

**(1986) 07 BOM CK 0069**

**In the Bombay High Court**

**Case No : Writ Petition No. 1362 of 1980**

Parle Products Ltd. and another

APPELLANT

Vs

Union of India and another

RESPONDENT

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**Date of Decision :** 21-07-1986

**Acts Referred:**

**Citation :** (1988) 15 ECC 353 : (1987) 30 ELT 180

**Hon'ble Judges :** R.A. Jahagirdar, J

**Bench :** Single Bench

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## **Judgement**

1. This is a petition under Article 226 of the Constitution of India praying for setting aside the assessment orders issued from March 1968 to June 1977 levying and collecting excise duty on lozenges, a product which is manufactured by the first petitioner, which is a limited company. The second petitioner is a director and shareholder of the first petitioner. The first respondent is the Union of India while the second respondent is the Assistant Collector of Central Excise who has passed the orders which are impugned in this petition.

2. On 1st of March 1968 item 1-A was inserted in the Excise Tariff. That item included, among other things, an article known as candy. The first petitioner, hereinafter referred to as "the petitioner", manufactures, among other things, what are called lozenges. The question naturally arose whether lozenges were covered by the word "candy" which was mentioned in item 1-A of the Excise Tariff. By his order dated 13th of March 1968 the Assistant Collector of Central Excise ordered the provisional assessment of lozenges on the basis that they are included in the word "candy". Subsequently, by a communication dated 5th of April 1968 the Inspector of Central Excise informed the petitioner Compressed Tablets and sticks popularly known as "Extra Strong" and sweetened cigarettes, lozenges, peppermints etc. fall in the category of "candies" and as such come under the purview of Tariff Item 1-A and they accordingly are liable for excise duty. The earlier instruction regarding the provisional assessment was to cease to have effect. The petitioner accepted the interpretation given by the

communication dated 5th April 1968 and, the petitioner says, believing that was the correct legal position the petitioner continued to pay the excise duty on the basis that lozenges were included in the category of goods known as "candy".

3. It has been stated in the petition that with effect from 1st of March 1975, residuary tariff entry No. 68 was inserted but no specific provision was made regarding lozenges. However, on 16th June 1977 Tariff Item 1-A was substituted and lozenges were specifically mentioned as being the subject of excise duty. Therefore from March 1968 to 16th of June 1977 excise duty was paid under Item 1-A(1) treating the same as candy. Annexed to the petition as Exhibit "C" is a statement of the rate at which excise duty was paid from 1st of March 1968 till 16th of June 1977.

4. The Madras High Court delivered a judgment on 5th of December 1979 in Parry Confectionery Ltd. v. Government of India & Others, which judgment was reported in the August 1980 issue of the Excise Law Times 1980 (6) E.L.T. 458. In this judgment the Madras High Court held that lozenges will not answer the description of candy and therefore was not liable to excise duty under item 1-A(I) of the Central Excise Tariff. The petitioner says that with the publication of the judgment of the Madras High Court in the case of Parry Confectionery Limited the petitioner became aware that there was a mistake of law which was mutual between the petitioner and the respondents under which the petitioner had been paying excise duty on lozenges as if the said item was included in the word "candy". The petitioner, therefore, says that the amount which had been collected by the respondents by way of excise duty on the basis that lozenges were included in the word "candy" ought to be refunded to the petitioner. Putting forth this view a letter was addressed on behalf of the petitioner to the Secretary, Ministry of Finance on 15th of November 1980 informing the latter that the petitioner had been paying excise duty on lozenges under a mistake of law which was common to both the petitioner and the respondents and calling upon the respondents to refund an amount of Rs. 10,54,858 which was the amount so collected by the respondents. Having received no reply from the respondents the petitioner has filed this petition. It is thus the case of the petitioner that the amount collected from 1968 to 1977 by the respondents treating the lozenges as a part of a product known as candy was collected by the respondents and paid by the petitioner under a mistake of law which mistake of law became known to the petitioner in or about August 1980. In this month the judgment of the Madras High Court in Parry Confectionery Limited's case was published. The claim of the petitioner in this petition is, therefore, based upon the discovery of a mistake of law which, according to the petitioner, was common to both the petitioner and the respondents.

5. The petition was filed in November 1980 and there is no return to this petition on behalf of the respondents. Mr. Sethna, the learned Advocate appearing for the respondents, has stated that no affidavit has been filed partly at any rate for the reason that the record of the case which is an old one could not be traced.

Whatever may be the reason for the non-filing of the affidavit in reply to the petition, one must proceed on the basis that there is no such reply. The facts mentioned in the petition could not be controverted by Mr. Sethna. It must also be started that some questions which arise from the averments made in the petition and which are mixed questions of law and fact also remain uncontroverted.

6. The law relating to the sustainability of a claim made by an assessee who has paid excise duty under a mistake of law and who claims refund of the same upon the discovery of that mistake of law is well-settled. Nevertheless, I am constrained to make brief reference to the same in view of the contest that took place at the bar at the hearing of this petition. This is especially so because Mr. Sethna has taken up several contentions which, according to him, remain still unresolved despite a long line of decisions on which Mr. Setalwad, the learned Advocate appearing in support of the petition, has relied and which he has pointed out. Before I do that, however, it would be advantageous to mention again that in Parry Confectionery's case the Madras High Court held that lozenges would not fall within the description of candy. This the High Court did by examining the literature relating to the manufacture of lozenges and candies. In particular, the Madras High Court referred to a communication dated 11th of October 1974 from the Indian Standard Institute (ISI) in which the ISI has stated that candy is a light, bright and glossy confection made by pulling sugar syrup boiled to a thick consistency. In the manufacture of lozenges, however, a cold process without any boiling being done was involved. The boiling was an essential part of the process in the manufacture of confectionery or candy without the aid of which they could not be manufactured, but lozenges are made out of finally pulverised sugar or icing sugar with certain binding materials, without the aid of heat. Lozenges are rolled flat and then stamped into separate parts by cutting. The ISI also noticed the fact that in India candy was understood to be the crystallised sugar made by repeated boiling. The trade name "mishri" is being given to the same. In Indian Standard Institute's specifications relating to IS : 1668-1975, it has been stated that lozenges are confections mainly made out of pulverised sugar or icing sugar with certain binding materials and lubricants with the addition of suitable flavors and colours. The compressed lozenges are produced by cold mixing and wet granulation of slugging procedure.

7. The petitioners before the Madras High Court had also obtained the views of the Central Food Technological Research Institute (CFTRI). In the views of the CFTRI, candy was the light and brilliant confection made by pulling sugar syrup, boiled to a thick consistency whereas lozenges, were made of sugar flavoured with essence and coloured to taste. It was also mentioned by the CFTRI that for the preparation of lozenges, finely pulverised sugar, glucose syrup and a binder such as gum or liquid gelatin was worked up to a dough consistency without the aid of heat. From the opinions expressed by these two institutions it is noticed that one striking difference between lozenges and candy is that in the preparation of the former no heat is applied while in the preparation of the latter

heat is a very essential part of the process. It must be stated that Mr. Sethna did not contest the position that lozenges are not embraced by the word "candy" as has been held by the Madras High Court in the abovementioned case. One, therefore, must proceed on the basis that the position that lozenges are not candies is undisputed.

8. In *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, the Supreme Court held that the Court could not deny refund of tax paid under a mistake of law even if the person who paid it, had collected it from his customers and has no subsisting liability or intention to refund it to them. Noticing that the law of limitation did not apply to petitions filed in the High Court under Article 226 of the Constitution, it was held that the period of limitation prescribed for recovery of money paid under a mistake of law was three years from the date when the mistake was known and that period may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Article 226 can be measured. This was in fact the position which had already been pointed out by the Supreme Court in *State of Madhya Pradesh Vs. Bhailal Bhai and Others*, . Similar was the observation made by a Bench of seven Judges of the Supreme Court in *State of Kerala v. Aluminium Industries Limited*, (1965) 16 S T C 689. Therefore it was held in *D. Cawasji's* case that for filing a writ petition to recover the money paid under a mistake of law 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 and the period of limitation would normally be the period which would govern a suit for a similar relief. If any writ petition was filed beyond three years after that date, said the Supreme Court, it will almost always be proper for the Court to consider that it was unreasonable to entertain that petition subject, however, to the rider that even in cases where it is filed within three years the Court had the discretion, having regard to the facts and circumstances of each case, not to entertain the application. In the instant case the petition has alleged, and it has not been denied by the respondents, that the mistake of law became known to the petitioner in or about August 1980. The respondents were called upon to refund the amount which had been paid by the petitioner under a mutual mistake of law. This demand was made in November 1980 within three months after the mistake of law become known to the petitioner. The petition was filed in November 1980 itself. It can, therefore, be safely said that the petitioner has approached this Court expeditiously even without waiting upto a period of three years from the date of the discovery of the mistake of law. In the light of the guidelines mentioned in *Cawasji's* case it is impossible to hold that there is any delay on the part of the petitioner in the instant case in approaching this Court under Article 226 of the Constitution of India.

9. While I am with the judgment of the Supreme Court in *Cawasji's* case I might as well refer to a contention which is often raised on behalf of the Excise Departments that it is unjust to order, in a petition under Article 226 of the Constitution, the refund of the amount to an assessee who is under no obligation

to return the same to the persons from whom it had been collected. The Supreme Court held in paragraph 9 of the judgment in Cawasji's case as follows :-

"We are aware that the result of this view would be to enable a person to recover the amount paid as tax even after several years of the date of payment, if some other party would successfully challenge the validity of the law under which the payment was made and if only a suit or writ petition is filed for refund by the person within three years from the date of declaration of the invalidity of the law. That might both be inexpedient and unjust so far as the State is concerned."

But it was pointed out that "the task of writing legislation to protect the interest of the nation is committed to Parliament and the legislatures of the States". The Supreme Court referred to this aspect "to alert their attention to the present state of law".

10. An occasion arose to consider the entire law on the subject before Justice Madon (as he then was) in *Golden Tobacco Company Ltd. Vs. Union of India and another*, In this judgment, naturally pointed reference was made to the decision of the Supreme Court in Cawasji's case. Madon J. noticed that apparently a different approach on the point of delay was taken in some later decisions of the Supreme Court. Madon J. examined the same, but found that the position which emerged from those decisions was 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 was filed for the same relief. If a 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 the relief. Even where a petition was presented within the period of limitation prescribed for a suit the Court might, in exercise of its discretionary jurisdiction under Article 226 of the Constitution, refuse to grant the relief if the special circumstances of that case warranted the denial of such relief.

11. The law laid down by the Supreme Court and propounded, by this Court on the subject of the right of an assessee to claim refund of the duty paid under a mistake of law, the period of limitation governing petitions filed for such purpose, and the question whether by granting such relief the assessees would be allowed to unjustly enrich themselves was comprehensively reviewed by P. S. Shah J. in a judgment delivered in *I.T.C. Limited Vs. M.K. Chipkar and others*, The petition of I.T.C. Limited, namely Miscellaneous Petition No. 1151 of 1975, had been dismissed summarily by a single Judge of this Court. An appeal, being Appeal No. 108 of 1977, had been referred therefrom by the assessee company. Lentin and Sawant JJ. constituting the Bench which heard the appeal differed on some important questions that arose in the appeal and they gave differing judgments. Thus the matter came to be referred to Shah J. as the third Judge who, after, with great respect, an extra-ordinarily exhaustive survey of the case law on the subject, agreed with Lentin J. on all the points. In the paragraph which concluded

the discussion, namely paragraph 58 of the judgment, Shah J. observed as follows :-

"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."

In this elaborate judgment, Shah J. Has practically referred to every judgment of the Supreme Court and of this Court touching this aspect of the law. Two decisions of the Supreme Court, namely those in Shivshankar Dal Mills and U.P. State Electricity Board, were also noticed by Shah J. and he found that they did not affect the consistent view taken by the Supreme Court as well as by this Court in a long line of decisions. I am specifically mentioning this because Mr. Sethna at one stage made an attempt to show that the view taken by this Court, though it is taken in a long line of decisions, on the question of unjust enrichment is not correct in view of the decisions of the Supreme Court in the cases of Shivshankar Dal Mills and U.P. State Electricity Board. After going through the said judgments and also other judgments of the Supreme Court and of this Court, even on reconsideration I do not think I would have differed from the view taken by Shah J. The view expressed by Shah J., concurring with the view expressed by Lentin J., I regard, is binding upon me and I see no reason to deal at length with the argument of Mr. Sethna that the said view is not supportable by at least two judgments of the Supreme Court.

12. I may now briefly summarise the propositions which emerge from the various decisions beginning from the decision of the Supreme Court in D. Cawasji's case and the other decisions which have been referred to by Madon J. and also by Shah J. in the judgments referred to above.

(1) The discovery of a mistake of law under which an assessee has paid excess excise duty provides a cause of action to the assessee to claim refund of the amount paid by him;

(2) To a claim so made by an assessee, it is no defence on the part of the Excise department to contend that the refund of such amount to the assessee would result in the unjust enrichment of such an assessee who is under no obligation to refund the said amount to those persons from whom he had collected it;

(3) The period of limitation which would normally govern a petition under Article 226 of the Constitution claiming refund of the amount paid under a mistake of

law would be the period of limitation which would govern a suit if one is filed for the said purpose;

(4) The starting point of limitation for such a claim is the date on which the mistake of law is discovered as, for example, the date on which the judgment declaring as void a particular law under which the tax was paid was pronounced;

(5) Though a petition for such a relief has to be filed within a period of three years from the date of the accrual of the cause of action, which is the discovery of the mistake of law, a Court under Article 226 of the Constitution may legitimately refuse to decree the whole or part of the claim if the circumstances of the particular case warrant such a refusal;

(6) If any writ petition is filed beyond three years after the date of the accrual of the cause of action, it is almost always be proper for a Court to refuse to give the relief;

(7) Since the cause of action for the recovery of the amount paid under a mistake of law accrues on the discovery of the mistake of law, the amount to be claimed naturally becomes due on the date on which the mistake of law is discovered;

(8) A claim made with a period of three years from the date of such accrual of the cause of action will naturally include refund of the entire amount that becomes due though the same might have been paid several years earlier;

(9) If such is the position in law and if it is regarded as inimical to the interests of the State the remedy lies with the law-making authorities and Courts cannot deny and relief on the ground that grant of such relief will result in the unjust enrichment of the assessee.

13. Mr. Sethna at one stage contended that the petitioner should have right from the beginning insisted that lozenges were not liable to excise duty as contended by the authorities and should have approached the Court at the earliest challenging the view taken by the excise authorities. If in the instant case, says Mr. Sethna, the assessee has slept over its right for such a long time, this Court under Article 226 of the Constitution should refuse to entertain the claim of the petitioner especially in view of the fact that the amount which would be refunded to the petitioner would go into its coffers and the persons from whom it had been recovered by the petitioner would remain impoverished, enriching the petitioner. The argument is too familiar and has been repeatedly rejected by a long line of decisions of this Court. In my opinion, with respect to Mr. Sethna, this view also is based upon a total misconception of what is regarded as a mistake of law providing a cause of action for a petition of this type or for a suit for claiming a similar relief. If the petitioner in the present case had challenged the view of the department, the question of a mistake of law providing a cause of action for the present petition would not have arisen at all. The petitioner's case, a case which has not been denied by the respondents and on the facts of this case could not

have been denied, is that the amount was paid by the petitioner under a mistake of law which was mutual both to the petitioner and the respondents. It is only upon the discovery of a mistake of law consequent to the pronouncement of the judgment by the Madras High Court in Parry Confectionary Limited's case that the petitioner has approached this Court for the refund of the amount. I do not see how it is open to the respondents to contend that the petitioner ought to have approached this Court earlier, for the simple reason that in the absence of the discovery of a mistake of law the petitioner had no cause of action. If the petitioner had thought in the year 1968 when the petitioner accepted the view of the department that it was an incorrect view, then at that time itself the cause of action would have arisen and the petitioner would have taken appropriate proceedings under the provisions of the Central Excise Act itself or other proceedings. The fact that the department expressed a view, which view was accepted by the petitioner as the correct legal view, shows that both the petitioner and the respondents were labouring under common mistake of law which till its discovery could not have provided a cause of action to the petitioner or any other assessee similarly placed.

14. In *Tilokchand and Motichand and Others Vs. H.B. Munshi and Another*, a decision which has been referred to with profit in several decisions of this Court rendered later, Bachawat J., one of the three Judges who gave the majority judgment, pointed out that "the right to relief u/s 72 (of the Indian Contract Act) extends to money paid under mistake of law, i.e. "mistake in thinking that the money paid was due when in fact, it was not due"." This law was already to be found in AIR 1949 297 (Privy Council) and also in *Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf*, It should be stated that on the facts of *Tilokchand Motichand*'s case, however, the Supreme Court held that the petitioner before it was not labouring under any mistake of law as to claim refund of the amounts paid. Mitter J. in the same judgment pointed out the correct meaning of "a payment made under a mistake of law". In paragraph 50 of the judgment (page 914 of the report) it was pointed out that payments made under compulsion or coercion could not be regarded as payments made under a mistake of law. Though the Judges differed on the question whether the petitioner before them could be given the reliefs asked for, on the facts of the case there was no difference as to the correct nature of the mistake of law.

15. It has not been alleged by the respondents, and indeed it could not be done in the light of the correspondence which has been annexed to this petition, that the petitioner in the instant case paid the amount under coercion or threat. The material which is on record clearly shows that the petitioner and the respondents shared the same view, a view which is now found to be incorrect by the pronouncement of the judgment by the Madras High Court the correctness of which has not been questioned by Mr. Sethna. However, Mr. Sethna insisted that the fact that the petitioner continued to pay the excise duty at the rate demanded by the department showed that the petitioner acquiesced in that position and such acquiescence could not be equated with a mistake of law which

would provide a cause of action for recovering the amount so paid. It is impossible to accept this interpretation which is being put by Mr. Sethna on what he regards as the conduct of acquiescence on the part of the petitioner. A short answer to this submission made by Mr. Sethna is to be found in the following observation of Lentin J. (with Kania J) in *Industrial Cables (India) Ltd. Vs. Union of India and others*, -

"It is highly improbable and for that matter almost inconceivable, that an importer and a businessman would blithely go on paying duty to the Department which he knew he was under no obligation to pay."

16. In support of his contention that amounts which had been paid by the petitioner beyond a period of three years prior to the filing of the petition should not be refunded to the petitioner Mr. Sethna relied upon a part of a judgment of a Division Bench of this Court in *Chemicals and Fibres India Limited Vs. Union of India and others*, The petitioner before the Division Bench was manufacturer of synthetic fibres and relying upon a judgment of this Court in another case the petitioner approached this Court under Article 226 of the Constitution to claim refund of the amount which the petitioner contended had been paid under a mistake of law. On facts the Division Bench held that the petitioner's product on which duty had been paid was totally different from the one which was the subject-matter of the decision relied upon by the petitioner. In paragraph 44 of the judgment the Division Bench held that the polyester chips in question were covered by the item "Artificial or synthetic resins" and the petitioner before it was liable to pay excise duty. The question of delay in filing of the petition did not necessarily arise for decision. However, in paragraph 45 of the judgment the Division Bench noticed that the petitioners had been paying excise duty under protest from 1965 to 1969 and thereafter according to them, they were compelled to discontinue the protest. It was also noticed by the Division Bench that the claim for refund made was founded upon the decision in the case of *Nirlon Synthetic Fibres & Chemical Limited* rendered by this Court on 30th April, 1970. The petition in *Nirlon Synthetic*'s case had been filed in the year 1964. The Division Bench thought that the absence of any explanation on the part of the petitioners before it as to why they did not think it worthwhile to approach the Court independently and challenge the levy which according to it was illegal was sufficient ground to deny to the petitioners the claim for the refund for a period beyond three years before the filing of the petition. Therefore it was held "No justification has been made out as to why the petitioners were required to wait for a decision in the case of *Nirlon Synthetic Fibres & Chemicals Ltd.*, in order to make a claim for refund of the excise duty alleged to have been illegally recovered. If at all the petitioners were entitled to any refund, in our view, an order for refund could be made only in respect of recovery for a period of three years prior to the filing of the petition."

17. Mr. Sethna very strongly relies upon this part of the judgment in the case of *Chemicals and Fibres India Limited*. It is his contention that if Parry

Confectionery could approach the Madras High Court in the year 1973 there was nothing that prevented the present petitioner from approaching this Court at that time or as soon thereafter as possible. Here again, the contention is based upon a total misconception of the cause of action upon which this petition is based. I have dwelt at sufficient length on the nature of the cause of action upon which the claim in this petition is founded. It is unnecessary for me to repeat the same. The reliance placed by Mr. Sethna on the judgment in the case of Chemicals and Fibres India Limited is also, in my opinion, misplaced because the Division Bench in that case has not stated that the cause of action to the petitioners before them had not accrued till the decision was given by another Division Bench of this Court in Nirlon Synthetic's case. Further, the question of limitation, which has been with sufficient clarity pointed out by the Supreme Court in Cawasji's case and followed by this Court in a long of decisions, was not considered at all by the Division Bench in the case of Chemicals and Fibres India Limited. If at all, the observations in paragraph 45 of the judgment in Chemicals and Fibres India Limited's case seem to suggest that the petitioners before the Division Bench were aware that there was a challenge made by Nirlon Synthetic Limited - a challenge which was shared by the petitioners before the Division Bench. Yet the petitioners did not bestir themselves to approach the Court expeditiously. In other words, if anything, though apparently the claim for refund made by the petitioners in Chemicals and Fibres India Limited was based upon the decision in the case of Nirlon Synthetic Limited, in fact the petitioners, the Division Bench thought, were fully aware of the erroneous stand which had been taken by the excise authorities. It is in these circumstances that the Division Bench in Chemicals and Fibres India Limited's case held that the petitioners ought to have given an explanation as to why they had not approached the High Court earlier without waiting for the decision in Nirlon Synthetic's case.

18. A judgment of the Supreme Court on which repeatedly reliance is being placed by the Advocates appearing for the Excise Department in this Court and upon which Mr. Sethna predictably placed reliance is the one in Shri Vallabh Glass Works Ltd. and Another Vs. Union of India (UOI) and Others, . Reliance is being placed upon this judgment for contending that a claim for refund based upon even the discovery of a mistake of law should not be decreed for the amount paid beyond a period of three years from the date of the filing of the claim. Before dealing with the argument of Mr. Sethna it is, again, necessary to recall what provides a cause of action for claiming refund of the excise duty paid under a mistake of law. D. Cawasji had held that discovery of a mistake of law under which excise duty has been paid by an assessee provides a cause of action for recovering the amount so paid. Normally the period which would govern a suit for enforcing such a claim would also be the period of limitation for a petition under Article 226 of the Constitution. The accrual of the cause of action for the recovery of the amounts means for the entire amount paid upto the date of the discovery of the mistake of law or, in other words upto the date of the accrual of the cause of action. It is no answer to this legal position to contend that only

amount paid within a period of three years prior to the institution of the claim, whether in a suit or in a writ petition, could be legitimately decreed. What is claimed and what has got to be decreed is not the amount that has been paid over a period of time by the assessee, but the amount which becomes due on a particular day on which the cause of action has accrued.

19. As mentioned earlier, the cause of action accrues on the date of the discovery of the mistake of law. It is on this date that all amounts paid, irrespective of the period over which such amounts have been paid under a mistake of law, becomes the subject of a claim for refund. It is the discovery of the mistake of law, which is again the equivalent to the accrual of the cause of action, that is the starting point of limitation for putting forth a claim for refund. The period of limitation is three years from this date. All amounts that became payable on the date of the accrual of the cause of action would have to be paid if a claim for refund of the same is brought within three years from the date of the accrual of the cause of action. This, I understand, is the correct position as explained by the Supreme Court in D. Cawasji's case. That is why the Supreme Court was constrained to observe that a claim for refund of amounts paid even for several years before the claim is actually made has to be upheld in the absence of any legal bar to the same. If that created an unhappy situation it was for the legislature to amend the law and it is not for the Courts to turn down such a claim.

20. If once the aforesaid legal position is firmly grasped and understood, there is no scope for misunderstanding the judgment of the Supreme Court in Shri Vallabh Glass Works" case. However, Mr. Sethna insists that despite what has been said in all the preceding judgments the Supreme Court has explicitly or by necessary implication held in Shri Vallabh Glass Works" case that the amounts which were paid beyond a period of three years next before the institution of a writ petition could not be granted in a petition under Article 226 of the Constitution or for that matter even in a suit filed for the said purpose. The facts in Shri Vallabh Glass Works ought to be necessarily noted.

21. An application for refund had been made on behalf of the assessee on 20th of February 1976. On 20th of September 1976 the Assistant Collector rejected the refund application. On 28th of September 1976 a writ petition was filed by the assessee, but it was later withdrawn as alternative remedy by way of appeal was available to the assessee. The alternative remedy of appeal and revision was pursued by the assessee till 2nd of February 1978 on which day the revision application was rejected. Immediately thereafter the assessee filed a writ petition in the High Court of Gujarat which held, by its judgment dated 22nd November 1978, that refund for the period subsequent to 20th of February 1976 alone could be claimed by the assessee. Challenging the said order of the Gujarat High Court the petitioner approached the Supreme Court in an appeal.

22. All the aforesaid dates were noticed by the Supreme Court in its judgment. It was also noticed that the assessee had not mentioned as to when the mistake of

law upon which the assessee had based its claim was discovered by the assessee. Referring to the law of limitation the Supreme Court stated that in a suit or application for relief from the consequences of a mistake, the period of limitation shall not begin to run until plaintiff or applicant had discovered it or could have with reasonable diligence discovered it. Proceeding further the Supreme Court observed : "In the instant case the date on which the mistake was discovered by the appellants or the date on which the appellants could with reasonable diligence have discovered it is not clear from the record before us. No effort also was made in the course of the arguments urged on behalf of the appellants to establish it. We have, therefore, to assume that on the date of each payment of excise duty made by the appellants in excess of the proper duty payable by them, the appellants could have discovered with due diligence that the duty claimed from them was excessive." It was thus clear that the Supreme Court proceeded on the basis that every time a payment was made by an assessee, the assessee could have asked for refund of the excess amount so paid because every time the payment was made it was made on the basis that the mistake of law was discovered at the time of payment.

23. It was noticed by the Supreme Court that the writ petition was for the first time filed on 28th of September 1976. Therefore the assessee was entitled to the refund of all excess payments made on or after 28th September 1973 because such payments fell within the period of three years prior to the date on which the writ petition had been filed by the assessee in the High Court. The refusal of the High Court to order refund of the amount paid within three years next before the filing of the writ petition was held to be unjust especially because the High Court had declined to order the refund on grounds of estoppel and acquiescence. The claim of the assessee for refund of the amounts paid between October 1, 1963 and September 27, 1973 was negatived for the obvious reason that the Supreme Court had proceeded, as already mentioned above, on the basis that every time the payment was made by the assessee there should be deemed to have arisen a cause of action based upon the mistake of law. This assumption had been made because the assessee had failed to establish when the mistake of law had been discovered by it. I do not see how this judgment lays down a proposition that in a petition under Article 226 of the Constitution no amount which had been paid beyond a period of three years before the filing of the writ petition could be refunded to the assessee if the claim is based upon the discovery of a mistake of law. On the other hand, in my opinion, the judgment in the case of Shri Vallabh Glass Works proceeds upon the basis that any amount which becomes due on the date on which the mistake of law is discovered giving a cause of action to a party must be paid if a claim is made within a period of three years from the date on which the amount becomes so due. Far from taking a view different from the one taken by the Supreme Court in D. Cawasji's case, Shri Vallabh Glass Works affirms the law laid down in D. Cawasji's case.

24. It may incidentally be noted that in Shri Vallabh Glass Works's case an application for refund had been made by the assessee on 20th of February 1976.

If that application had been granted the amount paid within a period of six months before the date of the application could probably have been refunded. The relief ultimately granted by the Supreme Court necessarily included the refund of the amount paid within six months before the filing of the revision application because the amount ordered to be refunded by the Supreme Court was the amount which had been paid within three years before 28th September 1976, that is all the amounts paid after 20th of September 1973. The argument that no amount paid beyond a period of three years before the filing of a writ petition or of a suit can be are refunded must, therefore, necessarily be rejected.

25. While arguing that the law as the understood as the correct law laid down by the Supreme Court in Vallabh Glass Works" case, Mr. Sethna also returned to the operative part of the order passed by the Madras High Court in the case of Parry Confectionery Limited. Paragraph 11 of the judgment in Parry Confectionery case is as follows :-

"It is manifest that the petitioners having filed an application for refund on 20-10-1973, will be entitled to a refund of the excise duty mistakenly paid for a period of three years prior to that date. No question of limitation arises because the application itself is dated 20-10-1973, and the pendency of the application will not bar the relief itself. The petitioners will accordingly be entitled to a refund of the moneys paid for a period of three months prior to 20-10-1973, and also for the subsequent to 20-10-1973, which they paid under protest."

In the case of Parry Confectionary Limited, application for refund had been made on 20th October 1973 though the writ petition had been filed in the year 1977. The mention of "a period of three years" in the first sentence of the extracted paragraph in fact seems to be incorrect because an application for refund of amount paid beyond a period of three months at that time or six months subsequently could not have been granted. That seems to be the correct position because in the third sentence of the same paragraph it was held that the petitioners were entitled to a refund of the moneys "paid for a period of three months prior to 20-10-1973." I do not see how any argument could be based upon what has been mentioned in paragraph 11 of the judgment in Parry Confectionery case. The facts show that an application for refund had been made on 20th of October 1973, the Court held that the assessee was entitled to the refund of the moneys paid for a period of three months prior to the date of the application for refund, and since the subsequent payments had been made under protest the assessee was held to be entitled to refund of every payment so made. In fact the Court specifically stated that the question of limitation did not arise on the facts of that case.

26. Mr. Sethna returned to the argument of unjust enrichment because, according to him, though all the decisions right upto the U.P. Electricity Board"s case, as I have already pointed out, have been considered by different judgments of this Court and the last one being of Shah J., there is a subsequent judgment of the Supreme Court in State of Madhya Pradesh Vs. Vyankatlal and

Another, , which has taken a view which disentitles claims of assesseees like the present petitioner who would be enriching themselves if the amount is refunded to them when such refunded amount would not ultimately reach the persons who had paid them. The facts in *Vyankatlal's* case disclosed that the respondents in the appeal before the Supreme Court were the owners of Jaora Sugar Mills. The Madhya Bharat Government, in exercise of the powers vested in it under the Madhya Bharat Essential Supplies (Temporary powers) Act, 1948, had issued a notification and included sugar in the list of articles as an essential commodity. Under another notification, all the sugar factories in Madhya Bharat were to supply and despatch sugar of Grade E-27 at Rs. 32,40 per maund. The supply price was a little higher than the ex-factory price. The difference between the supply price and the ex-factory price was to be credited to the Madhya Bharat Government Sugar Fund. The respondents before the Supreme Court after crediting certain amount though under protest filed a suit for refund of the amount so credited on the ground that the levy and collection made under the notification, which collection had been credited to the Government Sugar Fund, was without lawful authority and without legislative competence. It was, therefore, pleaded that the State was bound to refund the same.

27. The suit was dismissed by the trial Court. In appeal the High Court upheld the contention of the claimants that the requirements of crediting the difference between the supply price and the ex-factory price to the Government Sugar Fund lacked legal authority. The State of Madhya Pradesh preferred appeal to the Supreme Court. The Supreme Court confirmed the view of the High Court. However, referring to certain earlier decisions as those delivered in *Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others*, , *Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf*, and *Amar Nath Om Prakash and Others Vs. State of Punjab and Others*, the Supreme Court did not think it proper to decree the refund of the amount claimed by the owners of the sugar mill. In paragraph 14 of its judgment the Supreme Court said that the principles laid down in the case referred to earlier were based upon the specific provisions in those Acts, but thought that the same principles can safely be applied to the facts of the case before it inasmuch as the claimants did not have to pay the amount from their coffers. The burden of paying the amount in question has been transferred to the purchasers and, therefore, the claimants were not entitled to get a refund. Proceeding further, it was stated as follows :-

"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."

28. The reliance placed by Mr. Sethna on these observations is apparently justified, but if one looks to the facts of the case before the Supreme Court it is easily seen that the Supreme Court directed the utilisation of the amount which had been deposited for the purpose for which the amount had been originally collected, namely for the development of sugarcane. It is clear to me that the theory of unjust enrichment, which had been repeatedly rejected by the Supreme Court itself in several cases involving claims for refund of excise duty, has not been revived by what is mentioned in paragraph 14 of the judgment in State of M.P. v. Vyankatlal. The principles which the Supreme Court had laid down in the three judgments referred to in paragraph 11, 12 and 13 of the judgment were applied to the facts in State of M.P. v. Vyankatlal. In none of the three cases which had been referred to by the Supreme Court the theory of unjust enrichment, which had been held to be inapplicable in claims for refund of excise duty, had been applied or upheld. Those were the cases where amounts had been collected and refunds were denied on principles based upon specific provisions of those Acts. Under the Madhya Bharat Essential Supplies (Temporary Powers) Act read with the orders passed and notifications issued under the said Act, the purpose of the collection of the amount was gathered as one for the development of sugarcane. On the facts before it, therefore, the Supreme Court found that it was unjust to return the amount to the sugar mill owners who were not in a position to refund the amounts to the persons from whom the same had been collected. On the other hand, it would be correct to direct the application of the amount for the purpose for which it had been collected, namely for the development of sugarcane. I am not convinced that the judgment in State M.P. v. Vyankatlal revives the theory of unjust enrichment which has been consistently rejected in all cases where claims for refund of the amounts paid by way of excise duty under a mistake of law had been upheld both by the Supreme Court and by this Court.

29. In the result, this petition must succeed. Rule is accordingly made absolute in terms of prayer clauses (a) and (b). It is directed that the payment due under this order shall be made by the respondents on or before 31st October 1986.

30. There will be no order as to costs.