 11A, 11B, 3, 4, 40
Constitution of India, 1950 — Article 226
Contract Act, 1872 — Section 72
Customs Act, 1962 — Section 27
Limitation Act, 1963 — Section 17(1)

Citation : (1986) 9 ECC 385 : (1987) 10 ECR 531 : (1985) 22 ELT 334

Hon'ble Judges : P.S. Shah, J;P.B. Sawant, J;B. Lentin, J

Bench : Full Bench

Judgement

1. This appeal is directed against the decision dated April 6, 1977, of the learned Single Judge (Rege J.) dismissing the petition filed under Article 226 of the Constitution claiming a refund of excess excise duty paid under a mistake of law. This appeal was heard by the Division Bench consisting of Lentin and Sawant JJ. On a difference of opinion expressed by their separate judgments the matter has been placed before me.

2. The facts leading to this appeal which are not in dispute are these. The appellants - I.T.C. Limited formerly known as India Tobacco Co. Ltd., manufacture and sell cigarettes and tobacco products. They sell their products to the wholesale buyers who in turn sell the same to the secondary wholesalers of their choice. The secondary wholesalers in turn sell the said products to the retailers who ultimately sell them to the consumers. Between 1st September 1970 and 6th October 1972 I.T.C. effected sales of cigarettes bonafide in usual course of business at arms length on principal-to-principal basis to wholesale buyers. I.T.C. did not derive any extra benefit from the wholesale buyers and dealers and all the sales made by the I.T.C. did not have any consideration other

than the price of the products. During the aforesaid period I.T.C. followed the self removal procedure provided in Chapter VIII-A of the Central Excise Rules. Till September 1972 I.T.C. were removing their goods under self removal procedure after paying excise duty thereon on the basis of prices charged by the wholesale buyers to the secondary wholesalers. Between September 1, 1970 and October 6, 1972, I.T.C. declared the assessable value u/s 4 of the Central Excises and Salt Act, 1944, in the price list according to the prices charged by the wholesalers to the secondary wholesales and accordingly paid the excise duty to the department. On August 14, 1970, a Division Bench of this Court in *Voltas Limited v. A. K. Roy*, 73 Bombay Law Reporter, 229, held that the correct basis of the assessment of the excise duty on the manufactured goods was the price charged by the manufacturers to their immediate wholesalers i.e. first wholesalers. This judgment was upheld by the Supreme Court on December 1, 1972, in *A.K. Roy and Another Vs. Voltas Limited*, (hereinafter referred to as "the Voltas case").

3. As a result of the Supreme Court decision in Voltas case, I.T.C. discovered that for the periods 1st September 1970 to 28th May 1971 and 29th May 1971 to 14th February 1972, they had paid excess excise duty amounting to Rs. 10,05,944.99 and Rs. 13,20,083.47 respectively aggregating to Rs. 23,26,028.46 and that for the periods 15th February 1972 to 16th March 1972 and 17th March 1972 to 6th October 1972 the excess excise duty paid was Rs. 1,83,685.67 and Rs. 10,16,417.83 respectively aggregating to Rs. 1,00,103.80. These excess amounts represented the over-paid duty on prices charged by I.T.C.'s wholesalers to the secondary wholesale dealers. There is a dispute between the parties as to the date of discovery of mistake by I.T.C.

4. Consequent to the judgment of the Supreme Court in Voltas case, I.T.C. made four separate refund applications to the department. These applications were (a) application dated February 5, 1973, for Rs. 10,16,417.83 for excess duty paid on goods removed during the period March 17, 1972 to October 6, 1972, (b) application dated February 14, 1973, for Rs. 1,83,685.67 for excess duty paid on goods removed during the period February 25, 1972 to March 16, 1972, (c) application dated February 23, 1973, for Rs. 13,20,083.47 for excess duty paid on goods removed during the period May 29, 1971 to February 14, 1972, and (d) application dated February 26, 1973, for Rs. 10,05,944.99, for excess duty paid on goods removed during the period September 1 to May 28, 1971.]

5. By a notice dated September 6, 1973, the Assistant Collector of Central Excise called upon the I.T.C. to show-cause why all the said applications should not be rejected. I.T.C. showed cause to the notice by filing written submissions dated October 23, 1973. However, ultimately all the four refund-applications were rejected by the Assistant Collector on May 4, 1974. On July 31, 1974, the I.T.C. filed appeals against the orders of the Assistant Collector rejecting their refund applications before the Appellate Collector. On November 25, 1974, the Appellate Collector passed two separate orders stating that I.T.C.'s appeals pertaining to

the refund of Rs. 13,20,083.47 (for the period May 29, 1971, to February 19, 1972) and Rs. 10,05,944.99 (pertaining to the period September 1, 1970, to May 20, 1971) were allowed, that the orders of the Assistant Collector were set aside and that consequential relief was granted to the I.T.C. "within the time limit of Rule 11" of the Central Excise Rules.

6. In the same day similar orders were passed by the Appellate Collector pertaining to the refund of Rs. 10,16,417.83 (for the period March 17, 1972 to October 6, 1972) and Rs. 1,83,685.67 (for the period February 15, 1972 to March 16, 1972). These amounts were refunded by the department to the I.T.C.

7. By their two letters both dated December 11, 1974, addressed to the Assistant Collector the I.T.C. requested for refund in respect of the amounts aggregating to Rs. 23,26,028.46. As no reply was received, I.T.C. sent reminders by their two letters both dated February 14, 1975, to the Assistant Collector. By his letter dated March 12, 1975, the Assistant Collector informed the I.T.C. that their claim has been referred to the Collector, Central Excise, and that communication in that matter was awaited. Since nothing was heard either from the Assistant Collector or the Collector, I.T.C. sent reminders to the Assistant Collector by their letters dated March 23, 1975, and August 4, 1975. On September 16, 1975, the Assistant Collector addressed a letter to I.T.C. informing them that the department desired to have the Appellate Collector's order reviewed by the Government of India and that the claim for refund will be considered after the receipt of the Government of India's decision in the matter.

8. After giving notice to the department, by their letter dated September 26, 1975, I.T.C. filed a writ petition in this Court on September 30, 1975, for a mandamus directing the respondents to carry out the orders in appeal dated November 25, 1974, and for refund of the sum of Rs. 23,26,028.46 or in the alternative for a mandamus directing them to the withdraw and/or cancel the directions relating to grant of consequential relief contained in the orders dated November 25, 1974, and for the refund of the said amount.

9. By his Judgment and order dated April 6, 1977, the learned single judge dismissed the petition on the preliminary contention urged by the respondents that I.T.C.'s proper remedy was by way of a suit so that it could be established by evidence at what point of time they came to know their mistake. The learned single judge observed that there was a prima-facie triable issue as regards the availability of the relief of refund of excess excise duty to the petitioners on the ground of limitation and it would be proper to leave the I.T.C. to seek their remedy for the refund of excise duty on the cause of action u/s 72 of the Contract Act by the ordinary mode of action in the civil court rather than exercising the court's discretion under Article 226 of the Constitution. The I.T.C. have, therefore, preferred the present appeal.

10. It appears from the judgment of Lentin J. that at the time of hearing of the appeal it was urged on behalf of the I.T.C. that (i) in view of the judgment

delivered by the Supreme Court in Voltas case, indisputably the amount of Rs. 23,26,028.46 was collected by the department without authority of law which the department was bound to refund to I.T.C., (ii) Rule 11 of the Excise Rules has no application; (iii) I.T.C. were entitled to take appropriate action within three years from the delivery of the Supreme Court judgment in Voltas case on 1st December 1972 which in fact I.T.C. did within one year, by way of making the refund applications dated 23rd February 1973 and 26th February 1973; and (iv) in any event, I.T.C.'s refund applications were within time.

11. On the other hand the contentions urged on behalf of the respondents were (i) the appropriate remedy of I.T.C. was by way of a suit so that it could be ascertained at what point of time I.T.C. discovered their mistake in making the over-payments, (ii) starting point of limitation was three years from 14th August 1970 when the Bombay High Court delivered its judgment in Voltas case, (iii) the writ petition filed on 30th September 1975 was barred by limitation as it had been filed more than three years after the Bombay High Court delivered its judgment in Voltas case, (iv) the writ petition was not maintainable because the I.T.C. chose to avail itself of the departmental remedy (in other words the contention raised appears to be that in view of their resorting to a proceeding under Rule 11 all that has to be seen is whether the claim could be granted within the frame-work of Rule 11 and if it is found that the claim cannot be granted under Rule 11, the writ petition is liable to be rejected, and (v) writ jurisdiction should not be exercised in favour of I.T.C. as they had already collected the excise duty from their distributors and hence were guilty of unjust enrichment.

12. Lentin J. held that none of the contentions urged on behalf of the respondents were tenable. He inter-alia held that -

(a) the department is bound to refund to I.T.C. the excess duty admittedly having been collected without authority of law;

(b) Rule 11 is not attracted where collection of duty is without authority of law,

(c) (i) a writ is the more efficacious, expeditious and adequate remedy than a suit (ii) persons cannot be denied remedy by way of a writ where revenue has collected taxes without authority of law,

(d) remedy by way of writ is available if the writ is filed within three years from the discovery of the mistake, and

(e) time is to be computed not from 14th August 1970 when the Bombay High Court delivered its judgment in Voltas case, but when the Supreme Court said so on 1st December 1972.

13. He also rejected the contention of the respondent that I.T.C.'s availing itself of the departmental remedy under Rule 11 disentitles them of the remedy of a writ under Article 226 of the Constitution. As regards the contention of unjust enrichment he 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 just not arise. He held that assuming that there was unjust enrichment by I.T.C., in law the department cannot resist restitution having regard to the various decisions of the Supreme Court and also of this court referred to in his judgment. In the result, he allowed the appeal and set aside the judgment and order of the learned Single Judge and also set aside the impugned orders dated November 25, 1974, and directed the respondents to refund to I.T.C. such sum as on calculations is ascertained to have been paid by the I.T.C. as excise duty. Sawant J. disagreed with Lentin J. and dismissed the appeal on two grounds viz. that the petitioners are not entitled to invoke the equitable and discretionary jurisdiction under Article 226 of the Constitution and also that their claim is barred by limitation.

14. Mr. Desai appearing for the I.T.C. submitted before me that (a) in view of the judgment in Voltas case finally decided by the Supreme Court, the excess amounts collected by the department from I.T.C. were without the authority of law and it is the obligation of the State to refund tax collected without the authority of law, (b) Rule 11 of the Central Excise Rules does not apply to the collection of tax without authority of law, (c) the mistake was discovered by I.T.C. when the Supreme Court finally decided the Voltas case and assuming that the mistake must be deemed to have been discovered by I.T.C. in March 1971, when Bombay Judgment in Voltas case was reported the claim for refund of excess amount collected from I.T.C. was lodged with the department well within the period of three years from that day, (d) though Rule 11 as such does not apply, the department can refund tax collected without the authority of law in its administrative capacity in an application under Rule 11 and there was nothing wrong, if I.T.C. believed that they would get a refund of the amount from the department without its being driven to file any writ petition under Article 226 or a suit, (e) that as a matter of fact the appeals preferred by I.T.C. were allowed and the department thereafter took its own time to inform the petitioner that their case has been suggested for review by the Government of India by the department's letter dated September 15, 1975, (f) that the department actually made a refund of the amount for the period from 15th February 1972 to 6th October 1972, (g) that the I.T.C. had sent reminders after the decision in appeal, but did not invoke any response from the department till September 1975 and thereafter immediately the petition is filed by the I.T.C., (h) that having regard to the facts of the case and the conduct of the parties, I.T.C. cannot be held guilty of laches in approaching the court, (i) that in any event there is no strict period of limitation in a Writ Petition and even the three years prescribed under the Limitation Act is only a factor to be taken into account which can be relaxed or restricted on the facts and circumstances of each case. (j) that the delay, if any, in filing the Writ Petition has been satisfactorily explained in this case and there was no negligence whatsoever on the part of I.T.C. in not filing the Writ Petition till September 19, 1975, (k) that the theory of unjust enrichment has in any event no relevance to the collection of tax without the authority of law, (1) that

the I.T.C. have an integrated price which includes such excise as is payable in law and not any specific amount of excise, (m) that even if it is assumed that the I.T.C. have collected the excess amount of tax which is not due to the Government from their customers the Government cannot decline to refund the tax illegally collected by it by contending that the assessee may have collected it from his customers.

15. The principal contentions urged by Mr. Sethna appearing for the respondents are these - (i) that the petition admittedly having been filed more than three years after the date of the judgment of this court in Voltas case, or in any event after the said decision was reported in the Bombay Law Reporter, the petition is barred by limitation (ii) that assuming that the Rule of Limitation of three years cannot be said to strictly apply to High Court's jurisdiction under Article 226, the facts and circumstances of the case disclose that there is gross delay in filing this petition and further the I.T.C. is also guilty of laches since they failed to file the petition expeditiously after they discovered the mistake, whether one takes into consideration the date when the High Court Judgment in Voltas case was reported in Bombay Law Reporter, or the date when according to I.T.C. it came to know of the said decision or the date when the I.T.C. came to know of the judgment of the Supreme Court in Voltas case as the relevant date, (iii) that the I.T.C. had chosen to avail of the remedy provided by Rule 11 of the Excise Rules and the order passed in these departmental proceedings are not shown to suffer from any illegality since indisputably refund under Rule 11 can be granted only if the claim is made within one year of the actual payment of the duty, the date of the discovery of the mistake being not relevant. I.T.C.'s resorting to the departmental remedy under Rule 11 was wholly misconceived. I.T.C., therefore, cannot take advantage of the pendency of the departmental proceedings and the time consumed in the correspondence made by them with the department in order to explain the delay in filing the petition. Moreover, I.T.C.'s further correspondence after the decision in appeal being in the nature of mere representations without any statutory force cannot be utilised by the I.T.C. for the purpose of explaining the delay in filing the petition, (iv) that the I.T.C. is not entitled to refund as they had already collected the excess excise duty from their distributors and on the principle that it is unjust to permit the manufacturers to make windfall gains by pocketing the money that does not belong to them, (v) that the facts and circumstances of this case do not warrant exercise of extraordinary jurisdiction under Article 226 in favour of a big company like I.T.C. and lastly (vi) the question of limitation which depends on proof of the date of discovery of the mistake as also the question as to whether the I.T.C. had recovered the duty amount in full or not from their distributors are disputed question of fact and it is proper to leave the I.T.C. to the normal remedy of filing a civil suit.

16. Before I proceed to deal with the facts of this case it would be proper at this stage to refer to the well settled principles governing the rights of the parties to claim refund of tax levied or collected without the authority or law. Article 265 of

the Constitution lays down the mandate that no tax shall be levied or collected except by authority of law. In view of the decision in *Voltas* case there is no dispute that the amounts collected by the department from I.T.C. were without the authority of law and, therefore, without jurisdiction. In *Patel India Private Limited Vs. Union of India and Others*, , it is held that there was a legal obligation on the part of the Government to return the excess duty collected by it without the authority of law. It is not disputed by Mr. Sethna that Rule 11 of the Central Excise Rules relating to refund of excess duty does not apply to collection of tax without authority of law. Indeed the contention of Mr. Sethna before me has been that the applications of I.T.C. under Rule 11 for refund of tax were not maintainable in law and the I.T.C. was wrong in pursuing the remedy under Rule 11 for seeking a refund of the excess duty paid by it and having deliberately pursued such a wrong remedy cannot be heard to say that the period spent in those proceedings should be taken into account while considering the question of limitation and delay in filing the petition.

17. In *Patel India Private Limited Vs. Union of India and Others*, , it has been held that section 40 (which provision is in pari-materia with the provision in Rule 11) applies only to cases where duties have been paid through inadvertence, error or misconstruction, and where refund application has to be made within three months from the date of such payment. In that case the facts were that M/s. Patel India (Pvt.) Ltd., used to import View-master stereoscopes, reels etc. acting as the sole distributing agent in India for the products of M/s. Sawyer's Inc., Portland, U.S.A. The customs authorities used to levy import duty on the basis of the invoice price u/s 29 read with Section 30 of the Sea Customs Act, 1878, as being the real value of the goods so imported. During the year 1954-55, the appellant company imported several items set out in Annexure "D" to the appellant's Special Leave petition. When items 1 and 2 arrived in Bombay port, the customs authorities, ignoring their hitherto followed practice, refused to accept the invoice price as the real value and levied excess duty in the aggregate sum of Rs. 1,356/-. An appeal to the customs collector failed whereupon the appellant-company lodged a revision application before the Government of India. Pending the disposal of the said revision, several other items arrived in Bombay port, in respect of which the Customs refused to accept their invoice price and charged the appellant-company with excess amounts as import duty which were paid by them under protest. On March 20, 1957, the Government of India disposed of the said revision, accepting their contention and directed reassessment. Thinking that the customs would follow the principle which were laid down in the decision in their revision the company abstained from filing appeals in respect of other items which had arrived pending the decision of the said revision although the Customs had levied excess duty thereon. On the revision being disposed of in their favour the company applied for refund of the excess duty charged in respect of the items 22 to 29 and 33-35. This was done u/s 40 of the Act and within the period prescribed therein and the customs granted refund on the said items. The customs, however, declined to refund the excess

duty in respect of the rest of the items on the ground that the application for refund in respect of those items had not been made within the time prescribed by Section 40. An appeal to the Collector and a revision before the Government of India against the said refusal to grant refund were both rejected, the refusal by the Customs Appraiser being confirmed on the ground that refund was not applied for in time u/s 40. The company filed a Writ Petition under Article 226 for quashing the orders of refusal and for an order directing refund of excess duty inter-alia on the ground that Section 40 of the Act had no application. The Supreme Court held that the direction given by the Government of India in its decision in the said revision that the invoice price should be accepted as real value within the meaning of Section 30 of the Act applied to the rest of the consignments and as such the customs authorities were not right in law in charging excess duty on the rest of the consignments and charging the excess duty was in excess of jurisdiction. The Supreme Court further observed -

"This position, indeed, was accepted by the customs authorities when they ordered refund of excess duty charged by them in relation to items 22 to 29 and 33-35. Such refund could only have been ordered on the footing that the excess duty on those consignments had been charged without the authority of law and, therefore, without jurisdiction. The fact that no application had been made therefore u/s 40 was irrelevant to the point that the excess duty was assessed and recovered without the authority of law.

Section 40 on which the Union of India relied in its return, provides that no customs duties or charges which have been paid, and on which payment wholly or in part, is claimed in consequence of the same having been paid through inadvertence, error or misconstruction, shall be returned, unless such claim is made within three months from the date of such payment. The section clearly applies only to cases where duties have been paid through inadvertence, error or misconstruction, and where refund application has to be made within three months from the date of such payment."

After observing as above, the Supreme Court held that since Section 40 did not apply, the Government of India could not retain the excess duty except upon the authority of some other provisions of law and since no such provision other than Section 40 which disentitled the appellant company to the refund having been put forward and the customs authorities not being entitled to retain the excess duty, there was a legal obligation on the part of the respondents to return the excess duty and a corresponding legal right in the appellant-company to recover it. The Supreme Court, therefore, held that the refusal to return the excess duty on the ground that the appellant-company had not applied within time provided by the Act was clearly unsustainable.

18. In *Associated Bearing Co. Ltd.*, - 1980. E.L.T. 415 (Bom.), a Division Bench of this Court observed -

"The jurisdiction of the authorities under the Central Excise Act is to recover duty

according to law. If any duty is recovered in such a manner that duty comes to be levied on price which is not permissible to law as in the case of including post-manufacturing expenses in the price of the dutiable article, the levy of duty clearly amounts either to acting in excess of jurisdiction or acting without jurisdiction. Such an act on the part of the departmental authorities cannot be considered as resulting from any error or misconstruction as contemplated by Rule 11 of the Act. If such a case there is also no question of any inadvertent demand. The very basis of computation of duty becomes wrong and to that extent the recovery is wholly unauthorised."

19. A similar view has been taken in the later decisions of this Court in (1) Maharashtra Vegetable Products Pvt. Ltd., 1981 E.L.T. 468 (Bom.), (2) Wipro Products Ltd., 1981 E.L.T. 531 (Bom.), (3) Leucoplast (India) Ltd., 1983 E.L.T. 2106 (Bom.) ; (4) Universal Drinks Private Ltd., Nagpur Vs. Union of India and another, and (5) Golden Tobacco Co. Ltd. - 1983 E.L.T. 2238 (Bom.). In view of this well-settled law, Rule 11 will not apply to the facts of the present case and consequently it would be impermissible for the department to refuse refund on the ground of bar of limitation prescribed under Rule 11.

20. In D. Cawasji and Co. and Others Vs. State of Mysore and Another, , it is pointed out that Section 17(1)(c) of the Limitation Act, 1963, provides that in the case of a suit for relief on the ground of mistake, the period of limitation does not begin to run until the plaintiff had discovered the mistake or could, with reasonable diligence, have discovered it. In a case where payment is made under a mistake of law as contrasted with a mistake of fact, generally the mistake becomes known to the party only when a court makes a declaration as to the invalidity of the law. Though a party could, with reasonable diligence, discover a mistake of fact even before a court makes a pronouncement, it is seldom that a person can, even with a reasonable diligence discover a mistake of law before a judgment adjudging the validity of the law.

21. In State of Madhya Pradesh Vs. Bhailal Bhai and Others, , while holding that the High Courts have power for the purpose of enforcement of fundamental rights and statutory rights to give consequential relief by ordering repayment of money realised by the Government without the authority of law, said that the special remedy provided in Article 226 is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defences legitimately open in such action and that among the several matters which the High Courts rightly take into consideration in the exercise of that discretion is the delay made by the aggrieved party in seeking this special remedy and the excuse there is for it. If a person comes to the court for relief under Article 226 on the allegation that he has been assessed to tax under a void legislation and having paid it under a mistake is entitled to get it back, the court, if it finds that the assessment was void, being made under a void provision of law, and the payment was made by mistake, is still not bound to exercise its discretion directing repayment, and that whether repayment should be ordered in the

exercise of this discretion will depend in each case on its own facts and circumstances and that it is not easy nor is it desirable to lay a general rule. If there has been unreasonable delay the court ought not ordinarily to lead its aid to a party by this extraordinary remedy of mandamus. On the question of the period of limitation applicable to a petition under Article 226 the Supreme Court observed -

"The provisions of the Limitation Act do not as such apply to the granting of relief under Article 226. However, the maximum period fixed by the Legislature as the time within which the relief by a suit in a civil court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Article 226 can be measured. The Court may consider the delay unreasonable even if it is less than the period of limitation prescribed for a civil action for the remedy but where the delay is more than this period, it will almost always be proper for the Court to hold that it is unreasonable."

22. In *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, , after referring to the above mentioned passages in *Bhailalbhai*, the Supreme Court observed -

"Section 17(1)(c) of the Limitation Act, 1963, provides that in the case of a suit for relief on the ground of mistake, the period of limitation does not begin to run until the plaintiff had discovered the mistake or could, with reasonable diligence, have discovered it. In a case where payment is made under a mistake of law as contrasted with a mistake of fact, generally the mistake becomes known to the party only when a court makes a declaration as to the invalidity of the law. Though a party could, with reasonable diligence, discover a mistake of fact even before a court makes a pronouncement, it is seldom that a person can, even with a reasonable diligence, discover a mistake of law before a judgment adjudging the validity of the law.

Therefore, where a suit will lie to recover moneys paid under a mistake of law, a writ petition for refund of tax within the period of limitation prescribed i.e. within 3 years of the knowledge of the mistake, would also lie. For filing a writ petition to recover the money paid under a mistake of law, this Court has said that the starting point of limitation is from the date on which the judgment declaring as void the particular law under which the tax was paid was rendered, as that would normally be the date on which the mistake becomes known to the party. If any writ petition is filed beyond three years after that date, it will almost always be proper for the court to consider that it is unreasonable to entertain that petition, though even in cases where it is filed within three years, the court has a discretion, having regard to the facts and circumstances of each case, not to entertain the application."

23. In *Tilokchand and Motichand and Others Vs. H.B. Munshi and Another*, the question as to limitation in a petition under Article 32 arose. While dealing with this question the Court held -

"If then there is no period prescribed what is the standard for this Court to follow ? I should say that utmost expedition is the sine qua non for such claims. The party aggrieved must move the Court at the earliest possible time and explain satisfactorily all semblance of delay. I am not indicating any period which may be regarded as the ultimate limit of action for that would be taking upon myself legislative functions. In England a period of 6 months has been provided statutorily, but that could be because there is no guaranteed remedy and the matter is one entirely of discretion. In India I will only say that each case will have to be considered on its own facts. Where there is appearance of avoidable delay and this delay affects the merits of the claim, this Court will consider it and in a proper case hold the party disentitled to invoke the extraordinary jurisdiction.

Therefore, the question is one of discretion for this Court to follow from case to case. There is no lower limit and there is no upper limit. A case may be brought within Limitation Act by reason of some Article but this Court need not necessarily give the total time to the litigant to move this Court under Article 32. Similarly, in a suitable case this Court may entertain such a petition even after a lapse of time. It will all depend on what the breach of the Fundamental Right and the remedy claimed are and how the delay arose."

24. In a recent decision in *Shri Vallabh Glass Works Ltd. and Another Vs. Union of India (UOI) and Others*, , the Court observed as follows -

"While there are different periods of limitation prescribed for the institution of different kinds of suits by the Limitation Act, 1963, there is no such period prescribed by law in respect of petitions filed under Article 226 of the Constitution. Whether relief should be granted to a petitioner under Article 226 of the Constitution where the cause of action had arisen in the remote past is a matter of sound judicial discretion governed by the doctrine of laches. Where a petitioner who could have availed of the alternative remedy by way of suit approaches the High Court under Article 226 of the Constitution, it is appropriate ordinarily to construe that any unexplained delay in the filing of the writ petition after the expiry of the period of limitation prescribed for filing a suit as unreasonable. This rule, however, cannot be a rigid formula. There may be cases where even a delay of a shorter period may be considered to be sufficient to refuse relief in a petition under Article 226 of the Constitution. There may also be cases where there may be circumstances which may persuade the court to grant relief even though the petition may have been filed beyond the period of limitation prescribed for a suit. Each case has to be judged on its own facts and circumstances touching the conduct of the parties, the change in situation, the prejudice which is likely to be caused to the opposite party or to the general public etc."

25. In *Golden Tobacco*, 1983 E.L.T. 2238 (Bom) , Madon J. as he then was, after referring to the decision of the Supreme Court in *Tilokchand and Motichand and Others Vs. H.B. Munshi and Another*, M/s. D. Cawasji & Co., 1978 E.L.T. (J 154) (S.C.) : 1975 S.C. 813 , *Shiv Shankar Dal Mills and Others Vs. State of Haryana*

and Others, and Hindustan Sugar Mills Vs. State of Rajasthan and Others, summed up the legal position in para-16 of the judgment as under -

"The position which emerges from the above decisions of the Supreme Court is that though the Limitation Act does not directly apply to writ petitions, the Court in judging whether a petition should be disallowed on the ground of gross delay or laches would take into account the period of limitation, where a suit is filed for some relief. If the petition were filed beyond the prescribed period of limitation for a suit, the Court would ordinarily hold the petitioner guilty of delay and would not grant his petition. Even where the petitions were presented within the period of limitation prescribed for a suit, in the special circumstances of a particular case the Court might refuse to exercise its discretion and grant relief to the petitioner. In the special circumstances of a case the Court might interfere in the exercise of its writ jurisdiction even where a petition is filed after the expiry of the period of limitation for a suit. The Supreme Court in its later decisions has looked with great disfavour upon technicalities and objections raised by the state to returning money collected contrary to law and unlawfully retained by it."

26. As far as the question of limitation as also the question of delay and laches in filing this petition, the facts that need to be borne in mind are that the refund of excess excise duty claimed in the petition relates to the period from 1st September 1970 to 14th February 1972 and the petition is filed on September 30, 1975. It is contended by Mr. Sethna that the Bombay decision in Voltas case was reported some time in February/March 1971 and, therefore, that should be considered as the date on which the I.T.C. got the knowledge of the mistake and since the petition has been filed more than three years thereafter the petition is barred by limitation (on the basis that three years limitation under the Limitation Act applies) and in any event the I.T.C. is guilty of gross delay and laches in approaching this Court and were not entitled to the discretionary relief under Article 226. Secondly, it was submitted that in any event the date of knowledge is in dispute and being a disputed question of fact should best be left to be determined in an ordinary suit. Having regard to the facts and circumstances of the case as I shall presently show that neither of these contentions is well founded. In the course of the hearing of the appeals by the Appellate Collector, Central Excise, the I.T.C. had filed the affidavit of Mr. S. Krishnamurthy, an Officer of I.T.C. dated October 3, 1974. It has been stated in this affidavit that on February 18, 1972, he came across a report in the Times of India about a decision of the Bombay High Court in "Queens Chemist" in which report the earlier decision of the Bombay High Court in Voltas case was mentioned and indicated that "price charged by the manufacturer must be taken to be wholesale cash price". Thereafter, he contacted I.T.C.'s Calcutta Solicitor Mr. S. K. Banerjee in their registered office at Calcutta and during his visit to Bombay handed over a copy of the press report to him. He was then advised by Mr. Banerjee to obtain a copy of the judgment in Voltas case and to forward the same to him at Calcutta for his consideration. He then contacted I.T.C.'s Solicitors in Bombay and asked for a copy of the Bombay High Court's Voltas Judgment which copy was received

by him in March 1972 and forwarded to Mr. Banerjee. He was also informed by I.T.C.'s Bombay Solicitors that the excise authorities had filed an appeal against the judgment of the Bombay High Court. He was advised by Mr. Banerjee that in view of the conflict between the Bombay judgment in National Tobacco Co. of India Ltd. Vs. Collector of Central Excise and Others, and the pendency of the appeal in the Supreme Court in Voltas case it would be necessary to obtain the advice from a senior Counsel. Accordingly, in May 1972 opinion of the Senior Counsel was taken. The I.T.C. were advised that in view of the conflict of decisions of various High Courts it was not possible to say definitely what the correct legal position was until the Supreme Court finally decided the matter. The I.T.C. were also advised that in the meantime efforts should be made to persuade the excise authorities to assess the products of the I.T.C. on the basis of the Bombay High Court Judgment. Acting on this advice the I.T.C. approached the excise authorities and some time in September 1972 they permitted the I.T.C. to make clearance of its products on the basis of the prices charged by the I.T.C. to its own customers i.e. the wholesalers. It is further stated in the affidavit that the controversy was set at rest by the Supreme Court on December 1, 1972, in the Voltas case. The copy of the said judgment of the Supreme Court was obtained some time in January 1973 and after studying the same the I.T.C. definitely came to know and discovered that the past payment of excise duty paid by them was made under a mistake of law. I do not see any reason to doubt the statements made in the affidavit of Mr. Krishnamurthy. His affidavit shows that in March 1972 I.T.C. received the copy of the Bombay High Court judgment in Voltas case. I.T.C. has factories in different States and, therefore, it cannot be said that they would not consider waiting for the verdict of the Supreme Court in view of the conflicting views taken by different High Courts. Immediately after the judgment of the Supreme Court I.T.C. filed the application for refund in February 1973. Earlier they had also approached the excise authorities in September 1972 for being permitted to make clearance of its products on the basis of the prices charged by the I.T.C. to its own customers i.e. wholesalers. Having regard to the facts and circumstances mentioned above it is not possible to hold that the I.T.C. was guilty of delay in taking steps to claim refund of the excess duty. Under the Limitation Act the starting point of limitation is the date of the knowledge and limitation prescribed for filing the suit is three years from the date of the discovery of the mistake. Having regard to the facts stated in the affidavit of Mr. K. Krishnamurthy the claim to the department was made within less than a year of the date of the knowledge of the Bombay judgment in Voltas case. Even if the date when the judgment of the Bombay High Court in Voltas case was reported in Bombay Law Reporter is taken as the date of discovery of the mistake, the claim for refund to the department was made within two years from the date and if one were to go backwards to the date of the judgment on August 14, 1970, as the relevant date the applications made to the department were within three years from that date. I.T.C.'s step in applying for refund to the department soon after the decision of the Supreme Court in Voltas case has to be taken into consideration for the purpose of considering the question whether the

I.T.C. is guilty of delay in filing the petition under Article 226. I have already pointed out the various steps taken by the I.T.C. as disclosed in the affidavit of Mr. Krishnamurthy, coupled with the fact that I.T.C. had factories also in other States and the High Courts other than Bombay High Court had taken a contrary view, it is not possible to accept the submission of Mr. Sethna that I.T.C. was guilty of delay and laches at least till it approached the department for refund in the month of February 1973.

27. Was I.T.C. not justified in approaching the department at all and consequently I.T.C. cannot be permitted to take advantage of the time spent by it from the date of making applications to the department till it filed the present petition on September 30, 1975 ? According to Mr. Sethna, the answer is "No". He submitted that the applications for refund to the department were themselves misconceived and the I.T.C. cannot be permitted to take advantage of the time spent by it in the proceedings under Rule 11 when such proceedings did not lie and consequently even the subsequent correspondence by I.T.C. with the department cannot save the situation for I.T.C. for the purpose of explaining the delay. Mr. Sethna argued that the least that can be said is that the I.T.C. was negligent and cannot claim the exercise of discretion by the High Court in its jurisdiction under Article 226. Reliance was placed by Mr. Sethna on certain decision to support his contentions, but before advertng to those decisions it is necessary to recapitulate the events that happened since the filing of I.T.C.'s applications for refund to the department in February 1973. The Assistant Collector issued show cause notice dated September 6, 1973, calling upon the I.T.C. to show cause why the applications should not be rejected. I.T.C. showed cause on October 23, 1973. The applications were rejected by the Assistant Collector on May 4, 1974. On this decision being communicated, I.T.C. filed appeals on July 31, 1974. On November 25, 1974, all these appeals were allowed and the orders of the Assistant Collector were set aside and the consequential relief was granted to the I.T.C. "within the time limit of Rule 11". Identical separate orders were passed in each of the four appeals. Since their appeals were allowed I.T.C. addressed letters dated December 11, 1974, to the Assistant Collector requesting for refund. Reminders were sent by I.T.C. since they did not receive any reply. It was for the first time on March 12, 1975, that the Assistant Collector wrote a letter to the I.T.C. saying that their claim has been referred to the Collector. Since nothing was heard thereafter, either from the Assistant Collector or the Collector, I.T.C. sent reminders and by his letter dated September 15, 1975, the Assistant Collector informed the I.T.C. for the first time that the department desired to have the Appellate Collector's order reviewed by the Government of India and that the claim for refund will be considered after the receipt of the Government of India's decision in the matter. Then followed the notice dated September 26, 1975, and thereafter writ petition on September 30, 1975. It is to be noted that the I.T.C. did receive refund for the period 15th March 1972 to 6th October 1972 and presumably the department had second thoughts about the remaining two claims which formed the subject matter of this

petition. The fact that the department wanted a review prima-facie indicates that it understood the orders in appeal in respect of these claims as having been granted by the Collector in Appeal, notwithstanding the addition of the words "within the time limit of Rule 11" in the orders. Though, the appeals were heard together and common arguments were advanced, four separate independent orders were passed. If the intention was to reject the claim in respect of the period prior to one year of the making of the application, there was no question of allowing such appeals and setting aside the orders of the Assistant Collector. Added to this is the fact that the department did not inform I.T.C. in reply to their letters and reminders that the claims were rejected by the Appellate authority as time barred and the I.T.C. was wrong in insisting for refund. Further, by his last letter the Assistant Collector informed I.T.C. that they were approaching the Government of India for review of the orders in appeal. If these are the facts, it is not possible to accede to Mr. Sethna's contention that I.T.C. is guilty of delay in filing the petition. To say the least, the orders in appeal cannot, but be described as contradictory inter se in the sense that there was no question of allowing the appeal and setting aside the orders of the Assistant Collector, if the claim was treated as barred by limitation under Rule 11. Surely, in this state of affairs, I.T.C. cannot be blamed of delay in filing the petition.

28. Rule 11 does not apply to the claim of refund on the ground that payment was made under a mistake is not disputed. However, that does not prevent the department from taking cognizance of the claim which is otherwise perfectly legal and justified in its administrative capacity by treating such an application as a representation for refund since the levy of excess duty was illegal. Moreover, even if the department is held obliged to grant refund only if the application is made within the prescribed period of one year and in no other case, it does not mean that the High Court cannot grant refund in a petition under Article 226. Mr. Sethna relied on the decisions of the Supreme Court in *Burmah Construction Co. Vs. The State of Orissa and Others*, ; and *Madras Rubber Factory Ltd. Vs. The Union of India (UOI) and Others*, . It is sufficient to state that these two decisions have been considered by a Division Bench of this Court in *Leucoplast (India) Ltd., v. Union of India*, 1983 E.L.T. 2106 (Bom) and it has been held that while exercising jurisdiction under Article 226 restrictions as to limitation would not come in the way of the petitioner for getting appropriate relief. The Division Bench has explained the said two decisions of the Supreme Court in para-8 of its judgment as follows :

"It was a case (i.e. *Madras Rubber Factory Ltd. Vs. The Union of India (UOI) and Others*, under the Customs Act. Section 27 of the Act has made a provision for refund of duty. That section is similar to R. 11 or S. 11B of the Central Excises and Salt Act. Section 27 has also prescribed a period of limitation for making an application and when the matter went to the Supreme Court, the Supreme Court has held as follows : "The appellant's case was governed by sub-section (1) of section 27. No case of any running account was set up by the appellant nor was there anything in the records of this case to substantiate it. Customs duty was

paid in respect of each of the five consignments on the date of its respective bill. Ultimately, this position could not be disputed before us. The appellant, however, contended that the duty was paid always under general protest which covered the cases of these five consignments also. Hence, under the proviso to sub-section (1) the limitation of six months does not apply."

29. The Supreme Court in the latter part of the judgment has observed that a claim made before it would not be permissible as the view taken by the Customs Authorities about the bar of limitation was quite correct. It was urged by Mr. Neurenkar that this decision would mean that the claim of refund will be governed by the restrictions of a particular section which has particular effect. It is however material to note that in the matter before the Supreme Court the concerned party has not initially moved the High Court under Article 226 of the Constitution or the Supreme Court under Article 32. The matter was taken up before the Supreme Court under Article 136 of the Constitution directly from the order passed by the Central Government. In such matters it is necessary to bear in mind that the jurisdiction of the Appellate Authority would be limited to the jurisdiction of the authority which has passed the original order. The question as to whether a refund is permissible even if a claim is made beyond the period of limitation, could not have been decided by the Central Government in favour of the petitioner in view of the fact that there was a specific provision under the Act that the claim must be made within time. When the matter went to the Supreme Court, the Supreme Court considered this period of limitation as it was exercising a jurisdiction not under Article 32 of the Constitution. The fact that the concerned authority would ordinarily exercise the jurisdiction that was invested in the original authority can very well be seen from the decision of the Supreme Court in the case of *Raja Bahdur Kamakhya Narain Singh Vs. The Commissioner of Income Tax, Bihar and Orissa*, . It would not therefore, be correct for Mr. Neurenkar to urge that whenever a provision for refund has prescribed a period of limitation the High Court or the Supreme Court would not be able to grant relief (after that period of limitation was over), if the recovery was illegal. The other case on which Mr. Neurenkar has relied upon is of *Burmah Construction Co. Vs. The State of Orissa and Others*, . It was a claim for refund of Sales Tax. Section 14 of the Orissa Sales Tax Act has made a provision that a refund would be permissible if a claim is made within a prescribed period of 24 months. The petitioner, did not lodge such a claim within time. It was rejected. The petitioner, therefore, filed a writ petition in the Orissa High Court. It was also rejected and when he took the matter before the Supreme Court the Supreme Court found that the petitioner was not entitled to a refund. There are certain observations in the judgment of the Supreme Court suggesting that the rejection of the claim on the ground of bar of limitation was quite legal. Mr. Neurenkar relied upon these observations for the purpose of contending that even in a writ petition the provisions of limitation contained in a statute would be binding upon the claimant. No doubt prima-facie such an impression is likely to be created. However, it is material to note that in the writ petition that was filed before the

High Court, the petitioner has claimed for the enforcement of a liability of the Sales Tax Authorities imposed on them by a statute to refund the tax as per the provisions of the Act. Thus, though the matter was under Article 226 of the Constitution, the jurisdiction of the High Court that was invoked was for a limited purpose of asking the authorities under the Sales Tax Act to act in terms of that Act. It is in that background that the Supreme Court has held that the claim has to be rejected as under the Act the claim was required to be made within a prescribed period of limitation."

30. I fail to see how any fault can be found with I.T.C. for their conduct in making applications for refund to the department merely because such a refund could not be claimed strictly within the four corners of the provisions of rule 11. It was the department which had recovered the excess duty admittedly without the authority of law. I.T.C. was, therefore, justified in approaching the department itself for refund instead of immediately rushing to the court either by filing a petition under Article 226 or filing a suit in a civil court. In my view, the department could always refund the duty which has been illegally collected in its administrative capacity on an application being made to it. In this connection, one may usefully refer to the decision of the Delhi High Court in Vazir Sultan Tobacco Company Ltd., 1981. E.L.T. 140, where it has been held that the payment of excise duty would be payment authorised by law and not any payment in excess thereof and in that view of the matter it could be said that the applications made cannot be regarded as applications under Rule 11, but then the applications of the petitioners should have been regarded as representations not covered by Rule 11 and the department ought to have availed the law laid down in Voltas case and passed an administrative order directing the refund of the excess duty realised by them in excess of what was permissible under the Act. The above mentioned observations in Vazir Sultan Co. Ltd., have been noted with the approval of Madon J. (as he then was) in Swadeshi Mills Co. Ltd., v. Union of India - 1982 E.L.T. 237 (Bom.) : 1982 E.C.R. 165D (Bom.) . In Patel India Private Limited Vs. Union of India and Others, (cited supra) also it has been held that the refusal to return the excess duty on the ground that the company had not applied within the time provided by the Act was "unsustainable". The above mentioned decisions relied on by Mr. Desai support his contention that though the applications for refund were filed under Rule 11 the department could have administratively granted refund of duty which was admittedly recovered without the authority of law. The question for consideration in the present case is whether I.T.C. can be said to be guilty of "delay and laches" in making the applications for refund to the department merely because Rule 11 was not applicable. It is not at all possible to accept the argument that the time spent by the I.T.C. In the departmental proceedings should not be taken into account for the purpose of explaining the delay in approaching this Court under Article 226 of the Constitution. There is no reason why the tax payer should not except a fair deal from the department when it is discovered that the amount has been recovered without any authority of law. What is more, notwithstanding the fact

that all the applications for refund were made under Rule 11 and may not strictly fall within the four corners of Rule 11, not only all the four appeals were allowed, but also in respect of two of the appeals the amount was actually refunded for the period mentioned therein. The department took its own time for concluding the departmental proceedings and also to take a decision to make a review application to the Government. Surely, I.T.C. could not in the circumstances be blamed for not rushing to the Court for relief till they were informed by the department by their letter dated September 15, 1975, that the case was suggested for review by the Government of India. Within 15 days of this communication the present petition was filed by the I.T.C.

31. In my view, the facts and circumstances of this case do not show that I.T.C. can be refused relief on the ground of delay and laches in approaching this Court. As pointed out above, the applications for refund were made well within three years of the discovery of mistake, whether the date of the judgment of the Supreme Court in Voltas case or the date when the I.T.C. obtained the Bombay judgment in Voltas case or the date when the Bombay judgment in Voltas case was reported in Bombay Law Reporter or the date of the Bombay judgment in Voltas case is considered as the starting point of limitation. Then commenced the proceedings on the applications for refund made by the I.T.C. to the department. On completion of these proceedings followed the correspondence which correspondence was fully justified in the circumstances of the case and the petition was filed immediately after the department informed the I.T.C. about its intention to move the Government of India for review.

32. It cannot be disputed that if I.T.C. had filed the suit within the period of limitation, excess amount would have become refundable by virtue of Section 72 of the Indian Contract Act. Section 17(1)(c) of the Limitation Act, 1963, provides where in the case of any suit or application for which a period of limitation is prescribed under that Act the suit or application is for relief from the consequence of a mistake, the period of limitation shall not begin to run until the plaintiff or the applicant had discovered the mistake or could have with reasonable diligence discovered. However, there is no such period prescribed by law in petitions under Article 226 of the Constitution and whether relief should be granted to a petitioner under Article 226 of the Constitution where the cause of action had arisen in the remote of past is a matter of judicial discretion governed by the doctrine of lapses. As pointed out by the Supreme Court in *Shri Vallabh Glass Works* it is appropriate ordinarily to construe that any unexplained delay in filing of the writ petition after the expiry of the period of limitation prescribed for filing a suit as reasonable, but this rule cannot be regarded as the rigid formula and it all depends on the facts and circumstances of each case. While in a given case even a delay of shorter period may be considered to be sufficient to refuse relief in a petition under Article 226 of the Constitution, in another case there may be circumstances which may persuade the court to grant relief even though the petition is beyond the period of limitation prescribed for a suit. In other words, the question of delay and the discretion to be exercised by the court has

to be dealt with in the light of the facts and circumstances of each case. The facts in this case are that the period for which the refund was claimed in the applications for refund fell within the period of three years prior to the date of making the applications for refund. The affidavit of Mr. Krishnamurthy disclosed the events till the filing of the refund applications. The affidavit explains the circumstances in which the I.T.C. came to know of the judgment and the reasons for their waiting for the verdict of the Supreme Court in Voltas case. It is not that the I.T.C. with some malafide motive resorted to the departmental remedies instead of immediately filing a writ petition when the refund applications were made. The delay after February 1973 upto September 1975 is attributable solely to the departmental proceedings. In these proceedings I.T.C.'s appeals were allowed. The correspondence subsequent to the orders in appeal by the Collector does not indicate that the department disputed its liability to make refund pursuant to the orders in appeal. It was only in September 1975 that I.T.C. were informed of the department's intention to approach the Government for review. Taking a comprehensive view of the facts and circumstances of the present case, in my view, I.T.C. cannot be held guilty of delay or laches on their part and it would be unjust to deny relief to them on the technical plea that the period for which the refund is claimed falls beyond three years prior to the date of filing of the petition under Article 226. It is also not possible to hold that I.T.C. were guilty of delay in approaching the department or in filing the present petition. I do not find the conduct of I.T.C. is of such a nature as would disentitle them to claim refund of excess duty paid by them.

33. This brings me to the question of unjust enrichment. According to Mr. Sethna, granting of refund to I.T.C. in this case would result in their unjust enrichment and the High Court in its discretionary jurisdiction under Article 226 of the Constitution should not lend its hand to such a litigant. It is urged by Mr. Sethna that I.T.C. had recovered from their distributors the excess duty paid by I.T.C. to the department and, therefore, it would be unjust and inequitable to grant to I.T.C. the relief of restitution. Before referring to the various decisions cited it is necessary to bear in mind the undisputed facts in this case. It is not dispute that the I.T.C. makes all sales to wholesale buyers and I.T.C. have no control over the wholesale after sales. The wholesalers sell the product to secondary wholesalers of their choice who in turn sell to retailers who sell to the consumers. The averments in para 3 of the petition which have been admitted as substantially correct in the affidavit in reply are (a) I.T.C. make all sales to wholesale buyers and/or dealers in large bulk entirely on principal to principal basis, (b) these sales are evidenced by written contracts which represent normal commercial arrangements and are concluded in the usual course of business, (c) I.T.C. do not make any retail sales or sales in small quantities, (d) I.T.C. do not derive any extra benefit from the wholesale buyers, (e) the transactions between the I.T.C. and wholesale buyer were effected at arms length. In the normal course of business and do not have any consideration other than the price for the products, (f) all the sales made by the I.T.C. during the relevant period for which

the refund is claimed were as aforesaid. It is also not in dispute that I.T.C. have an integrated price system which includes such excise as is payable in law and not any specific amount of excise. It is also seen that before and after the self-removal procedure introduced under Chapter VII of the Rules, the price list was submitted by I.T.C. and were approved by the department on the basis of the prices charged and realised by the secondary wholesalers from the retailers, which after the discount was the price charged and realised by I.T.C.'s wholesale buyers from the secondary wholesale buyers. It is not possible to predicate that the I.T.C. is recovering a particular or specific amount of excise and it is only by working out backwards on the basis of price charged by the wholesaler to the secondary wholesaler that the quantum of excise duty payable by I.T.C. is calculated. As pointed out above I.T.C. charges an integrated price that the cigarettes can be sold at. From this price the assessable value is calculated backwards. For example, if the sale price is Rs. 100/- and duty is 33.3% the assessable value would be Rs. 75/- and excise duty would be Rs. 25/- which taken together represent the sale price viz. Rs. 100/-. If the sale by I.T.C. to the wholesale dealer is at Rs. 100/- and the sale by wholesale dealer to secondary wholesale dealer is at Rs. 104/- during the relevant period, even though in law I.T.C. should have paid Rs. 25/- as excise duty they actually paid Re. 1/- extra on the following basis :

Notional sale price ... Rs. 104.00 (i.e. sale price charged by wholesaler to secondary wholesaler). Assessable value ... Rs. 78.00 Excise duty ... Rs. 26.00 Thus on the above basis I.T.C. would pay Rs. 26.00 as duty though its price included only Rs. 25/- as duty. In other words Re. 1/- extra is recovered by the department.

34. Attention was drawn by Mr. Sethna to a statement annexed as Exh. 1 to the affidavit in reply dated November 22, 1976, filed by the Asstt. Collector. The heading of this statement is "list showing how the Central Excise duty was charged from the petitioners". This statement refers to different varieties of products manufactured and sold by I.T.C. It would be useful to reproduce the said statement as regards one item of product which would give an idea as to how the excise duty was calculated and charged from I.T.C.

Approved	Prices	effective	from	29-5-1972
-----	-----	-----	-----	Brand of
Maximum Less Maximum Less/CED/ Maximum Price Price Cigarette List Dis-	wholes- SED/AED Valuat- charge- charge- tes & Price count ale nett on for ed by	ed by packing for selling CED Ass- I.T.C. Distri- Mills price easement to Dis-	butor tribute- to who- tor on lesaler 25/6/ on 1972 4-11-1972	
-----	-----	-----	-----	(1) (2) (3) (4)
(5) (6) (7) (8) -----				
India 20HL 215.00 1.00 214.00 150.686391 63.313609 212.70 214.00 Kings FT				
- - - - - -----				35.

Besides the above statement (Exh. 1) prepared by the department Mr. Sethna

also relied on certain statements made in the affidavits made on behalf of the department which he contended were not controverted by filing any rejoinder by I.T.C. He also relied on the averments in para 16 of the petition. Based on the above, it was Mr. Sethna's submission that I.T.C. must have collected the excess excise duty and granting them refund would result in unjust enrichment of I.T.C. In any event, he submitted that I.T.C. had not produced material to show that they had not collected the excess excise duty in full, it being a disputed question of fact, they cannot claim the exercise of discretion in their favour under Article 226. What is stated in para 16 of the petition is as under :

"The petitioners say that the amounts paid as and by way of excise duty for and in the course of their business from the time of the levy of the central excise duty upto date has not been at all times wholly collected from the purchasers. The petitioners say that depending upon the prevailing competitive market conditions the levy of excise duty each year was borne by the petitioners in such proportion as was required and necessary from a commercial and practical point of view. The petitioners say that it was not their practice that in each year the excise duty levied and paid to the state was wholly collected from the purchasers."

According to Mr. Sethna the averments show that I.T.C. had atleast partly collected excise duty and in the absence of material being produced by I.T.C. in that behalf they are not entitled to any relief in this petition.

36. The averments made in the affidavit of the Assistant Collector, Central Excise, dated March 29, 1976, in para 11 are -

"I do not admit that the petitioners have not collected excess duty and I put the petitioners to the strict proof thereon."

37. In the affidavit dated November 22, 1976, the Assistant Collector, Central Excise, has stated in para 3(i) as follows :

"I further say that from Exhibit No. 1 hereto it will be clear that the petitioners have recovered from the distributors the amounts mentioned in column 7 in the said Exhibit No. 1. The said amounts included excise duty. It further appears that when the petitioners fixed maximum wholesale nett selling price as mentioned in the said exhibit No. 1 hereto, the same also included the excise duty payable in respect thereof. I say that the said Exhibit No. 1 will show the price received by the petitioners from the distributors which price definitely includes excise duty on the said goods. It would be clear from the said Exhibit No. 1 that the wholesalers would not be able to sell goods at a price lesser than the price received by the petitioners unless they suffer a loss. I say that it is clear that the petitioners have recorded excise duty in respect of all the sales for which they are making claims for refund in this petition. There is no allegation in the petition that they have refunded the excise duty to the consumer. I submit that the excise duty has been fully recovered from the consumers and do not in fact or in law belong to the petitioners and justice of the case requires that the petitioners would not be

entitle to be paid the amount, much less in law which does not belong to them."

It was contended that the said averments in the said two affidavits of the Assistant Collector were not denied by filing rejoinders. In my view, reliance placed on the statements in the said two affidavits of the department are misplaced having regard to the undisputed facts which have been already adverted to above. Firstly, the I.T.C. has an integrated price system which includes such excise as is payable in law and not any specific amount of excise. It cannot be predicated that any particular amount of excise is included in the price charged by I.T.C. to their wholesale buyers. They did not derive any extra benefit from their wholesale buyers and the transactions between them are bona fide at arms length and did not have any consideration other than the price of the products. In view of the integrated pricing system and the fact that the duty was calculated on the basis of the sale price charged by I.T.C.'s wholesalers to the secondary wholesalers, the excess excise duty recovered from I.T.C. has to be borne by I.T.C. In the circumstances, the statement in the petition that I.T.C. had not "wholly collected" the excise duty from the purchasers cannot be understood to me that they have collected amount of excess excise duty. The statement (Exh. 1) referred to by Mr. Sethna itself refers to page 51 of the petition which are written submissions filed by I.T.C. with the department on October 23, 1973. It shows that both prior to and after this self-removal procedure introduced under Chapter VII-A of the Rules the price list was submitted by I.T.C. and were approved by the Excise Authorities on the basis of the price charged and realised by the secondary wholesalers to retailers, which after discount was the price charged and realised by I.T.C.'s wholesale buyers from the secondary wholesalers. In view of the self-removal procedure I.T.C. submitted official current price list of the products which were approved by the Excise Authorities with the following columns :

"Maximum List Price per Mille"

"Less discount"

"Maximum Wholesale Nett Selling Price"

"Less Central Excise Duty/Special Excise Duty/Additional Excise Duty"

"Maximum Valuation for Central Excise Duty Assessment."

These columns are depicted in statements Exh. 1. The maximum list price per Mille represented the price at which the Assessee's products were sold by the secondary wholesalers to the retailers. "Maximum Wholesale Nett Selling Price" represented the net selling price realised by I.T.C.'s wholesale buyers from the secondary wholesalers after the deduction of the permitted discount. From the maximum wholesale nett selling price (Central Excise Duty/Special Excise Duty/Additional Excise Duty) was deducted to arrive at the maximum valuation of the I.T.C.'s products "for Central Excise Duty Assessment". Accordingly, the value of the I.T.C.'s products for the purpose of assessment of Central Excise Duty

was determined on the basis of the maximum wholesale nett selling price which represented the wholesale buyers price to the secondary wholesalers. The official current price list submitted by the I.T.C. does not indicate the price realised by them from their wholesalers as both I.T.C. and the Excise Authorities under a mistaken belief that such price was not pertinent for the determination of the value of the products u/s 4(a) of the Act. Having regard to the facts stated in para 3 of the petition which are not in dispute and the facts stated in the written statement filed by I.T.C. with the department as also the fact that I.T.C. had an integrated price for its products which included excise duty payable in law and not any specific amount of excise, it is not possible to uphold Mr. Sethna's contention that I.T.C. is guilty of unjust enrichment. In my view, the absence of denials of statements made in the two affidavits filed on behalf of the department can have no significance in view of the undisputed facts discussed above.

38. In the result, I.T.C. cannot be refused refund on the ground that granting relief of restitution would have resulted in their unjust enrichment.

39. The next question is whether unjust enrichment is a valid defence to the restitution in respect of the excess duty collected by the department without the authority of law. This question is squarely answered by the observations of the Supreme Court in *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, . In para 10 the Supreme Court pointed out -

"Nor is there any provision under which the court could deny refund of tax even if the person who paid it has collected it from his customers and has no subsisting liability or intention to refund it to them, or, for any reason, it is impracticable to do so."

40. Mr. Sethna relied on the observations in the two succeeding paras of that judgment wherein the difference between the law in India and the U.S.A. was highlighted by the Supreme Court. The observations are as under :

"In the U.S.A. it is generally held that in the absence of a statute to the contrary, taxes voluntarily paid under a mistake of law with full knowledge of facts cannot be recovered back while taxes paid under a mistake of fact may ordinarily be recovered back (see *Corpus Juris Secundum*, Vol. 84, p. 637). Although Section 72 of the Contract Act has been held to cover cases of payment of money under a mistake of law, as the State stands in a peculiar position in respect of taxes paid to it, there are perhaps practical reasons for the law according to a different treatment both in the matter of the heads under which they could be recovered and the period of limitation for the recovery.

"The task of writing legislation to protect the interests of the nation is committed to Parliament and the legislatures of the States. We are referring to this aspect only to alert their attention to the present state of law."

41. These observations were obviously made to draw the Government's

attention to the state of law in U.S.A. which disentitles a person to claim refund of taxes voluntarily paid under a mistake of law with full knowledge of facts, whereas taxes paid under a mistake of fact may ordinarily be recovered. As far as our country is concerned, the law as observed by the Supreme Court in para 10 is clear that the refund of tax cannot be denied on the ground that the same has been collected by the claimant through his customers and has even no intention to refund the same to them. Mr. Sethna, however, strongly relied on the observations of Mukhi J. in *M/s Ogale Glass Works Ltd., v. The Union of India*, 1979 E.L.T. (J 468) : 79 BomLR 37. According to him, the Division Bench in that case has laid down the principles that where unjust enrichment of the petitioner will result if relief is granted; the Court should refuse refund of tax even though the same may have been collected without the authority of law. *M/s. Ogale Glass Works case* was also relied on by the department in *Maharashtra Vegetable Products Pvt. Ltd. v. Union of India*, - 1981 E.L.T. 468. The Division Bench consisting of Chandurkar J. as he then was and Bhonsale J. after pointing out to the facts of *M/s Ogale Glass Works case* observed in paras 12 and 13 as under :

"It is not doubt true that in *Ogale Glass Works case* the Division Bench declined to grant any relief in respect of amounts recovered prior to December 18, 1972. That was the date on which a representation was made in writing to the Assistant Collector of Central Excise on behalf of the petitioners in that case that no excise duty could be validly levied on packing charges. In the judgment of Deshpande J. he had observed that the counsel for the petitioners in that case was right in contending that the Supreme Court never considered the inexpediency and justice pin pointed in *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, , as themselves being fatal to the claim for the refund, and it was pointed out that in *Cawasji's case* the Supreme Court had ultimately upheld the order of the High Court refusing to exercise its discretion on the ground of laches.

42. In the Judgment of Mukhi J. learned Judge seems to have reached a conclusion that the petitioners in that case were not entitled to a direction for a refund prior to December 18, 1972, having regard to the facts of that case because the learned judge has clearly observed on page 55 of the report :

"In the petition before us, I am unable to persuade myself that justice lies on the side of the petitioners and that this court will be doing justice in ordering the respondents to refund the amount of Rs. 12 lakhs to the petitioners when, to being with, that money never came from the petitioner's pocket. It is argued on the above observations that unjust enrichment of the manufacturer was treated by the learned judge as sufficient ground to hold that the justice was not on the side of the petitioners in that case. Now we have carefully gone through the decision in *Cawasji's case* and we are unable to lend the decision in *Cawasji's case* as an authority for the proposition that in every case, where the manufacturer who has paid the Excise Duty and has passed it on to the consumers and has recovered it, the claim to recover monies from the Government should be rejected. We may point out that in paragraph 11 and 12

of the decision in Cawasji's case the Supreme Court has made it clear as to why they were referring to the aspect of inexpediency of making an order for refund after the whole or part of the monies have been expended by the State."

43. The Division Bench in para-14 of the judgment pointed out the circumstances and the grounds on which the dismissal of the writ petitions by the High Court was upheld by the Supreme Court in D. Cawasji's case. It would be useful to quote the relevant portion from the judgment which runs as under :

"A careful study of Cawasji case will also show that the relief to the petitioners in that case was declined not on the ground that it would result in unjust enrichment of the company. The claim in the writ petitions was for refund of educational cess for the period 1951-52 to 1965-66. It was, however, found that in the earlier petitions which culminated in the decision in D. Cawasji and Co. v. State of Mysore - 1978 ELT (J 154) : AIR 1969 Mys 23, the Company did pray for refund in each of the writ petitions and the High Court had allowed the prayer in some petitions and rejected it in others holding that the company was at liberty to institute suits or other proceedings. The Supreme Court held that the company had not prayed in the earlier writ petition for refund of amounts paid by way of sales for the years 1951-52 to 1965-66 and they gave no reasons before the High Court in the writ petitions against the dismissal of which the appeal was filed, as to why they did not make a prayer for the refund of the amounts paid during the years in question. The main ground on which the dismissal of the writ petitions by the High Court was upheld in paragraph 18 of the judgment of the Supreme Court is as follows :

"Avoiding multiplicity of unnecessary legal proceedings should be an aim of all courts. Therefore, the appellants could not be allowed to split up their claim for refund and file writ petitions on this piecemeal fashion. If the appellants could have, but did not, without any legal justification, claim refund of the amounts paid during the years in question, in the earlier writ petitions, we see no reason why the appellants should be allowed to claim the amounts by filing writ petitions again. In the circumstances of this case, having regard to the conduct of the appellants in not claiming these amounts in the earlier writ petitions without any justification, we do not think we would be justified in interfering with the discretion exercised by the High Court in dismissing the writ petitions which were filed only for the purpose of obtaining the refund and directing them to resort to the remedy of suit."

44. These observations will make it clear that the ground on which the Supreme Court was not inclined to interfere with the order of the High Court was that it was not proper to promote multiplicity of unnecessary legal proceedings. Cawasji's case is, therefore, not an authority for the proposition that the claim for refund must necessarily be rejected on the ground that an order for refund is likely to result in unjust enrichment. It appears from the judgment of the Supreme Court that the fact that the appellants had not given any reasons as to why what claim was not made in the earlier writ petitions heavily weighed with

the Supreme Court when they declined to interfere with the decision of the High Court.

It would thus be clear that the ground of unjust enrichment as a defence against the claim of restitution has been rejected by the Division Bench in Maharashtra Vegetable Products Ltd., and it was held that duty which is collected without the authority of law was refundable even though it was recovered from the consumers or manufacturers and granting relief of refund may result in his unjust enrichment. The ground of unjust enrichment has also been successively rejected in three later decisions of this Court in Wipro Products Ltd., v. Union of India, 1981 ELT 531, Leucoplast, 1983 ELT 2106 and Chemicals & Fibres, 1982, ELT 917. These decisions clearly lay down that a manufacturer cannot be refused refund of tax illegally collected from him though he may have passed on the burden of the tax to the consumer.

45. The decision in Maharashtra Vegetable case which has been followed in the later decisions of this Court has explained the ratio and ambit of the decision of this Court in M/s. Ogale Glass Works and also interpreted the decision of the Supreme Court in D. Cawasji as laying down the proposition that a claim of restitution cannot be denied even if the manufacturer may have collected the amount of tax from his consumers. I respectfully agree with the view taken by the Division Benche"s decision in Maharashtra Vegetable Products Pvt. Ltd., and also by other Division Benches thereafter.

46. Mr. Desai also relied on the decision of the Supreme Court in R. Abdul Quader and Co. Vs. Sales Tax Officer, Hyderabad, In that case the vires of Sections 11(2) and 20(c) of Hyderabad General Sales Tax Act were challenged. In the course of the judgment the Supreme Court observed -

"If a dealer has collected anything from a purchaser which is not authorised by the taxing law, that is a matter between him and the purchaser, and the purchaser may be entitled to recover the amount from the dealer. But unless the money so collected is due as a tax, the State cannot by law make it recoverable simply because it has been wrongly collected the dealer."

I do not think that the question which arose in our case has been dealt with in Abdul Quader & Co. case and the said decision would be of little assistance in deciding the question posed before me.

47. Mr. Sethna, however, submitted that the ratio laid down in the D. Cawasji as also the above mentioned decisions of this Court no longer holds good in view of later decisions of the Supreme Court in The Newabganj Sugar Mills Co. Ltd. and Others Vs. The Union of India (UOI) and Others, , Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others, and U.P. State Electricity Board, Lucknow v. City Board, Mussoorie - Civil Appeal Nos. 814 and 815 of 1974, decided on February 8, 1985.

48. Navabganj Sugar Mills case was not a case of refund of tax. In that case the

facts were that the price of levy sugar was pegged down by the State. The appellants - mill owners impeached validity of control and obtained stay of operation of the order. Under the cover of the Court's stay order which was granted, on bank guarantee for the excess price being furnished to the Court, the appellants sold sugar at free market rates. But eventually, the High Court upheld the control of price and since the mill owners had overpriced the article under judicial cover the question of restoring the unjust enrichment to the consumers arose. It was in this background that the High Court had passed the following order :

"We, therefore, direct that the Registrar will take immediate steps to encash the security and to recover the amount so over-charged by the petitioners and pay the same to the State Government which will keep it in a separate account. The petitioners will furnish to the State Government within a period of six weeks of this order, a list of all such persons to whom they sold the levy sugar of 1971-72 season, together with their addresses, quantity of such sugar sold to and the amount of excess price charged from each of them. The State Government will then refund to the persons concerned the excess amount realised from each of them. The State Government will then refund to the persons concerned the excess amount realised from each of them, if necessary, after verifying the claim for refund of such amount made by such persons."

49. The mill owners challenged this order in the Supreme Court. The Supreme Court held that the moneys charged in excess must go to the respective buyers through Court process and accordingly gave elaborate directions which in the view of the Supreme Court would pragmatically meet the needs both of the appellants and the range of buyers from whom higher prices were charged. It is not necessary to reproduce the directions given by the Supreme Court for our purpose. What is necessary to be noted is that (1) it was not a case of refund of tax illegally collected, (2) it was a case of price control legislation and the unjust enrichment arose because of an interim order passed by the High Court and the wrong done to the consumers had to be remedied as the mill owners had secured an unfair advantage as a result of the Court's order and (3) bank guarantee given by the mill owners as a part of the interim order had to be encashed and there was no question of denying that liability. In my opinion, therefore, the decision in Nawabgang Sugar Mills case turns on its own facts particularly because the main question before the Court in that case was to devise the mode by whether wrong done to the consumers by reason of the judicial order passed in favour of the traders should be remedied.

50. Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others, also was not a case of claim for refund of tax and the question of mandate of Article 265 did not arise. In that case the petitioners who were dealers had paid market fees at the increased rate of 3% (raised from original 2%) under the Haryana Act of 1937. The excess of 1% over the original rate having been declared ultra vires by the decision of the Supreme Court in Kewal Krishan Puri and Others Vs. State of

Punjab and Another, , became refundable to the respective dealers from whom they were recovered by the market committee. The demand for refund of the excess amount illegally recovered from them not having been complied with, they filed Writ Petitions for a direction to the market committee to refund the excess amount recovered by them. While dealing with the facts of that case the Court observed :

"There cannot be any dispute about the obligation or the amounts since the market committees have accounts of collections and are willing to disgorge the excess sums. Indeed, if they file suits within the limitation period, decrees must surely follow. What the period of limitation is and whether Art. 226 will apply are moot as it evident from the High Court's judgment, but we are not called upon to pronounce on either point in the view we take. Where public bodies, under colour of public laws, recover 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. Nor is it 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."

51. As far as scope of Article 226 is concerned, it was observed :

"Article 226 grants an extraordinary remedy which is essentially discretionary, although founded on legal injury. It is perfectly open for the court, exercising this flexible power, to pass such order such as public interest dictates and equity projects."

52. It may be mentioned that the observations about the obligation of public bodies of returning what was wrongly recovered were applied for granting of refund of duty collected illegally to the petitioners in the cases of Golden Tobacco Company Ltd. Vs. Union of India and another, and 2249), I.T.C. Ltd. and Others (Karnataka) 1981 E.L.T. 690 and Khardah Co. Ltd., (Calcutta), 1983 E.L.T. 2159 . It would also appear from the judgment in Shiv Shankar Dal Mills that the Supreme Court applied the procedure adopted in Nawabganj Sugar Mills case by consent of the parties and gave directions for disbursement of the amounts similar to those given in Navabganj Sugar Mills case. It is also significant to note that the decision of the Supreme Court in D. Cawasji and Co. and Others Vs. State of Mysore and Another, , has not been referred to in Shiv Shankar Dal Mills case nor does it lay down that in every case the claim for refund of amount illegally collected should be refused on the ground that the petitioner has or must have passed on his burden to the consumer.

53. Mr. Sethna strongly relied on the decision of the Supreme Court in U.P. State Electricity Board, Lucknow v. City Board, Mussoorie and Others and contended that the view taken by the Supreme Court in the case clearly supports his contention that the High Court in exercise of its discretion under Article 226

should not direct refund if it would result in unjust enrichment of the petitioner. The case before the Supreme Court arose under the Indian Electricity Act, 1910, read with the Electricity (Supply) Act, 1948. The facts of that case were that the City Board of Mussoorie, a local authority as a licensee under the Indian Electricity Act, 1910, used to get bulk supply of electric energy from the Electricity Board from the G. S. Grid and in its turn was distributing it to the customers. By a Notification dated April 24, 1962, issued u/s 46 the tariff payable by the City Board and the other licensees in the Grid was fixed by the Electricity Board. The tariff so fixed was enhanced by another Notification dated September 30, 1967, by 20% and the enhanced rate came into force on December 1, 1967. u/s 58 of the Act, the Electricity Board or where no such Board was constituted; the State Government had the power to direct the amortisation and tariff policies of any licensee, being a local authority, with respect to its licensed undertaking in such manner as the Electricity Board or the State Government, as the case may be, after giving the local authority a reasonable opportunity of being heard, considered expedient for the purposes of the Act. The licensee, being a local authority, the provisions of any other law or of any rules made or directions given thereunder notwithstanding, was bound to give effect to any such directions of the Electricity Board or the State Government, as the case may be. The Electricity Board, however, could not issue any directions u/s 58 of the Act except after obtaining the prior approval of the State Government. The City Board had moved the State Government on September 13, 1966, for permission to enhance the rates for supply of electric energy to consumers. No such sanction was given till March 23, 1968. In Writ petition filed in the High Court the City Board challenged the Notification issued on April 24, 1962, on the ground that it was not in conformity with Section 46 of the Act. It questioned the enhancement made on September 30, 1967, on the ground that it had not been permitted to enhance correspondingly the rates chargeable by it to the consumers even though in its vicinity the Electricity Board itself was supplying electric energy to the consumers at a much higher rate. Subsequent to the filing of the Writ Petition, on April 20, 1968, the City Board was permitted to raise the charges for light and fans by 2 paise per unit which came to 6% or 7% of the original rate and 10% for electric energy used for other purposes. The Division Bench of the Allahabad High Court held that the levy of an additional 7 1/2% as an additional charge made by the Electricity Board under the first para of clause 2 of the impugned Notification dated April 24, 1962, and September 30, 1967, was illegal and, therefore, liable to be quashed on the ground that the additional charge of 7 1/2% can be imposed under the proviso to section 46(2) of the Act to cover the extra expenses and not for supplying electric energy at a lower voltage of 6600 volts when the Grid Tariff had fixed rates for supplying electric energy at 11000 volts. The High Court held that it was open to the Electricity Board to make an additional charge only to the extent of the actual expenditure incurred by supplying electric energy of 6600 volts. The High Court also quashed the Government Order dated April 20, 1968, by which the City Board was permitted to increase the charges payable by the consumers

in some respects and subsequent action taken on the above basis. The Division Bench directed the respondents to consider afresh the question of the rates at which electric energy can be supplied. The Supreme Court held that having regard to the provisions of the Act and the facts of the case it would not be proper to reopen the case of the City Board in regard to the period prior to the filing of the writ petition arising on the basis of the alleged invalidity of the Notification dated April 24, 1962, and accordingly refused to grant relief to the City Board for the period till March 30, 1968. The Supreme Court, however, allowed the decision of the High Court to remain only for the period between March 23, 1968, which was the date on which the Grid Tariff was again revised, without expressing any opinion on its correctness on the ground that the period was small one and the Electricity Board did not insist upon a decision on this question.

54. Mr. Sethna relied on the following observations of the Supreme Court in that judgment -

"We are of the view that in cases of this nature where there is little or no possibility of refunding the excess amount collected from the ultimate consumer to him and the granting of the relief to the petitioner would result in his unjust enrichment, the Court should not ordinarily direct any refund in exercise of its discretion under Article 226 of the Constitution."

55. In order to appreciate the contention of Mr. Sethna it would be necessary to refer to the relevant provisions of the Indian Electricity Act, 1948, on which the decision of the Supreme Court is based. Section 46 in so far as it is relevant runs thus :

"(1) A tariff to be known as the Grid Tariff shall, in accordance with any regulations made in this behalf, be fixed from time to time by the Board in respect of each area for which a scheme is in force and, tariffs fixed under this section may, if the Board thinks fit, differ for different areas.

(2) Without prejudice to the provisions of Section 47, the Grid Tariff shall apply to sales of electricity by the Board to licensees where so required under any of the First, Second and Third Schedules, and shall, subject as hereinafter provided, also be applicable to sales of electricity by the Board to licensees in other cases :

Provided that if in any such other case it appears to the Board that, having regard to the extent of the supply required, the transmission expenses involved in affording the supply are higher than those allowed in fixing the Grid Tariff, the Board may make such additional charges as it considers appropriate."

Proviso to sub-section 2 of Section 46 would show that the additional charge could be imposed to cover extra expenses only. Section 58 of the Act provides as under :

"The Board or where no Board is constituted under this Act, the State Government shall have power to direct the amortisation and tariffs policies of any

licensee, being a local authority, with respect of his licensed undertaking in such manner, as the Board or the State Government, as the case may be, after giving the local authority a reasonable opportunity of being heard, considers expedient for the purposes of the Act; and the licensee, being a local authority, the provisions of any other law or of any rules made or directions given thereunder notwithstanding, shall give effect to any such directions of the Board or the State Government, as the case may be :

Provided that the Board shall not issue any directions under this section except after obtaining the prior approval of the State Government."

It is in the light of these provisions and the context in which the observations made by the Supreme Court must be understood. It would be useful to quote the passage from the judgment of the Supreme Court giving the reasons for rejecting the relief to the City Board for the period upto the date of the Writ Petition.

"The contention relating to the validity of the levy of additional charges could not be raised by the City Board under Article 226 of the Constitution in respect of the period prior to the filing of the Writ Petition. The above additional charge of 7 1/2% was levied in 1962 and the City Board did not question it before the Court till March 23, 1968 when it filed the writ petition. It is further seen that it has not stated that it had not collected charges from the consumers of electric energy supplied by it at the rates which would cover the additional 7 1/2%. The learned counsel for the City Board was not able to state that the City Board had not recouped itself by collecting the charges from the consumers. In this situation we have to presume that the City Board had not suffered any loss by the levy of 7 1/2% by way of additional charges. We are of the view that in cases of this nature where there is little or no possibility of refunding the excess amount collected from the ultimate consumer to him and the granting of the relief to the petitioner would result in his unjust enrichment, the Court should not ordinarily direct any refund in exercise of its discretion under Article 226 of the Constitution. Moreover, in this case the City Board woke up nearly 6 years after the issue of the first notification and that too only after an enhancement by 20% was made under the second notification. In the case of the City Board, which is a local authority, there is an additional reason. u/s 58 of the Act which is already referred to above a local authority is bound to implement the directions issued by the Electricity Board or the Government, as the case may be, with regard to the amortisation and tariff policies. The City Board has been given directions from time to time by the Government regarding the charges it may collect from the consumers in the light of the charges it has to pay to the Electricity Board and its own investment and expenditure on the undertaking. The City Board cannot question the Grid Tariff only without at the same time questioning the directions pursuant to which it has been collection charges from its consumers. No satisfactory material is placed before the Court showing that the charges which were being collected by the City Board from the consumers were uneconomical

and did not satisfy the reasonable standard which should govern the directions issued by the Electricity Board or the Government from time to time regarding the tariffs policies of the City Board. In this situation, we feel that it would not be proper to reopen the claims of the City Board in regard to the period prior to the filing of the writ petition arising on the basis of the alleged invalidity of the notification dated April 24, 1962. Hence, we refuse to grant any relief in this regard to the City Board for the period upto the date of the Writ petition, that is, till March 23, 1968."

The above passage would show that the Supreme Court considered the effect of Section 58 of the Act whereunder a local authority is bound to implement the directions issued by the Electricity Board or the Government as the case may be with regard to amortisation and tariff policies. Accordingly, the City Board has been given instructions from time to time by the Government regarding the charges it may collect from the consumers in the light of the charges it has to pay to the Electricity Board and its own investment and expenditure on the undertaking. Further as observed by the Supreme Court, the City Board cannot question the Grid Tariff only without at the same time questioning the directions pursuant to which it has been collecting charges from its consumers. Moreover, the City Board even did not place before the Court the material showing that the charges which were being collected by the City Board from the consumers were uneconomical and did not satisfy the reasonable standards which should govern the directions issued by the Electricity Board or the Government from time to time regarding the tariffs policies of the City Board. The provisions of the Act show that the City Board's charges to the consumers are dependent on the directions issued by the Electricity Board or the Government. If the City Board is made to pay excess amount and it becomes uneconomical for the City Board to sell the energy the proper course of the City Board is to approach the Government and get refund of rates after placing all the material before it in support of its case of enhanced rate. It is further that the City Board did not take any action for nearly six years after the issue of the first notification and it was only after an enhancement of 20% made under the second notification that they objected for the first time. It is in this background and the facts of the case and the provisions of the Act with relevant observations on which reliance is placed by Mr. Sethna must be understood. As pointed out, the cumulative effect of the provisions is that mere levy of additional charge by itself, assuming it to be illegal, cannot help the City Board in getting a refund because of its ability to recover the charges for the energy from the consumers depends on whether it becomes uneconomical and that too after convincing the Government or the Electricity Board about its case and obtaining consequent directions. In my view, therefore, the observations relied on cannot be read out of context. The sentence in the judgment relied on by Mr. Sethna itself goes to show that the decision is confined to the facts of that case and the provisions of the Act as seen from the expression "in cases of this nature" and also the expression "little or no possibility of refunding the excess amount collected from the ultimate consumer

to him", what can be collected is only reasonable charge from the consumer and in accordance with the directions of the Government. Moreover, the Supreme Court has not said that in every case a refund should be refused on the ground of unjust enrichment as is clear from the word "ordinarily" appearing in the sentence relied on by Mr. Sethna. It may be further observed that the amount charged to the City Board under the Act constitutes the price for the electricity supplied. In other words, it is a case of collection by way of sale price and not tax and as such article 265 of the Constitution would have no application. In my view, the decision of the Supreme Court in that case is distinguishable and turns for its own facts and the relevant provisions of the Electricity Act. It is pertinent to note that D. Cawasji case, the ratio of which has been applied by the High Court in various cases has not been referred to by the Supreme Court in the above-mentioned decision of the Supreme Court. The decision of the Supreme Court in Shri Vallabh Glass Works Ltd. and Another Vs. Union of India (UOI) and Others, shows that if the manufacturer had filed suit within the period of limitation of three years provided for by Article 113 of the Limitation Act, 1963, the excess amount of duty would have been refundable by virtue of Section 72 of the Contract Act and further that the High Courts have power for the purpose of enforcement of fundamental rights and statutory rights to make consequential orders for repayment of money realised by Government without the authority of law and that is an alternative remedy provided by the Constitution in addition to and not in supersession of the ordinary remedy by way of suit and while there are different periods of limitation for institution or different kinds of suits by the Limitation Act, there is no such period prescribed in respect of writ petitions filed under Article 226. No such principle of unjust enrichment was applied in that case for refusing refund of duty to the manufacturer. In my view, none of the three decisions of the Supreme Court on which reliance is placed by Mr. Sethna are applicable to the case of refund of tax collected from the manufacturer without the authority of law.

56. Mr. Sethna drew my attention to the decisions of other High Courts including those of Delhi, Gujarat, Andhra Pradesh and Allahabad where the refund of excise duty was ordered to be returned for the benefit of and payment to ultimate consumers. I do not think it necessary to elaborately discuss those judgments since in my view the Division Bench Judgment in Maharashtra Vegetable Products Ltd., has on a consideration of the decision of the Supreme Court in D. Cawasji as also the decision of the Division Bench of this Court in Ogale Glass Works, has held that the petitioner cannot be denied refund solely on the ground of unjust enrichment. Thereafter, in the subsequent decisions of the Division Benches of this Court in Chemical and Fibres, Wipro and Leucoplast also the same view has been taken. I am in respectful agreement with the view taken by the Division Benches of this Court which have rejected the argument of unjust enrichment after interpreting the ratio of the Supreme Court in D. Cawasji's case.

57. Both Mr. Desai and Mr. Talyarkhan submitted that the application of the

theory of "unjust enrichment" should ordinarily be matched by the application of the theory of "unjust impoverishment". However, there is no counterveiling theory of "unjust impoverishment" applicable to duty of excise. They submitted that unless the counterveiling theory of unjust impoverishment could be recognised in respect of excise duty under the Excise and Salt Act or the Sea Customs Act, the possibility of unjust enrichment by itself cannot be a ground for refusing to grant refund of duty collected from the manufacturer without the authority of law. They also submitted that in a civil suit for refund the plaintiff would be entitled to a decree and the defence of "unjust enrichment" as a bar to refund would not be entertained. It was inter-alia contended by the counsel that in case of duty of excise, the taxable event is the manufacture of the product and not sale of the product and the manufacturer is under an obligation to pay duty whether or not goods are sold or consumed by the manufacturer. When the manufacturer pays duty he pays it on his own account and not as an agent of the possible buyer. In the case of a provisional assessment, the final liability of the manufacturer may not be known till a final assessment is made and this process may be time consuming with the result that the manufacturer cannot recover the excess amount which he is required to pay under the final assessment. The levy of duty can be even retrospective and it is no defence to the manufacturer to say that he cannot recover the duty retrospectively levied from his buyers. Further, there are provisions which confer right on the manufacturer to claim refund of excess duty subject of course to the period of limitation prescribed and there is no power to refuse refund on the ground that the duty has been or may have been recovered by the manufacturer from his customers. Indeed Mr. Sethna did not dispute that notwithstanding the possible unjust enrichment in such a case under the provisions the department cannot deny refund of excess duty recovered without the authority of law provided the claim is made within the prescribed period of limitation. Section 3 of the Act provides that there shall be levied and collected in such a manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in India and a duty on salt manufactured in, or imported by land into, any part of India as, and at the rates, set forth in First Schedule. Rule 9 inter-alia provided that no excisable goods shall be removed from any place where they are produced or manufactured whether for consumption, export or manufacture of any other commodity until the excise duty leviable thereon has been paid. Rule 2(ib) and Rule 173F would show that the manufacturer pays duty on his own account and not as an agent of a possible buyer. As can be seen from Rule 173C even if the manufacturer disputes a classification made, he is required to pay under protest and the procedure of finalisation and the quantum of duty payable may take even years. If the manufacturer is found liable to pay more duty then there is no provision under which he can recover this additional amount of duty from the consumer. Section 11A and Rule 173F also show that it is the manufacturer who must pay the duty, make up for a short levy, if any, and this is to be done regardless of whether the manufacturer has recovered or is in a position to recover the amount or excess

amount from the customer. Section 11B confers a right on the manufacturer to claim refund of excess duty paid subject to period of limitation mentioned in that section and there is no power to refuse refund on the ground that the duty has been or may have been recovered by the manufacturer from the customer. Similarly, the levy of duty can be retrospective and the manufacturer cannot set up a defence to the levy that he would not be able to recoup himself from the buyer. In this connection Mr. Talyarkhan relied on *Chhotabhai Jethabhai Patel and Co. Vs. The Union of India and Another*, which shows that the taxable event is the manufacture or production of the goods and it is immaterial whether what happens to them afterwards whether they have sold, consumed, destroyed or given away and it is not a necessary incident that the manufacturer must be able to pass it on to the consumers or indemnified himself. If the levy is imposed with retrospective effect, the manufacturer may not be able to recover the excise amount from the buyer. The fact that the manufacturer has no chance to get the tax from the buyer does not affect the legality of tax. It would thus appear that the scheme of the Act and the Rules show that it is the manufacturer who is bound to pay the duty or make up for a short levy and the manufacturer cannot recover the amount or excess amount from the customer would be no defence to the recovery of duty from the manufacturer. The theory of unjust enrichment is invoked on the basis of justice preventing the manufacturer from retaining a benefit from the customer and at the same time claiming a refund of the amount from the Government. Such a theory would necessarily also invite the application of the counterveiling theory of unjust impoverishment and since such a theory of unjust impoverishment cannot apply having regard to the provisions of the Act and Rules framed thereunder as also Article 265 of the Constitution, it was contended that the theory of unjust enrichment cannot be made applicable to the claim for refund of duty recovered from the manufacturer without authority of law. The counsel also drew my attention to the provisions of Sugar (Special Excise Duty) Act, 1959. This Act is intended for the imposition of special additional excise duty on certain types of Sugar viz. "khandasari sugar" and "palmyra sugar". Section 3 provides for the levy of special additional excise duty on such sugar at the rates mentioned in that section and Section 4 specifically authorises the manufacturer of such sugar to pass on the burden of the special duty of excise leviable u/s 3 to the buyer. Section 64A of the Sale of Goods Act undoubtedly allows the seller to pass on the burden of tax to the buyer, but the provision is subject to a contract to the contrary and applies to executory contracts, but only to the extent of increase in duty after making of the contract. The Central Excises and Salt Act does not contain a provision similar to the one incorporated in the Sugar (Special Excise Duty) Act, 1959.

58. Having regard to what is discussed above, I see considerable substance in the contention urged by Mr. Desai and Mr. Talyarkhan that the theory of unjust enrichment cannot be invoked in case of claim for refund of excise duty recovered from the manufacturer without the authority of law. That apart, as already held by me, the decisions of the Supreme Court in *Nawabganj Sugar*

Mills, Shivshankar Dal Mills and U.P. State Electricity Board (cited supra) are distinguishable and on the ratio laid down in the decision of the Supreme Court in D. Cawasji which decision has been interpreted and followed in the various decisions of this court, I.T.C. cannot be denied its claim for refund of excess excise duty paid by them on the alleged ground that granting relief of refund to them would result in their unjust enrichment.

59. In the result, with respect I am unable to agree with the view taken by my learned brother Sawant J. Having regard to the findings recorded by me I agree with the view taken by my learned brother Lentin J. I also agree with the final order proposed by Lentin J. in para-24 of his judgment.

60. As far as the costs of the hearing before me are concerned, I direct that the parties shall bear their respective costs.

61. The papers may now be put up before the learned Chief Justice for placing the matter before the Division Bench for disposal in accordance with the opinion of the majority.