

(1981) 09 MAD CK 0091

In the Madras High Court

Case No : Writ Petition No. 3604 of 1979

Soft Beverages (Pvt.) Ltd., Madurai

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 29-09-1981

Acts Referred:

Central Excise Rules, 1944 — Rule 11
Customs Act, 1962 — Section 25, 27

Citation : (1982) 10 ELT 119 : (1982) ILR (Mad) 124

Hon'ble Judges : Nainar Sundaram, J

Bench : Single Bench

Advocate : B.R. Dolia, of Iyer and Dolia, for the Appellant; K.N. Balasubramaniam, Addl. Central Government Standing Counsel, for the Respondent

Judgement

1. The prayer in the writ petition is for the issue of a writ of Mandamus, directing the respondents to refund to the petitioner a sum of Rs. 13,01,628.15, being the amount paid by it over and above ten per cent ad valorem duty in respect of its products Coca Cola and Fanta declared by them from 17-3-1976 to 25-7-1976, as per the chart marked annexure A to the petition. The petitioner has approached the court under the following circumstances. The petitioner was the authorised bottler of Coca Cola Export Corporation for bottling Coca Cola and Fanta. The formulae for the said two soft drinks were supplied by Coca Cola Export Corporation and the petitioner used to manufacture Coca Cola and Fanta and market them. There is no dispute now, the manufacture by the petitioner of the above products was not by the use of blended flavouring concentrates in any form. Yet, due to a misconception of the legal and factual position, the petitioner used to declare that its products fall under Central Excise Tariff Item I-D(1)(a) and paid 26 paise by way of excise duty per bottle. The products Coca Cola and Fanta factually and legally would only come under Central Excise Tariff Item 1-D(2) and not under 1-D(1)(a) and by virtue of a notification bearing No. 56/76, Central Excise, dated 16-3-1976, the duty to be payable was only 10 per cent.

The mistake was discovered only later and Mr. B.R. Dolia learned counsel for the petitioner, states that the mistake was discovered only after the judgment of the Bombay High Court in W.P. 944 of 1973, - Messrs Duke & Sons Ltd. v. Superintendent, Central Excise, dated 8/11-10-1976. For the period from 26-7-1976 to 16-6-1977, the petitioner made a claim for refund. The second respondent rejected even that claim by order dated 24-11-1977, though the claim was within time. Aggrieved by that order, the petitioner preferred an appeal before the Appellate Collector of Customs and Central Excise, Madras and the said appeal was also rejected by order dated 16-3-1979. The petitioner preferred a revision before the first respondent, challenging the order of the Appellate Collector. The matter stood thus at the time of the filing of the writ petition. On the basis that excise duty under a wrong tariff item was paid by the petitioner on a misconception of the law and facts, the petitioner has approached this court with the prayer set out above. It is now brought to my notice that by order dated 10-3-1981, the first respondent has allowed the revision since the claim of the petitioner for refund is limited to the period which is not barred under rule 11 of the Central Excise Rules. The writ petition has been filed on 12-6-1979. It is now well settled that the period of limitation prescribed for recovery of money paid under a mistake of law is three years from the date when the mistake is known and that period may ordinarily be taken to be a reasonable standard for which delay in seeking remedy under Art. 226 of the Constitution of India can be measured. If the date of the judgment of the Bombay High Court referred to above is counted as the date of discovery of the mistake, it is not possible to reject the claim of the petitioner on the ground of delay alone.

2. None of the above statements of fact is being disputed by the respondents. Mr. K.N. Balasubramaniam, learned counsel for the respondents, would urge only two factors to counteract the claim of the petitioner. One is that the petitioner paid duty under a procedure called "self removal procedure" and the petitioner having filed a classification list of its goods voluntarily stating that the aerated water manufactured by it contained blended flavouring concentrates, the rate of duty attracted by it being the maximum, the department approved it and the petitioner is estopped from resiling from its previous stand and claim refund on a ground of either mistake of law or of fact. The second ground that is sought to be put against the claim of the petitioner is that the petitioner cannot claim refund to enrich itself when the excise duty paid had already been reimbursed from its consumers and it would be inequitable to allow the petitioner to collect the duty from its purchasers and now put up a claim for refund of duty which it had not paid out of its profits and that would result in the Court giving a helping hand to the petitioner to enrich himself unjustly.

3. The questions that arise for consideration on the above contentions are interesting indeed. With regard to the first contention that the petitioner is stopped from making a claim for refund, I think this stand of the respondents cannot be countenanced in view of the position in law, which must be deemed to

be settled by judicial pronouncements. In *Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf*, , the Supreme Court laid down the law as follows :-

"The term "mistake" used in S. 72, Contract Act has been used without any qualification or limitation whatever and comprises within its scope a mistake of law as well as a mistake of fact. There is no warrant for ascribing any limited meaning to the word "mistake" as has been used therein. There is no conflict between the provisions of S. 72 on the one hand and Ss. 21 and 22 of the Contract Act on the other. The true principle is that if one party under a mistake whether of fact or law, pays to another party money which is not due by contract or otherwise that money must be repaid. The mistake lies in thinking that the money paid was due when in fact it was not due and that mistake, if established, entitles the party paying the money to recover it back from the party receiving the same."

4. In *State of Madhya Pradesh Vs. Bhailal Bhai and Others*, , the Supreme Court considered a case where the Sales Tax assessed and paid by the dealer, was declared by a competent court to be invalid in law, and it was held that the payment of tax already made is once made under a mistake within S. 72 of the Contract Act and so, the Government to whom the payment has been made by mistake must in law repay it. It was further laid down that the High Court has, in the exercise of its jurisdiction under Art. 226 of the Constitution of India, power for the purpose of enforcement of fundamental rights and statutory rights to give consequential relief by ordering repayment of money realised by Government without the authority of law.

5. In *State of Kerala v. Aluminium Industries, Ltd.* 16 STC 689, the party by mistake did not claim exemption in connection with the concerned Sales Tax even though such exemption was available to it. This claim was opposed on the ground that the party was stopped from claiming any refund because it has paid the tax voluntarily. The Supreme Court referred to its earlier ratio in *Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf*, , and held that there is no question of estoppel when the mistake of law is common in both the parties, which was the factual position in that case inasmuch as the party therein did not raise the question of exemption and the Sales Tax Officer had no occasion to consider it and the Supreme Court characterised the levy as one occasioned by mistake of law and further held that it is ordinarily the duty of the State, subject to any provision of the law relating to Sales Tax to refund the tax and if refund is not made, remedy through courts is open, subject to the same restrictions and also to the period of limitation, viz., three years from the date when the mistake becomes known to the person who had made the payment by mistake.

In *Asia Electric (India) Ltd. v. Joint C.T.O.*- 1969 MLJ 632, a Division Bench of this court consisting of K. Veeraswami J. as he then was and T. Ramaprasada Rao J. as he then was, dealt with a case of tax paid under a mistake of law under the

General Sales Tax Act I of 1959 and the Division Bench held as follows :-

"It is now well established that if an assessee has paid tax, though voluntarily, but by mistake of law, he is entitled to ask for refund of such tax by means of a petition under Art. 226 of the Constitution. Where a tax is levied by mistake of law, it is ordinarily the duty of the subject to any provision in the law relating to Sales Tax, to refund the tax. No question of estoppel would arise when the mistake of law is common to both the parties. If refund is not made, remedy through court is open subject to the same provisions, if any, and the period of limitation namely three years from the date when the mistake becomes known to the person".

6. A similar view has been taken recently by a Division Bench of this court consisting of Ramanujam J. and Sengottuvelan J. in *Durga Shankar Industries v. Govt. of India* - 1979 E.L.T. 227, with reference to excise duty wrongly collected under the Customs Act, 1962 and the Bench pointed out that if the excise duty collected from the petitioner was without the authority of law and was contrary to the statutory exemption notifications issued under S. 25 of the Customs Act 1962, it was refundable irrespective of the time limit laid down in S. 27 thereof.

7. *V. Ramaswami J. in Messrs Parry Confectionery Ltd. v. Govt. of India* - 1980 E.L.T. 468, also countenanced the position that the party will be entitled to refund of excise duty mistakenly paid. On facts, the learned Judge found that lozenges manufactured by the petitioners therein will not fall within the description of "candy" and is not, therefore, liable to excise duty under item 1-A(1), of the Central Excise Tariff and on the other hand, they are not excisable goods. There also, the petitioners have been wrongly including in their application and were also paying mistakenly duty on lozenges as if the lozenges are also covered under item 1-A(1) of the Central Excise Tariff.

8. In *Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others*, , the following observations of Krishna Iyer J. are more enlightening -

"Where public bodies, under colour of public laws, recover people's moneys, 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*." (page 1038)

If, on the facts of the particular case, excise duty is leviable only under a particular tariff item and if such duty has come to be paid merely on a misconception under some other tariff item, which is more onerous, definitely the mistake is one of law. Merely because the duty was paid voluntarily under a particular procedure called "self removal procedure" does not alter the position being one of mistake of law. The matter would stand on a different footing if the petitioner had agitated the levy of duty under the appropriate item, but that has

been discountenanced by the authority concerned. It is not the case of the respondents that the department was entertaining any other view, other than the misconceived one that the tariff item which was solely inapplicable to the products in question, was applicable to the products. Both the petitioner and the Department suffered this misconception and acted under it. As pointed out by the Supreme Court in *State of Kerala v. Aluminium Industries*, 1965 (16) STC 689, there is no question of estoppel when the mistake of law is common to both the parties. Here, there can be no doubt that the mistake of law was common to both the parties. This obliges me to reject the first contention put forth on behalf of the respondents.

9. The second contention urged, as stated above, is that refund of excise duty, though wrongly collected by the Department, would only go to unjustly enrich the petitioner and that this court should not lend its hand to aid that result. This contention is being expatiated by pointing out that the petitioner had already reimbursed itself from its consumers and purchasers the excess excise duty now claimed by way of refund. It is worthwhile to note the judicial precedents which have dwelt on this aspect, so that it would enable this court to deduce the correct principle that should be applied to the facts of the present case.

10. In *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, , the appellant contended before the High Court that the payment of cess in question was made by it under a mistake of law and it discovered the mistake only subsequently when the High Court, by its judgment, declared the provisions of the concerned statutes tax and the amendments thereto as unconstitutional and it filed the writ petitions within three months after the decision and hence the writ petitions were within time. The High Court found that there was delay in filing the petition and it was mainly for that reason it dismissed the petition. The Supreme Court referred to its earlier pronouncements in *State of Madhya Pradesh Vs. Bhailal Bhai and Others*, , and *State of Kerala v. Aluminium Industries*, 16 STC 999, and observed that the period of limitation prescribed for refund of the money paid by mistake is three years from the date when the mistake is known and that period may ordinarily be taken to be a reasonable standard by which delay in seeking the remedy under Art. 226 of the Constitution of India can be measured. It is further pointed out that in a case where the 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. The Supreme Court discussed the scope of the power of court under Art. 226 of the Constitution of India to order refund of tax paid under a mistake of law and its observations in paragraphs 9 to 12 in judgment are elucidative and definitely throw light on the question now raised. The said observations stand extracted 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 in-expedient and unjust so far as the State is concerned.

A tax is intended for immediate expenditure for the common good and it would be unjust to require its re-payment after it has been in whole or in part expended, which would often be the case, if the suit or application could be brought at any time within three years of a court declaring the law under which it was paid to be invalid, be it a hundred years after the date of payment. 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.

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*, volume 84, page 637). Although S. 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 a different treatment both in the matter of the heads under which they could be recovered and the period of limitation for the recovery.

11. The task of writing legislation to protect the interest of the Nation is committed to Parliament and the legislatures of the States. We are referring in this aspect only to alert their attention to the present state of law." (page 815)

The observations in paragraph 10 of the above judgment clearly indicate that the court could not deny refund of tax even if the person who has paid it has collected it from the customers and there is no subsisting liability or intention to refund it to them or for any reason, it is impracticable to do so.

12. *Jeevan Reddy J. of the High Court of Andhra Pradesh in Andhra Pradesh Paper Mills Ltd. v. Asst. Collector of Central Excise*, 1980 ELT 210, discountenanced the plea that the benefit of the concerned exemption notification should be denied to the party only on the ground that the benefit of the exemption has not been passed on by him to the buyer/consumer.

In *Associated Bearing Co. Ltd. v. Union of India*, 1980 ELT 415, a Division Bench of the Bombay High Court consisting of Chandurkar and Kotwall JJ. held that there is no provision in the Central Excise Law under which a manufacturer can be denied the refund of duty illegally collected from him, even though he had recovered it from the customers and had no intention to refund it to them.

13. *Lentin J. of the Bombay High Court in Ceat Tyres of India Ltd. v. Union of India*, 1980 ELT 563, reiterated the position that the term "mistake" used in S. 72 of the Contract Act has been used without any qualification or limitation and

comprises within its scope a mistake of law as well as a mistake of fact and, therefore, if the department received from the petitioner an amount higher than what it was entitled in law to receive and which it would not have received if the petitioner had not committed a bona fide mistake of paying it, the provisions of S. 72 of the Contract Act will come into play and the Department is liable to refund any such excess amount to the petitioner, even if the assessee has himself filed a wrong classification list and paid higher tax than it was required to pay.

14. As against the above decisions, I find there is a decision of a Division Bench of this court consisting of Ramanujam J. and Padmanabhan J. in *Madras Aluminium Co. Ltd. v. Union of India*, 1981 E.L.T. 478, and there, the Division Bench while countenancing the position that the High Court can, in its discretion, direct refund of duty illegally collected from the petitioners, held that where the petitioners cannot in their turn refund the same pro rata to the actual consumers from whom excise duty was recovered, the court will be justified in refusing to grant refund. The Division Bench further held that the right of the petitioners to get refund of excise duty is subject to questions of estoppel, limitation and the like and if peculiar circumstances existed which showed that the amount to be refunded really belongs to the consumers and not to the petitioners, then the court will be justified in refusing to grant refund because it will result in an unjust enrichment of the petitioners by having the benefit of both collection of excise duty from the consumers and the benefit of refund from the Government. The learned Judges referred to two pronouncements of the Federal Court for holding that excise duty, in its nature, is an indirect tax to be borne ultimately by the consumer. They also referred to and relied on three pronouncements of the Supreme Court for holding that excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country and it is an indirect duty which the manufacturer or producer passes on to the ultimate consumer, that is, its ultimate incidence will always be on the consumer. So far as this proposition goes, the ration of the Division Bench presents no difficulty. The learned Judges of the Division Bench referred to the judgment of the Supreme Court in *The Orient Paper Mills Ltd. Vs. The State of Orissa and Others*, , for ultimately holding that the court can refuse refund on the principle of unjust enrichment. In *The Orient Paper Mills Ltd. Vs. The State of Orissa and Others*, , the Supreme Court dealt with a case under S. 14-A of the Orissa Sales Tax (Amendment) Act, 1958, which provided that refund of tax which the dealer was not liable to pay could be claimed by a person from which the dealer has actually realised it and not by the dealer and the Supreme Court expressed the view that the dealer having collected the tax from the consumers and paid over the same to the State, he had no beneficial interest in that amount; that the amount shall be claimable only by the persons who paid the amount to the dealer and that, therefore, S. 9-B(3) of the Act providing that if the amount realised by the dealer exceeded the amount payable by him as tax such amount shall be deposited in the treasury is a reasonable restriction imposed on the right

of the dealer to obtain refund in the interest of general public and does not infringe the provisions of Art. 19(1)(6) of the Constitution of India. The Supreme Court dealt with the provisions of the concerned statute and held that it imposed a reasonable restriction which did not infringe the provisions of Art. 19(1)(6) of the Constitution of India. The Supreme Court in that case has not specifically laid down a proposition that refund to tax illegally collected can be denied to the person on the ground that he has collected it from his customers and has no subsisting liability and intention to refund it to them or for any reason, it is impracticable to do so. On the other hand, the decision of the Supreme Court in *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, , discountenanced such a proposition. I find that the decision of the Supreme Court in the said case was not brought to the notice of the learned Judges of the Division Bench in *Madras Aluminium Co. Ltd. v. Union of India*, 1981 ELT 478. Under Art. 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India. At the risk of repetition I would like to refer to the following observations of the Supreme Court in *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, .

"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."

The above is the law declared by the Supreme Court of India and it is binding on me in preference to the ration of the Division Bench referred to above.

15. There was a vague suggestion put forth on behalf of the respondents that the above observations cannot be stated to be the ration of the Supreme Court, but can only be characterised as "obiter". I am not able to countenance this suggestion. In *Dalbir Singh v. State of Punjab*, AIR 1979 SC 1384, the Supreme Court delineated three essential ingredients that would go to constitute a precedent, so as to be a law declared under Art. 141 of the Constitution of India. The second ingredient countenanced by the Supreme Court is "Statements of the Principles of law applicable to the legal problems disclosed by the facts". In *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, , the Supreme Court was considering the principles that should govern refund of cess collected under a mistake of law. I have no ambiguity in my mind, the observations of the Supreme Court culled out above do pronounce a precedent so as to be binding on this court. Even if we take the above observations as "obiter", they would be still binding on this court because they are not stray observations of the Supreme Court, but they expressed the considered opinion of the highest court in the land. Though it is not necessary to cite case law on this aspect yet, I would like to refer to a few; first to the decision of the Allahabad High Court in *L. Deep Chandra Vs. Lala Raghuraj Swarup and Others*, , in which the Full Bench followed two decisions of earlier Full Benches.

16. In *Municipal Committee, Amritsar v. Hazar Singh*, 1975 KLT 275, the

Supreme Court approved the following observations in *State of Kerala v, Vasudevan Nair*, 1974 KLT 617 -

"Judicial propriety, dignity and decorum demand that being the highest judicial tribunal in the country even obiter dictum of the Supreme Court should be accepted as binding. Declaration of law by that court even if it be only by the way has to be respected. But all that does not mean that every statement contained in a judgment of that court would be attracted by Art. 141. Statements of matters other than law have no binding force."

The Division Bench in *Madras Aluminium Co. Ltd. v. Union of India* - 1981 ELT 478, refers to two decisions, one of the High Court of Andhra Pradesh and the other of the Calcutta High Court for spelling out the ration that refund could be denied on the principle of unjust enrichment. But they could not be of any force over this proposition in view of the declaration of law by the Supreme Court - *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, .

17. In *Maharashtra Vegetable Products Pvt. Ltd. v. Union of India*, 1981 ELT 468, a Division Bench of the Bombay High Court consisting of Chandurkar and Bhonsale JJ. held that an amount of duty illegally collected was refundable even though it was recovered from the consumers by the manufacturer and may result in his unjust enrichment. The learned Judges referred to the observations of the Supreme Court in *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, culled out above and repelled the contention that it would amount to 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. The reason is obvious, because the observations of the Supreme Court would constitute an authority for the converse proposition. The Division Bench of the Bombay High Court took note of one salient factor and in my view, a very relevant and convincing factor and that is, if the petitioner had to file a civil suit and if it established that excise duty outside the Act has been recovered, the question as to whether they have passed on the burden to the consumer or not would not have been a relevant factor at all for deciding the liability of the department to refund the duty wrongly collected. It is very doubtful that the position would stand altered merely because resort has been made to the process under Art. 226 of the Constitution of India.

18. In *Wipro Products Ltd. v. Union of India*, 1981 ELT 531, a Division Bench of the Bombay High Court consisting of Kanade and Pendce JJ. discussed the question as to whether relief of refund of duty paid under a mistake of law could be denied on the principle of unjust enrichment. The Division Bench observed that the same contention was being repeatedly urged before the Division Benches of that court on behalf of the department even though it has been turned down every time. The attention of the Division Bench was drawn to the decision of the Division Bench of this court in *Madras Aluminium Co. Ltd. v. Union of India*, 1981 ELT 478, and the learned Judges of the Bombay High Court rightly felt obliged to follow the decision of the earlier Division Bench of that court in

Maharashtra Vegetable Products Pvt. Ltd. v. Union of India, 1981 ELT 468.

19. My attention has been drawn to a decision of Padmanabhan J. in Madras Rubber factory Ltd. v. Asst. Collector of Central Excise Madras, 1981 ELT 565. There, the learned Judge was concerned with a case in which a show cause notice was issued by the department for recovery of the duty refunded to the assessee on the ground that the refund was erroneous. Besides dealing with other points, the learned Judge held that though if the manufacturer is allowed to retain the amount of refund it will amount to unjust enrichment of the manufacturer yet, it is not open to the department to claim back the amount of duty once refunded to the petitioner on the ground that the manufacturer had not passed it on to the consumer. This decision does not directly throw any light on the problem faced in the present case.

20. Barring a few pronouncements, including those of the Division Bench of this court in Madras Aluminium Co. Ltd. v. Union of India, 1981 ELT 478, and that of Padmanabhan, J. in Standard Batteries Ltd. v. Appraiser, Appraising Dept., 1981 ELT, 257, which followed the Division Bench judgment, most of the other, pronouncements have taken the view that refund of duty illegally recovered and which cannot be sustained in law and the payment of which was the result of a mistake of law mutual to both the parties, cannot be denied on the principle of unjust enrichment. The law declared by the Supreme Court in D. Cawasji and Co. and Others Vs. State of Mysore and Another, , should prevail and in this view, I am not able to countenance the second contention put forth on behalf of the respondents.

21. Mr. K.M. Balasubramaniam, learned counsel for the respondents, relies on the dictum of the Privy Council in Shiva Prasad Singh v. Srishchandra Nandi, 1949-2-MLJ 657, that it cannot be stated that every sum paid under a mistake is recoverable, no matter that the circumstances may be and there may, in a particular case, be circumstances which disentitle a plaintiff by estoppel or otherwise. But the question that has arisen for consideration in the present case is as to whether the ground of unjust enrichment could be put against the normal process of refund of duty paid under a mistake of law. The decision of the Privy Council does not provide an answer for this.

22. Learned counsel for the respondents drew my attention to the Supreme Court in The Newabganj Sugar Mills Co. Ltd. and Others Vs. The Union of India (UOI) and Others, . On going through the judgment I find that it does not provide an answer for the issue that has arisen in this case. The Supreme Court was dealing with a case where under cover of the order of stay, on bank guarantee for the excess price having had been furnished to the court, the appellants therein sold sugar at free market rates and ultimately the court upheld the control of prices, and the obligation arose to restore the unjust enrichment. Under those circumstances, the Supreme Court issued the requisite directions for refund.

23. Learned counsel for the respondents relies on a judgment of a Division Bench of the Bombay High Court in *Ogale Glass Works v. Union of India* - 77 BLR 37 = 1979 E.L.T. 478. This decision has been referred to by the subsequent Division Bench of the Bombay High Court in *Maharashtra Vegetable Products Pvt. Ltd. v. Union of India*, 1981 ELT 468, and the later Bench expressed convincing reasons for spelling out the correct proposition deducible from *D. Cawasji and Co. and Others Vs. State of Mysore and Another*, . That appeals to me.

24. Coming to the present case, it is true that at this point of time, the petitioner may not be able to place as to who were the ultimate consumers or purchasers in respect of the goods which have suffered excise duty and in respect of which refund is now sought for by the petitioner. The solvency and the financial stability of the petitioner were not put in issue before me. As pointed out by the Supreme Court in *D. Cawasji and Co. v. State of Mysore* AIR S.C. 813 1978 ELT 154, the impracticability of refunding the excise duty to the ultimate consumers or purchasers shall not be put against to impede the refund of excise duty collected under a mistake of law, to the petitioner, the petitioner can hold the amount refunded in trust for the ultimate consumers and the petitioner can be made liable as a trustee to refund the duty pro rata to the actual consumers as and when they make their claims.

25. Taking into consideration all the above factors, this writ petition is allowed, directing the refund of the amount as prayed for within three months from today. The petitioner shall keep the amount refunded in trust for the actual consumers or purchasers and it shall be refunded pro rata to the actual consumers or purchasers as and when claims are made by them with interest. There will be no order as to costs in this writ petition.