
(1989) 11 BOM CK 0019

In the Bombay High Court

Case No : Writ Petition No. 1336 of 1987

New India Industries Ltd. and another

APPELLANT

Vs

Union of India and another

RESPONDENT

Date of Decision : 27-11-1989

Acts Referred:

Constitution of India, 1950 — Article 226, 265, 285
Contract Act, 1872 — Section 72

Citation : AIR 1990 Bom 239 : (1990) 1 BomCR 515 : (1992) 38 ECC 136 : (1991) 56 ELT 3

Hon'ble Judges : C. Mookerjee, C.J.; T.D. Sugla, J.; S.P. Bharucha, J

Bench : Full Bench

Advocate : Ashok H. Desai, A. Hidayatullah, E.P. Bharucha, Vikram Nankani and N.R. Kothare, instructed by Nanu Hormasjee and Co., M.A. Hidayatullah, J.F. Pochkhanwalla and P.M. Patel, for the Appellant; M.V. Parnjape, Shankararamkrishnan and Miss S.I. Shah, for the Respondent

Judgement

Mookerjee, CJ.

1. This writ petition had come up for final hearing before Ashok Agarwal, J. The learned single Judge was of the view that the levy and collection of excise duty by the respondents upon the photographic printing papers manufactured by the petitioner No. 1 New India Industries Ltd. according to the price charged by its sole distributor Agfa Gevaert (India) Ltd. was illegal and unauthorised. The respondents had opposed the petitioners' claim for refund of excise duty, inter alia, on the ground that the petitioner No. 1 had already passed on the burden of the said duty. Therefore, the petitioners ought not to be allowed to unjustly enrich themselves by obtaining an order for refund. In view of difference of opinion on the said question between different Benches of this Court, Ashok Agarwal, J. has made the present reference for deciding the following question :-

"Where the tax admittedly has been held to be levied and collected by the State without the authority of law, whether refund of the tax must be granted to the

assessee or applying the principle of "unjust enrichment" no refund should be made to the assessee unless he can pass on the benefit to the ultimate consumer?"

2. We may first briefly refer to some of the reported Division Bench decisions on this point. The said point of unjust enrichment was, for the first time, raised by the revenue authorities in this Court in the case of *Ogale Glass Works Ltd. Vs. The Union of India*, . In the said case, *Deshpande and Mukhi, JJ.* both held that assessment of excise duty by including the cost of packing in the price of the product was illegal. The two learned Judges who delivered separate judgments gave slightly different reasons for rejecting the claim made by the petitioner of the said case for refund of excise duty paid by it from the year 1962 up to the year 1972. *Mukhi, J.*, inter alia, held that the petitioner having already collected the duty from its customers it would be unjust to grant refund to it. According to *Deshpande, J.* in the case of *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, , the Supreme Court did not consider that the inexpediency and injustice by themselves were fatal to the claim for refund and that the Supreme Court had upheld the Karnataka High Court's order refusing to exercise its discretion on the ground of laches on the part of the petitioner of the said case.

3. In the case of *Associated Bearing Company Limited Vs. Union of India and another*, , the Union of India had again urged that the Company must have already recovered the excise duty from its customers and, therefore, any order to refund would result in unjust enrichment. *Chandurkar and Kotwal, JJ.* had referred to the Supreme Court decision in *D. Cawasji and Co.'s case (supra)* and had rejected the said plea of the Excise authorities. In *Associated Bearing Co. Ltd.'s case (supra)*, the Division Bench did not expressly deal with the observations about unjustness of refund in such cases made by *Mukhi, J.* in *Ogale Glass Works Ltd.'s case (supra)*.

4. In the case of *Maharashtra Vegetable Products Pvt. Ltd. and another Vs. Union of India and others*, , *Chandurkar and Bhonsale, JJ.*, after giving elaborate reasons, had again rejected the Revenue's submission that it might result in unjust enrichment in the event even after recovering the amount in question from its customers a manufacturer was allowed to obtain under Art. 226 an order for refund of duty illegally collected from it. In para 11 of his judgment in *Maharashtra Vegetable Products Pvt. Ltd.'s case (supra)*, after referring to the views on this point of unjust enrichment expressed by *Mukhi, J.* in *Ogale Glass Works Ltd. Vs. The Union of India*, *Chandurkar, J.* had, inter alia observed that it was impossible to dispute the correctness of the observations of *Mukhi, J.* to the effect that in order to obtain relief under Art. 226 the petitioner must not only show that the order is illegal but also that justice lies on his side. In *Maharashtra Vegetable Products Pvt. Ltd.'s case (supra)*, *Chandurkar, J.* had referred to the Supreme Court decision in *D. Cawasji and Co.'s case (supra)* and had held that in para 10 of their judgment in the case, the Supreme Court had clearly highlighted the fact that the State was under an obligation to refund monies

which had been recovered without the authority of law, vide pages 473-475. In Maharashtra Vegetable Products Pvt. Ltd.'s case (supra), the additional ground given for rejection of the argument of unjust enrichment was that it was not possible to say how much of the excise duty formed part of the price which was controlled price.

5. The three subsequent Division Benches of this Court followed the decision in Maharashtra Vegetable Products Pvt. Ltd. and another Vs. Union of India and others, that tax or duty which had been recovered without authority of law ought to be refunded to the person from whom it was collected regardless of the fact whether or not the said person had passed on the burden to his customers, vide (1) judgment of Kanade and Pendse, JJ. in the case of Wipro Products Ltd. and another Vs. Union of India and another, , (2) judgment of Chandurkar and Gadgil, JJ. in the case of Chemicals and Fibres India Limited Vs. Union of India and others, judgment of Gadgil and Dr. Couto, JJ. in the case of Leukoplast (India) Ltd. v. Union of India 1983 (11) ELT 2106 (Bom).

6. In the case of I.T.C. Ltd. Vs. M.K. Chipkar and others, , there was difference of opinion, inter alia, on the question of refund of excise duty paid under mistake of law between Lentin and Sawant. JJ. Lentin, J. was, inter alia of the view that the writ petition was not liable to fail on the ground of delay. The duty collected was without the authority of law. The prayer for refund made in the writ petition was not liable to be rejected because the petitioner might have passed on the burden of excise duty collected from it to its customers. Sawant, J., on the other hand, inter alia held that the writ petition ought to be dismissed because the petitioner was not entitled to equitable and discretionary remedy. Relying upon several subsequent reported decisions of the Supreme Court, Sawant. J. held that the plea of unjust enrichment was available to the respondents. According to Sawant, J. the claim for refund was also barred by limitation.

7. The said matter thereafter under Cl. 36 of the Letters Patent was referred to Shah, J. in the case of I.T.C. Limited Vs. M.K. Chipkar and others, , Shah, J. concurred with the views of Lentin, J. In paragraphs 33-58 of his judgment Shah, J. considered the question of unjust enrichment. Shah, J. also found as a fact that the petitioner-Company had an integrated price for its products which included duty and not any specific amount of excise was charged. After arriving at the said finding, Shah, J, proceeded to consider the legal concept of "unjust enrichment". Shah, J. had expressed his agreement with the views expressed by the Division Bench in Maharashtra Vegetable Products Pvt. Ltd. and another Vs. Union of India and others, , about the effect of observations of the Supreme Court in D. Cawasji and Co. and Others Vs. State of Mysore and Another, , Shah. J. did not accept the contention of the respondents that the said decision in D. Cawasji and Co.'s case (supra) stood overruled by the subsequent Supreme Court decisions in the cases of 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 Vs. City

Board, Mussoorie and Others, . Shah, J. held that the said subsequent decisions were distinguishable and they could not be invoked in cases of claim for refund of excise duty recovered from the manufacturers without authority of law.

8. Mehta and Dr. Couto, JJ. in the cases of Rapidur (India) Ltd. Vs. Union of India and another, had followed the judgment of Shah J. in the case of I.T.C. Ltd. v. M. K. Chipkar (1985) 197 ELT 373 (supra) on difference of views in the said case between Lentin and Sawant, JJ.

9. On the question of applicability of the doctrine of unjust enrichment in cases of claim for refund of excise duty illegally collected, there was again a difference of opinion between Shah J. and Kolse-Patil, J. and on reference to him, in the said case of Associated Bearing Co. Ltd., Bombay Vs. Union of India and others, . Pendse J. had agreed with Shah, J. that the Court cannot refuse to direct the Government to refund the amounts collected without the authority of law on the basis of the doctrine of unjust enrichment.

10. Bharucha and Tipnis, JJ. in the case of Miranda Limited and Another Vs. Union of India (UOI) and Others, and Lentin and Mrs. Sujata Manohar, JJ. in the case of Union Bank of India and others Vs. Arphi Incorporated, , on the question of unjust enrichment, followed the views expressed in Maharashtra Vegetable Products Pvt. Ltd. and another Vs. Union of India and others, and other reported decisions of this court which had taken similar views.

11. In the case of Assistant Collector of Central Excise, Kalyan Division and another Vs. Dipsi Chemicals Pvt. Ltd. and another, Jahagirdar and Puranik, JJ. expressed similar views and dismissed a first appeal preferred by the Assistant Collector of Central Excise against a decree passed by the Civil Court for refund of excise duty paid by mistake of law.

12. Sawant and Kantharai, JJ. in the case of Roplas (India) Limited and Another Vs. Union of India and Another, , summarily rejected a writ petition claiming refund of excise duty paid under mistake. The Division Bench was of the view that since the petitioners had already recovered from their customers the whole of the duty, they were not entitled to refund of excise duty paid under mistake of law. In Roplas India Ltd.'s case (supra), the Division Bench was of the opinion that the decision in the case of Ogale Glass Works Ltd. Vs. The Union of India, had not yet been overruled and the subsequent decisions of this Court mentioned by them were contrary to the said decisions in the case of Ogale Glass Works Ltd. (supra) and also the Supreme Court decisions in the cases of the 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, , Amar Nath Om Prakash v. State of Punjab and M/s. Amar Nath Om Prakash and Others Vs. State of Punjab and Others, , U.P. State Electricity Board Lucknow Vs. City Board, Mussoorie and Others, State of Madhya Pradesh Vs. Vyankatlal and Another, , etc. The Division Bench observed that it would be travesty of justice if the Company which did not pay the amounts could be assisted to collect "illegal

booty".

13. The learned Counsel appearing both on behalf of the petitioners and on behalf of the respondents have placed before us a number of reported decisions on the question of unjust enrichment rendered by several other High Courts. These reported decisions sought to apply to particular facts before them the ratio of different Supreme Court judgments which have been cited before us. Therefore, we consider it unnecessary to deal separately with the said High Court decisions.

14. In order to answer the question referred to us, we may now indicate with reference to the reported decisions what has been considered to be the foundation of a claim made in a writ petition for refund of a tax collected from the petitioner without the authority of law. The mandate of Article 285 of the Constitution is that there must always be a valid law for making assessment and recovery of a tax. An assessment of a tax would be illegal when (a) the relevant legislation transgresses the constitutional limitations or (b) it is contrary to the provisions of the taxing law in question. Since no tax can be levied or collected except by authority of law, the Government has a duty to refund any sum collected without authority to the person who paid the said tax.

15. It is equally settled law that an application under Art. 226 of the Constitution would lie for enforcing the obligation of the State to refund and/or return the money-collected towards an illegal tax or duty. Ever since the decision in the case of *Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf*, , it has been consistently held that payment towards tax or duty which is without authority of law is a payment made under mistake within the meaning of S. 72 of the Indian Contract Act, Section 72 is based on equitable principles. Therefore, by claiming to retain the tax which has been collected without the authority of law, the Government cannot enrich itself and it is liable to make restitution to the person who had made payment under mistake or under coercion vide (1) *Patel India Private Limited Vs. Union of India and Others*, ; (2) *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, : (3) *Shri Vallabh Glass Works Ltd. and Another Vs. Union of India (UOI) and Others*, ; (4) *Commissioner of Sales Tax, U.P. Vs. Auriaya Chamber of Commerce, Allahabad*, (arising out of departmental proceedings for refund of sales tax), paras 11 to 17, 28 and 31 ; (5) *Salonath Tea Co. v. Supdt. of Taxes*, : 1988(33)ELT249(SC) ; (6) *Ayurveda Pharmacy and Another Vs. State of Tamil Nadu*, .

16. Another basic proposition which is beyond controversy is that the Court's jurisdiction under Art. 226 of the Constitution is discretionary. The powers under Art. 226 cannot be taken away or curtailed by legislation short of amendment of the Constitution (vide *In re The Kerala Education Bill, 1957*, AIR 1958 SC 956 . But the Writ Court does not act arbitrarily and guides itself according to certain well settled principles for doing justice. Therefore, the Court's powers under Art. 226 are subject to certain self-imposed limitations. This aspect of the summary nature of the Court's writ jurisdiction to order refund of tax has been indicated in

many of the reported decisions upon which Mr. Hidayatullah, the learned Counsel for the petitioners, relied in support of his submission that the Government has a binding obligation to refund tax or duty collected without the authority of law [vide *Sales Tax Officer v. Kanhaiya Lal* (supra); *State of Madhya Pradesh Vs. Bhailal Bhai and Others*, ; *Tilokchand and Motichand and Others Vs. H.B. Munshi and Another*, . Even if the Court finds that the assessment was void, it is still not bound to exercise its discretion directing repayment. The exercise of discretion would depend on its own facts and circumstances and it is not easy nor is it desirable to lay down a general rule [vide observations of Das Gupta, J. in *State of Madhya Pradesh v. Kholabhai* (supra) which was referred to by Mathew, J. in *D. Cawasji and Co.'s case* (supra)]. Thus, the conduct of the petitioner who seeks refund in a writ application is certainly relevant. In some of the reported cases, on ground of unreasonable delay, acquiescence and gross laches on the part of the petitioner, the Writ Court had refused to grant refunds of tax collected without lawful authority. Again, the petitioner who seeks personal redress under Art. 226 of the Constitution must, inter alia, prove that he had suffered injury or wrong.

17. Mr. Hidayatullah, the learned counsel for the petitioners, has submitted that since there could be no equity in the matter of payment of tax or duty, no equitable principles can be relied upon to defeat a claim for refund of an amount which had been paid as tax or duty under mistake of law or coercion. Whenever any tax or duty had been collected without authority of law, the writ Court ought to enforce the mandate of Art. 265 and compel the State to refund the illegal levy. According to Mr. Hidayatulla, it was totally irrelevant whether the assessee had ultimately passed on the burden to any other person. Adjustment of equities between the assessee and his customers must be left for determination in separate proceedings.

18. Mr. Paranjape, the learned Counsel for the respondents, on the other hand, has submitted that a claim for refund being founded on equitable principles, where the assessee has passed on the burden of tax or duty to his customers, he has no right in equity to ask the State to refund the money. According to Mr. Paranjape, even when a tax has been illegally collected, the Court ought not to interfere under Art. 226 if the same would result in securing unjust enrichment to the petitioners. In other words, when the State had collected an illegal tax but the person who paid the same had passed on the burden, the State should be allowed to retain the money.

19. We ought to reject both the extreme submissions made respectively on behalf of the petitioners and the respondents. Neither of these pleas in fact is justified by principles of equity from which the concept of unjust enrichment is derived. The Supreme Court decisions upon which the petitioners and the respondents relied do not also warrant taking any such extreme view. Regardless of the conduct of the petitioners themselves and of the fact whether they had

already reimbursed themselves, the writ Court is not bound to order refund whenever tax or duty had been collected from the petitioners without the authority of law. The Court has a large measure of discretion to select the appropriate relief. It would equally be abhorrent to principles of justice to hold that the State which has unjustly enriched itself by collecting tax without the authority of law ought to be permitted to retain the money unjustly gained by merely alleging that the petitioners had passed on the burden of the tax to others. The doctrine analogous to *pari delicto* cannot be invoked in case the State had violated the mandate of Art. 265 and, therefore, has a binding duty to refund the sum illegally collected.

20. It is possible and in fact it is imperative to satisfactorily adjust the conflicting claims, both of which are supposedly founded upon the principles of equity. A rigid or doctrinaire approach with a priori view in these cases would not be appropriate. When the petitioner claims refund of tax collected without authority of law and the State cannot deny that it had collected the tax without lawful authority but disputes its obligation to refund on the ground that the petitioner had passed on the burden, there is really no conflict of equities. By appropriately moulding the relief to be granted in the writ petition the Court might prevent both the State and the person from whom tax had been illegally collected from making unjust enrichment. There is no real contradiction between the two concepts, viz. (1) the State is bound to refund amounts collected without authority of law and (2) the jurisdiction under Art. 226 is discretionary and equitable in nature. Before further discussing the question of adjustment of equities and moulding the relief, we may deal with some of the other points raised before us.

21. Both Mr. Desai for the Interveners and Mr. Hidayatullah for the petitioners submitted that under the Central Excise and Salt Act the levy is on manufacturer. The obligation is upon manufacturer or producer and the excise duty is recovered from the manufacturer or the producer of goods. The point of collection of the excise duty is irrelevant and the same does not detract from its real character of being a tax on goods. The two learned counsel have placed reliance on the different provisions of the Central Excise and Salt Act and of the Central Excise Rules. Mr. Desai and Mr. Hidayatullah have also placed reliance upon the decisions in the cases of (1) *R.C. Jall Vs. Union of India (UOI)*, ; (2) *Chhotabhai Jethabhai Patel and Co. Vs. The Union of India and Another*, and (3) *British India Corporation Ltd. Vs. Collector of Central Excise*, . In the case of *M/s. Chhotabhai v. Union of India (supra)*, the Supreme Court had made observations about the burden of the excise duty in the context of the challenge made in the said case about the legislative competence to enact a law with retrospective effect which deprived the manufacturer of the opportunity to pass on the burden to others. It was held that the point of collection of the duty was irrelevant, so also the question whether the manufacturer upon whom the impost of the duty was had the ability to pass on the burden. In *M/s. Chhotabhai's case (supra)* reference was also made to the two decisions of the Federal Court AIR 1939 1 (Federal

Court) and Madras Province v. Boddu Paidanna and Sons AIR 1942 FC 33 , which also considered the question of legislative competence. In British India Corpn. v. Collector, Central Excise (supra), the decision in M/s. Chhotabhai's case (supra) was followed. In R. C. Jall v. Union-of India (supra), the Supreme Court dealt with the question of collection of duty from a consignee. Entirely different considerations arise when the Court is not applying canons of interpretation to taxing statute but deals with the claims made in a Writ Petition for refund of tax collected without authority of law. Unlike a case where legislative competence to enact a taxing law is to be decided, in granting or refusing the prayer for refund of tax paid the Court is bound to apply its mind to equities involved. In the case of Commissioner of Sales Tax, Uttar Pradesh Vs. The Modi Sugar Mills Ltd., , the Court was called upon to interpret a taxing statute and, therefore, equitable considerations were not relevant. It is not possible to hold that in determining a claim for refund, the Writ Court cannot at all enter into the question who had actually borne the burden of the said tax whether the person from whom the tax was collected had himself borne it or had passed on the burden to others.

22. We may also observe that some unnecessary confusion had been caused by reason of plea taken in some of the reported cases on behalf of the Union of India that the decision in D. Cawasji and Co. and Others Vs. State of Mysore and Another, was no longer good law by reason of the subsequent Supreme Court decisions in the cases of (1) The Newabganj Sugar Mills Co. Ltd. and Others Vs. The Union of India (UOI) and Others, (2) Shiv Shankar Dal Mills v. State of Haryana (supra), (3) Amar Nath Om Prakash and Others Vs. State of Punjab and Others, , (4) U.P. State Electricity Board Lucknow Vs. City Board, Mussoorie and Others, , (5) State of Madhya Pradesh Vs. Vyankatlal and Another, and (6) Ayurveda Pharmacy and Another Vs. State of Tamil Nadu, . In none of these later decisions the Supreme Court had expressly referred to their earlier decision in M/s. D. Cawasji and Co.'s case (supra). Secondly, in M/s. D. Cawasji and Co.'s case (supra), besides referring in para 10 about the absence of any provision for denying relief of refund to the assessee on the ground that he had passed on the burden, Mathew, J. did not deal with the applicability or otherwise of the concept of unjust enrichment in a writ petition. In paragraph 11 of his judgment in Ms. D. Cawasji and Co.'s case (supra) after referring to the legal position in the United States of America, Mathew, J. had observed that the task of writing legislation to protect the interest of the Nation was committed to Parliament and the legislatures of the States. In M/s. D. Cawasji and Co.'s case (supra), the relief by way of refund was refused on the ground of laches on the part of the petitioner of the case in not including its said claim in an earlier writ petition.

23. We are not impressed by the submission of Mr. Hidayatullah, the learned Counsel for the petitioners, that in case of a claim made by an assessee for refund of tax collected from him without authority of law, the ratio of the Supreme Court decisions relied upon by the respondents on the point of unjust enrichment would be inapplicable. These reported decisions cannot be distinguished only on the ground that they did not directly deal with the question

of refund of tax collected without the authority of law.

24. In *The Newabganj Sugar Mills Co. Ltd. and Others Vs. The Union of India (UOI) and Others*, the Supreme Court proceeded on two-fold basis. In the first place, after their writ petition failed, the petitioner Sugar Mills could not object to encashment of bank guarantee given by them in compliance with interim orders passed by High Court for selling sugar at free market price and above the levy price. Secondly, the Supreme Court held that the petitioner Mills were bound to restore what had been "nibbled from numerous buyers" by charging higher price of sugar. Thus the concept of unjust enrichment was also adverted to in *Newabganj Sugar Mills*, case (supra). In *Kewal Krishan Puri and Others Vs. State of Punjab and Another*, , the Supreme Court declared as invalid enhancement of licence fee chargeable under Punjab Agricultural Produce Markets Act. In the case of *Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others*, the petitioners claimed refund of additional duty paid by them which had been held to be invalid in *Kewal Krishan's CASE* (supra). Mr. Paranjape may not be right when he had contended that in *Kewal Krishan's* case (supra) in effect the additional duty was found to be a tax without the authority of law. But at the same time there is no cogent reason why the Supreme Court's observations in *Shiv Shankar Mill's* case (supra) regarding moulding of relief of refund by restoring the sums to persons who actually have paid, should be limited to cases of fee and not tax also. The principles of unjust enrichment in appropriate cases could be considered in different classes of compulsory levy of taxes, duties and fees. The contrary arguments of the petitioners are no longer available after the emphatic observations about unjust enrichment made by the Supreme Court in paragraph 14 of their judgment in the case of *State of Madhya Pradesh Vs. Vyankatlal and Another*, which reads as follows:

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

25. It is also settled law that it is not beyond the competence of the legislature to enact a law depriving assessee's right to obtain refund of tax, duty or fee

collected from him without authority of law when he had already realized the said amounts from his purchasers. See *The Orient Paper Mills Ltd. Vs. The State of Orissa and Others*, . *R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another*, and *Amar Nath Om Prakash and Others Vs. State of Punjab and Others*, .

26. In *M/s. Amar Nath Om Prakash's case* (supra) the Supreme Court upheld a provision inserted in the Punjab Agricultural Produce Markets Act for retaining the additional fee which had been declared invalid in *Kewal Krishan Puri and Others Vs. State of Punjab and Another*, The Supreme Court referred to directions given by it in *Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others*, regarding disbursement of excess fees collected by Market Committees. In *Amar Nath Om Prakash and Others Vs. State of Punjab and Others*, , the Supreme Court had applied the ratio of their earlier decisions in *Orient Paper Mill's case* (supra) and *R. S Joshi's case* (supra).

27. In view of the clear pronouncements made in paragraph 14 of the judgment in *State of Madhya Pradesh Vs. Vyankatlal and Another*, , we cannot accept as correct the submission that unless there is legislation in this behalf on the ground of unjust enrichment, the writ Court cannot deny an assessee refund of tax collected from him without authority of law.

28. The petitioners have attempted to distinguish the Supreme Court decision in the case of *Ayurveda Pharmacy and Another Vs. State of Tamil Nadu*, , on the ground that the petitioners in the said reported case had themselves made a statement before the Supreme Court that out of the amounts of sales tax refundable to them they would return excess amounts of tax collected to those customers who might apply to the petitioners and the balance would be donated to an educational Foundation for Ayurveda. The case of *Ayurveda Pharmacy v. State of Tamil Nadu* (supra) is in fact an instance where benefits of refund of sales tax which had been illegally collected were extended by consent/ concession of the petitioners, to those who had ultimately borne the burden of illegal taxation. But even when the parties to a writ petition do not give their consent, the Court does not lack jurisdiction to pass appropriate consequential orders for giving benefits of tax refunds to those who had ultimately shouldered its burden.

29. Thus, we reach the conclusion that when tax has been collected without authority of law, the State is bound to refund the same. Ordinarily, the tax illegally collected ought to be returned to the person from whom it had been collected. The concept of unjust enrichment is, however, not altogether irrelevant in the matter of granting refund of tax which has been collected without authority of law.

30. Excise duty has certain special traits which have a bearing on the question of refund of duty illegally collected. Excise duty is a tax on manufacture of goods and it is collected at the time of removal of excisable goods from the places of manufacture or from approved warehouses. The legal obligation of the

manufacturer to pay the said duty is irrespective of the fact whether or not he is able to ultimately shift the tax burden to his wholesale buyers or others. The liability of the manufacturer to pay excise duty may subsist even after the goods have passed out of his hands. But excise duty being an indirect tax, the manufacturer may add the duty to his wholesale cash price and pass on the burden to others. The learned Counsel for the Interveners has pointed out that in case the price charged by a manufacturer does not separately indicate the duty, it may not be possible to predicate how much of the excise duty had been in fact passed on by the manufacturer. In other words, when wholesale cash price of the manufacturer is a consolidated one, without separately mentioning the amount of excise duty, it may not be possible to find out how much of the price is attributable to the excise duty imposed by the State. Both Chandurkar, J. in his judgment in Maharashtra Vegetable Products Pvt. Ltd. and another Vs. Union of India and others, while dealing with controlled price of the product and Shah J. in the case of I.T.C. Limited Vs. M.K. Chipkar and others, had emphasised this aspect of consolidated wholesale cash price and about the difficulty of ascertaining how much of the excise duty formed part of the price.

31. In case there are series of intermediate sale transactions, it might be difficult to establish in what measure the tax burden was shifted and to identify the persons who might have borne the said burden. The learned Counsel for the Interveners has also pointed out that in the event excise duty illegally collected is ordered to be refunded, at least in some cases, the value element of the price charged by the manufacturer may be enhanced, thereby attracting higher excise duty on such goods. Only because excise duty is a tax on goods and it is capable of being passed on to others, in every case where an assessee prays in writ petition for refund, the writ Court ought not to presume that the burden of duty had been passed on and only upon that assumption cannot reject the consequential prayer for refund. In a number of reported cases, the revenue did not at all raise the plea of unjust enrichment and the Courts have considered on merits claim for refund of tax collected without authority of law. It is for the respondents in a writ petition to raise such a plea of unjust enrichment on affidavit and the Writ Court would decide the question according to the facts and circumstances of the case. In other words, the Writ Court is required to satisfy itself that the tax burden had been in fact shifted to others and that an order for refund in favour of the writ petitioner would result in his unjust enrichment.

32. Even when in a given case the Court is satisfied, on facts, that the writ petitioner has already passed on to others the burden of tax, there would be no uniform formula for moulding the consequential relief for benefiting those who had ultimately borne the burden. The form of the said consequential relief is to vary according to the facts of each case. Without attempting to be exhaustive, we may give some of the instances of relevant facts the total amount which is refundable, nature of the tax, the nature of the product on which the duty was illegally imposed, the possibility of identifying the persons who had ultimately borne the tax, etc. When the persons who had borne the ultimate burden form a

small class, it would not be difficult to identify them and to pass appropriate order of refund in their favour. But when tax had illegally been imposed on a product of mass consumption the persons to whom the tax burden has been shifted are too numerous to be identified for giving direct repayment orders, the Writ Court may mould the consequential relief in some other suitable manner.

33. We cannot accept the extreme submission made on behalf of the respondents that in all cases where order for tax refund to the assessee may involve his unjust enrichment, the State ought to be allowed to retain the amount which is refundable and the State itself ought to be left with the choice of how to benefit those who had borne the burden. Having collected tax without the authority of law, the State cannot have any preferential claim to decide how the amount of tax which is refundable shall be spent. According to the facts and circumstances of each case, the Writ Court would decide whether it is the State or the assessee or any third agency who ought to be entrusted with the duty of extending the benefit of tax refund to those who had ultimately borne the burden. As already stated, if consensus of the parties could be reached, the Writ court may act on the same. When the same is not possible, the Court has to exercise its own discretion according to the facts of each case for achieving the object of benefiting those who had borne the ultimate burden. Again, we may mention only some of the instances of forms in which such consequential relief may be granted. A fund may be created under a scheme for welfare of the particular industry and for the benefit of the consumers of the product. In case the excisable product is of mass consumption, benefit of refund may be given by way of reduction of its price for a certain period or by promotion of research, rationalisation, etc. It would be always preferable in those cases to leave the discretion with the Court to decide how the consequential relief ought to be formulated.

34. The aforesaid discussion answers the question posed to us by the learned single Judge. It will now be for him to apply those principles to the facts of the present case.

35. We clarify that the learned single Judge had preferred to the Full Bench the question of applicability of doctrine of unjust enrichment to Writ Petitions filed for obtaining refund of illegal tax. Therefore, we have not examined the further question whether the said doctrine has any application to suits before Civil Courts or to departmental proceedings for refund.

36. Order accordingly.