
(1988) 07 GUJ CK 0010
In the Gujarat High Court
Case No : First Appeal No. 308 of 1976

Union of India

APPELLANT

Vs

Wood Papers Ltd.

RESPONDENT

Date of Decision : 29-07-1988

Acts Referred:

Central Excise Rules, 1944 — Rule 11, 7

Citation : (1991) 53 ELT 189 : (1989) 2 GLR 1323

Hon'ble Judges : P.M. Chauhan, J;A.P. Ravani, J

Bench : Division Bench

Advocate : K.A. Metha, for the Appellant; S.I. Nanavati and Vijay Nair, for the Respondent

Judgement

Ravani, J.—Leaving aside gloss, the plaintiffs, in short, claim, "we have committed mistake. We were ignorant of law. Had we known the

law, we would not have paid the amount of tax recovered by you. No matter, we ourselves have not suffered the burden of tax. But the amount of

tax has reached to the State Coffers through our hands. Therefore refund the amount of tax to us." In response to such claim, question arises

whether allowing the claim would or would not amount to permitting the plaintiffs to fleece the pocket of the people i.e. unidentifiable and

innumerable unwary consumers who suffered the burden of tax ? Can such claim be allowed ? Let us examine the claim and the question posed.

2. The respondents are original plaintiffs. Respondent No. 1 is a company registered under the Companies Act, and respondent No. 2 is the

Managing Director thereof. The plaintiffs are engaged in the business of manufacturing straw-boards, duplex boards, packing and wrapping papers

and such other materials. The plaintiffs filed suit for a declaration that Rule 11 of

the Central Excise Rules, 1944 is ultra vires the Constitution is also ultra vires and certain provisions of the Contract Act and the Limitation Act and, therefore, the same be declared to be illegal and void and that the order passed by the Assistant Collector, Surat, rejecting the application for refund of Rs. 34,922.23 ps. and Rs. 2,79,242.30 ps. respectively be declared to be illegal and void, and for further declaration that the recovery of excise duty in excess of 25% on the product in question be also declared illegal and avoid, and for a prayer that an amount of Rs. 2,13,219.91 ps. paid as excise duty be ordered to be refunded with interest.

3. It was the case of the plaintiff-company that it started manufacturing packing and wrapping papers since year 1965. Since the grammage of the product was 220 gram per sq.m. it was classified as straw board. According to the plaintiff they improved their product from 1967 onwards and the grammage was reduced to 120 to 160 grams per sq. m. The product in question is covered by item No. 17(3) of Schedule-I to the Central Excise Act, 1944. Initially on May 14, 1965 when the sample was sent for purposes of test it was of 221.75 grammage. The product was classified by the plaintiff-company as straw-board. In August 1969 self removal procedure was introduced. At that time, again, the plaintiff company sent classification vide Exh. 40 dated August 14, 1969. The department made query as regards the grammage of the product. Again sample was sent and it was tested. As per the test report (Exh. 43) dated October 24, 1969 the grammage was below 100 grams per sqm. Thereafter as per Exh. 44 dated November 17, 1969 the product was classified as packing and wrapping paper. Ultimately on May 26, 1970, vide Exh. 46, the department informed the plaintiff that from September 5, 1965 onwards the product was considered as packing and wrapping paper and the duty was payable accordingly. Be it noted that by notification bearing No. 208 of 1967 dated 8-9-1967, 75% of the duty on certain items falling within item. No. 17(3) were exempted. The notification inter alia provides that papers other than paper boards, newsprint, cigarette-tissue, glassine paper, grease proof paper, coated papers and paper of a substance not exceeding 25 grammes per square meter were eligible for exemption. It is an admitted position that straw board was not subjected to

exemption as per the notification. However, on introduction of self-removal procedure when the plaintiff Company was required to submit another sample for testing and when the department made query with regard to the grammage of the product, according to the plaintiffs, they realised the importance of grammage. Ultimately when the department classified the product in question as packing and wrapping paper the plaintiffs felt that all the while from 1967 onwards they were labouring under a mistake on account of ignorance of law. Therefore the plaintiffs felt that on the straw boards having grammage less than 180 they would be entitled to refund of the excise duty paid in excess of 25% of the duty leviable thereon. The plaintiffs, therefore, submitted an application dated November 22, 1969 for refund of Rs. 34,922.53 ps. for the month of August, 1969 i.e. for the period commencing from August 11, 1969 to August 31, 1969. After some time the plaintiffs requested that they would like to submit a consolidated application covering the period from September 1967 to August 31, 1969 and therefore they requested that they be permitted to withdraw the application. In fact the plaintiffs submitted another application dated November 10, 1980 and claimed refund of Rs. 2,79,242.30 ps.

4. The Assistant Collector of Central of Central Excise, Surat, by order dated November 21, 1970 (Exh. 51) rejected the application for refund of Rs. 34,922.23 ps. on the ground that the exemption was available from the date of notification i.e. September 8, 1967, and for the period prior to the aforesaid notification the plaintiffs were not in a position to prove that they were actually manufacturing packing and wrapping paper and that through error they cleared the said product under the nomenclature straw board. Similarly another application has been rejected as per order dated April 3, 1971 (Exh. 38) mainly on the ground that the application was preferred after the period of limitation prescribed in Rule 7 of the Central Excise Rules, 1944. Thereafter it appears that both the aforesaid orders were appealed against and as stated in the plaint and in the evidence both the appeals were pending, when the suit was filed. It appears that by order dated May 25, 1971 the respondent authorities had granted refund of Rs. 55,001.97 ps. Thereafter, after giving set off for the aforesaid amount, according to the plaintiffs, the plaintiffs were entitled to refund of Rs. 2,13,279.91 ps.

5. The plaintiffs, before filing the suit served the defendants with notice u/s 80 of the Civil Procedure Code. The plaintiffs had also filed special civil application No. 1243 of 1971 in this High Court by which the plaintiffs challenged the legality and validity of the recovery of the aforesaid amount and also prayed for refund of the same. The petition was ultimately rejected as per order dated November 16, 1972 on the ground that civil suit was proper remedy and not writ petition. Thereafter the plaintiff filed the suit for the prayers as stated hereinabove, on October 25, 1972. The suit is mainly based on the ground that the plaintiffs were ignorant of the correct position of law and under mistake they have described the product as straw board though in fact it was packing and wrapping paper and was not subject to full duty as levied by the department. As per evidence of the witness of the plaintiffs the suit is for refund ""under general law on equitable grounds.

6. The defendants appeared in the suit and resisted the same on facts as well as on law points. It was contended that the suit was barred by limitation; that the plaintiffs were not entitled to claim any refund on the alleged ground of mistake of law or ignorance of the correct position of law.

Several other contentions were also raised. The trial court, after framing issues and after recording evidence came to the conclusion that the

plaintiffs had in fact manufactured packing and wrapping paper but not straw board though it was described as straw board. The trial court also

came to the conclusion that the description was so given on account of ""ignorance of law on the part of the plaintiffs and through mistake."" Since

there was no dispute with regard to the computation of amount the trial court decreed the suit of the plaintiff and declared that the orders rejecting

the revision application passed by the respondent authorities were illegal, and void and that the authorities had no authority in law to levy and

collect the excise duty in excess of 25% of the duty leviable under the Tariff Item No. 17(3) of Schedule-I to the Central Excises and Salt Act,

1944 on ""packing and wrapping paper"". The trial court also directed the defendants to pay Rs. 2,13,293.91 ps. to the plaintiffs and the costs of

the suit, with running interest over the said amount at the rate of 6 per cent. per annum from the date of the suit till the date of realisation. The

defendants having felt aggrieved by the aforesaid judgment and decree passed by the trial court have preferred this appeal, while the plaintiffs

having felt aggrieved by the direction as regards payment of interest have also preferred cross objections.

7. As stated hereinabove the main basis of the suit filed by the plaintiffs is that the plaintiffs were ignorant about the correct position of law and that

due to mistake they have described their product as straw board and not as packing and wrapping paper. In support of the aforesaid contention

the plaintiff-Company has examined one Shri Jayantilal Mohan Lal who has been working as Assistant Manager of the plaintiff - No. 1 Company.

It is an admitted position that till August 1969 self-removal procedure was not introduced in the Company. The Company had to fill in AR-1

Form. Thereafter the gate passes were to be written down and only after the A.R. 1 forms were cleared by the appropriate Excise Officer the

goods were taken out of the factory gate of the Company. A.R. 1 Forms were being filled in by the plaintiff-company. It is also an admitted

position that, as disclosed in the evidence of the plaintiffs' witness, the plaintiffs were manufacturing straw boards and Mill-Boards even prior to

the year 1965, and in 1965 they started manufacturing packing and wrapping papers on experimental basis and then from 1967 onwards on

commercial basis.

8. In the deposition of the plaintiff's witness it has come on record that the witness who was working as Assistant Sales Manager had the complete

knowledge of the products manufactured by the Company. A.R. 1 form and the gate passes were written within his knowledge. The witness was

aware about the notifications pertaining to straw board issued in the year 1964 and even thereafter. The plaintiff-company used to receive

magazines concerning paper industries and used to sell its product at Baroda, Bombay, Calcutta, Delhi and Madras. It has its distributors also at all

these places. It is also brought on record that over and above the Assistant Sales Manager there was Sales Manager and there were several

technical persons in the plaintiff-company. The plaintiff company also produced mill-boards, duplex boards, craft paper, pulp boards and wrapping

and packing papers. The sales manager engaged by the Company had the experience of about twenty to twenty five years. In the aforesaid

background of the plaintiffs business and its various commercial and business activities the contention raised by the plaintiffs that they were ignorant

about the correct position of law and that it committed mistake in describing its product is required to be examined.

9. The learned Judge of the trial court has heavily relied upon the fact that straw board has been defined by a notification, but packing and

wrapping paper has not been defined, either in the Central Excise Act or under the rules or by any trade notice or by notification. It is not

understood how so much emphasis is laid on this aspect. It is a trite knowledge that all the commodities which are being traded and sold in the

markets are not to be defined under the Central Excise Act and Rules. These commodities are to be known and identified by the name which is

prevalent in the commercial world. That which is understood in ordinary parlance in the business and trade circle is to be taken as the name

ascribed to that particular commodity. The learned Judge has referred certain dictionaries and encyclopaedia for arriving at the conclusion that

"board", straw-board, and "paper" or "packing and wrapping paper" are two distinct articles and the grammage is one of the distinguishing factors

to determine the difference between the two articles. Be it noted that for the purposes of identifying a commodity what is known and understood in

the business and commercial circle is much more relevant and not what is described in several dictionaries and encyclopaedia. However, even

assuming for a moment that the aforesaid literature referred to by the learned Judge of the trial is relevant, even ultimately what it comes to is that

distinguishing feature between two commodities i.e. straw-board and packing and wrapping paper is grammage. Below certain grammage per

sq.m. the commodity will be called packing and wrapping paper and above certain grammage it would be called straw-board. Now it is the

contention of the plaintiffs that this distinction was not known to the plaintiff-company, and that they came to know about it only after the self-

removal procedure was introduced in the year 1969. This contention has been accepted by the learned Judge of the trial court mainly on the

ground that in the weight-roll register Exh. 97 to 100 grammage of straw board has been mentioned and that is between 120 and 150 grammes

per sqm. Assuming for a moment that these weight-roll registers refer to straw-board i.e. the commodity in question, then also on little scrutiny of

the registers it becomes abundantly clear that the grammage is not mentioned against all the columns. The register Exh. 98 starts with January 21,

1968. At the top it is written "'straw-board rolls'". In the first column roll number is written; in the second column size is written; in the third column grammage is written; in the fourth column "T.U." probably meaning thereby bare weight is written; in the fifth column gross weight is written and in column No. 6 "P.No." Probably meaning thereby packing number is written. Except in the first line against roll No. 222 in no other column grammage is written. Moreover against each and every roll number size differs. Grammage appears to have been written only in first column. As far as Exh. 97 is concerned on some of the pages there is no mention with regard to the grammage at all (i.e. July 3, 1967 and July 4, 1967). While we find that grammage is mentioned in the page dated July 11, 1967 only in the first line in first column grammage is written while in the subsequent columns grammage is not mentioned at all. Again be it noted that the size in case of each and every roll varies. Moreover there is nothing on record to show that these were the goods which were cleared by the respective. A.R. 1 forms and the gate passes. Duplicate A.R. 1 forms and duplicate of the gate passes must be in possession of the plaintiffs, or the plaintiffs could have asked the department to produce the same. Unless it is shown that it is the same goods in respect of which grammage 120 to 160 is shown and that very goods are cleared by filling in A.R. 1 forms and respective gate passes, it cannot be said that the commodity mentioned in Exh. 97 to 100 are cleared by the plaintiff company. This missing link in the evidence has been completely overlooked by the learned trial court judge. This was very much essential because the plaintiff had come forward before the Department after a period of about two years for refund of excise duty already paid on the ground that it had committed mistake in describing its product.

10. Now, in the aforesaid connection evidence of plaintiff's witness be examined. The plaintiffs are in the business of paper manufacturing for a period of last twenty to twenty five years. It's sales manager is having experience of about 25 years in this very line. The assistant sales manager who has been examined as witness has been serving with the plaintiff company for last 22 years. There are technical personnel in the plaintiff-company who are working as per the directions given by the management. The witness has admitted in his deposition that the plaintiffs had even a

small laboratory and they often tested their goods in the laboratory and while filling the particulars in the A.R. 1 form they were testing their materials. The plaintiff-company has its distributors almost all over the country i.e. at Baroda, Bombay, Calcutta, Delhi and Madras. They are receiving magazines concerning paper industries. According to the plaintiffs own witness, in the year 1965 they started manufacturing packing and wrapping papers on experimental basis. They have come forward with a case that on commercial basis the production was started in the year 1967. This admission clearly shows that in the year 1965 the plaintiff company very well knew what packing and wrapping paper was and what it did mean. Exh. 107 is a letter written by the Sales Manager of the Company to the Inspector of Central Excise. By this letter the Company has sent extracts from the Indian Standards Specifications. The aforesaid evidence clearly shows that the Company was in touch with the Indian Standard Instituted also.

11. The witness has admitted that he knew about the straw-board notification since the year 1964. The witness is aware about the definition of straw-board given in Notification No. 68 of 1966 (Exh. 118). By letter dated August 26, 1968 the plaintiff company has informed the Central Excise Department that they had not manufactured printing papers, newsprint papers, and wrapping papers during the period commencing from April 24, 1962 to June 30, 1968. By the letter dated October 7, 1968 (Exh. 113) the plaintiff company made a declaration before the Department that the plaintiff has no plant attached to their factory for making bamboo pulp and they do not enjoy concessional rates or duties mentioned in certain notifications. This declaration was probably submitted pursuant to Notification No. 208/67 dated September 8, 1967 as amended from time to time. Letter dated January 31, 1969 (Exh. 108) is written by the plaintiff company in response to the inquiry made by the Department. The inquiry was with regard to straw board of 150 grammage manufactured and cleared by the company. By this letter it is stated by the company that the straw-board had already been tested in the past and there is no change in the ingredients. It is further declared that the sample will be submitted for test whenever there will be any change in

the ingredients in the manufacturing of above type of straw-board.

12. Together with the aforesaid documentary evidence oral evidence led by the plaintiff company be seen. In para 13 of the deposition the witness

has stated that he came to know about Notification No. 208 of 1967 dated September 7, 1967 in the year 1967. Description of straw-board was

the same as in the previous one. He further admits that in the year 1968 they knew what straw-board meant. He further admitted that the company

used the material as described in the definition of straw-board. In para 14 of the deposition it is admitted that before January 31, 1969 the plaintiffs

did not get their straw-board of 150 grammage tested. In further cross-examination it is admitted that in tariff, "straw-boards" and "packing and

wrapping papers" are shown as two different articles and that the witness knew the same. In para 17 of the cross-examination the witness has in

terms admitted that when they wrote straw-board in A.R. 1 Form they knew the definition of straw-board. Then he further states ""in commercial

world"" straw boards" and "packing and wrapping paper" are known as two distinct articles"". The nature of usage of both is also different. Their

prices are also different. It is further admitted that the plaintiffs were receiving orders for goods described by them. They were informing their

distributors that they were manufacturing straw-boards and they were receiving orders for straw-board. It is also admitted that in the year 1967-

68 the plaintiffs had not shown any goods as packing and wrapping papers. In view of the aforesaid documentary and oral evidence it is difficult to

believe that the plaintiffs were unaware about the distinction between "packing and wrapping paper" and straw board. It is the case of the plaintiffs

that they started manufacturing packing and wrapping papers on experimental basis in the year 1965 and that from the year 1967 they started

manufacturing the same on commercial basis.

13. From the evidence discussed hereinabove it can only be said that the plaintiffs were unaware about the distinction between packing and

wrapping paper and straw-board. If the plaintiffs started producing packing and wrapping papers on commercial basis there must be something on

record to show that they in fact manufactured packing and wrapping paper during this period or that they sold the same as packing and wrapping

paper. Assuming for a moment that they committed a mistake in describing their

goods which according to them was in fact packing and wrapping paper but was erroneously described as straw board before the Excise Department, then there should be atleast some documentary evidence to show that this product was sold in market as packing and wrapping paper. On the contrary evidence is otherwise. It is an admitted position that in respect of this very goods orders were received as straw-boards and the same was sold also as straw-boards. It appears that having realised that the exemption was available with respect to packing and wrapping paper the plaintiffs have made an application for refund as an after thought. In this connection also it may be noted that initial application dated November 22, 1970 was for refund for a period of one month. Thereafter the plaintiff Company changed its line of thought and submitted an application for refund covering the period commencing from the date of notification till the introduction of self-removal procedure. In above view of the matter the contention that the plaintiff had paid the excise duty in excess of what was leviable in ignorance of law and under mistake cannot be believed. The finding given by the trial court on this point is erroneous and the same is required to be reversed and set aside.

14. The plaintiff company has made its claim under general law and on equitable ground. It is clarified at the Bar that under general law means

under the provisions of Section 72 of the Contract Act, 1872. In view of the decision of this High Court in the case of Dhrangadhra Municipality v.

Dhrangadhra Chemical Works Ltd. (1) GLR 388, a plaintiff who bases his claim u/s 72 of the Contract Act, 1872 in order to succeed, has to

show :

(1) that the amount was paid under a mistake to the defendant and that at the time of payment, both the plaintiff as well as the defendant were

labouring under mutual mistake;

(2) that the amount was paid by the plaintiff under coercion, compulsion or pressure from the defendant; and

(3) that if restitution is not granted to the plaintiff, the plaintiff would suffer legal injury or prejudice.

In the instant case the plaintiff company has come forward with a case that there was a mistake on its part. On evidence the plaintiff-company has

not been able to show that both the plaintiffs as well as the defendant - (Excise

Department) were labouring under a common mistake. Right from the beginning the defendant-Excise Department has made its position abundantly clear. It was always for the plaintiff company to fill in A.R. 1 Form and describe its goods therein. It is not because of coercion or pressure or on account of any such factor the plaintiff-company was induced to write its product differently. From the pleadings also it does not appear that any case of common mistake is pleaded. As far as mistake of the plaintiffs is concerned, as indicated hereinabove, the plaintiffs have failed to prove the same.

15. There is no pleadings with regards to the legal injury or prejudices to the plaintiff. The plaintiff has not pleaded at all that on account of the alleged unlawful recovery the plaintiff has been put to injury. Unless this is pleaded there is no cause of action whatsoever. This is so held in the aforesaid decision in the case of Dhrangadhra Municipality. As held therein such a suit is liable to be rejected under the provisions of Order 7 Rule 11 of the CPC since it does not disclose any cause of action.

16. In the Division Bench judgment rendered by this High Court in the case of Dhrangadhra Municipality (supra) this Court has referred to Abson's Law of Contract (25th Edition 1979.) The following passage occurring at page 649 of the Book has been approvingly quoted by the Division Bench.

The principle of unjust enrichment presupposes three things, first, that the defendant has been enriched by the receipt of benefit, secondly, that such enrichment has occurred at the expense of the plaintiff, thirdly, that would be unjust for the defendant to retain that benefit. There is no accepted classification of situations where a claim to restitution will arise on the ground of unjust enrichment.

Thereafter in para 13 of the judgment. Chitty on Contracts, (25th edition) paragraph 1942 has been approvingly referred to which reads as follows

:

The principle of unjust enrichment requires first that the defendant has been enriched by the receipt of a benefit, secondly, that this enrichment is at the expense of the plaintiff and thirdly that the retention of the enrichment be unjust".

After discussing the principles underlying the provision of Section 72 of the

Contract Act, 1872 and after referring to the aforesaid books on Law of Contracts, in para 14 of the judgment is further observed as follows :

... the thrust of Section 72 of the Act which also projects a type of quasi contract is that apart from the pleading and then later proving that the

plaintiff had paid money or anything to the defendant under mistake or coercion, the plaintiff must further plead and prove that he would suffer legal

injury or prejudice if return of the amount is not ordered. Once on the construction of Section 72, this conclusion is reached, it becomes obvious

that when the plaintiff seeks to recover from the defendant tax amount on the ground that the tax was illegally collected of necessity, it is to be

pleaded and then proved, that the amount was paid under a mistake or coercion and that if it is not returned or repaid, the plaintiff would suffer

legal injury or prejudice. It also becomes obvious that in cases where the plaintiff who has paid alleged illegal tax, has himself not suffered the

incidence thereof but has passed it on to the consumers, he cannot legitimately contend that refusal of his request for restitution would result in any

prejudice to him.

Thereafter, in para 15 of the judgment it is further observed as under :

.... so far as the plaintiff is concerned, even assuming that tax was illegally recovered from him, he has paid the tax after collecting it from the

consumers. So it is the consumer to whom (burden of) tax is passed on, who has really paid the tax through the hands of the plaintiff who is only a

collecting instrumentality. If ultimately it is found that tax is illegally recovered by the defendant, then it should go back to the real tax payer and the

real tax payer is not the plaintiff but the consumer who has borne the burden of the tax. It must logically follow that no collecting instrumentality can

claim any refund of money because such intermediary is not out of pocket in any manner. The entire burden of tax rests on the shoulders of the real

tax payer viz., the consumer. Under these circumstances, when the tax is passed on to the consumer no case for any restitution to the intermediary

would ever survive. Such intermediary (collection instrumentality) suing as plaintiffs can never be permitted to get restitution from the defendants

as for them it would be a windfall and unjust enrichment at the cost of the proper claimants for restitution, namely, the consumers-real tax payer. In

such cases, the real plaintiffs should be those who have actually suffered the

burden of tax. They would be the persons who would suffer legal injury if the restitution is denied and not the intermediaries like the traders and manufacturers who have merely passed on the burden of tax to the consumers and who themselves suffer no burden thereof.

Thereafter in that very judgment three basic requirements for completing a cause of action u/s 72 of the Contract Act have been spelt out, and they have been extracted and referred to hereinabove in para 14 of this judgment.

17. In the decision of Dhrangadhra Municipality (supra) the Division Bench of this High Court has approvingly referred to the principles laid down and the observations made by this High Court in the following decisions.

(i) Union of India v. Tata Chemicals Ltd. - 1983 GLR 985.

(ii) Union of India Vs. New India Industries Ltd., Baroda, .

(iii) Union of India Vs. Bharat Vijay Mills Co. Ltd., .

We are also in respectful agreement with the principles laid down and the observations made in all the aforesaid decisions. Here reference may be

made to a decision of the Supreme Court in the case of State of Madhya Pradesh Vs. Vyankatlal and Another, . Therein the question, whether

refund of sugar levy amount can be claimed by the plaintiff mill which had not suffered the burden of the levy but had passed on the burden of the

same to the consumers, had arisen. In that connection the Supreme Court has observed as follows :

... in the present case also the respondents had not to pay the amount from their coffars. 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.

In the case of Dhrangadhra Municipality (supra) the Division Bench of this High Court has also held that the aforesaid principles laid down by the

Supreme Court squarely rest on the principles of restitution which in its turn is the foundation of Section 72 of the Contract Act, 1872. Therefore, it

must be held that before the plaintiff who claims refund of any amount paid to the defendant can succeed, it must be shown by the plaintiff that the

plaintiff itself had borne the entire burden of the payment and refusing such relief would amount to unjust enrichment of the defendant at the cost of

the plaintiff. In above view of the matter the law is well settled.

18. Faced with the aforesaid difficulty the learned counsel for the respondent plaintiffs submitted that the plaintiff company was not at all required

to show that there was any injury. In support of this contention it is submitted that by the notification in question a benefit is granted to the plaintiffs

and, therefore, the plaintiff company is not required to plead injury. The learned counsel for the respondent-plaintiffs has relied upon the following

two decisions :

(1) Indian Aluminium Co. Ltd. & Anr. v. UOI & Others 1983 (12) ELT 349 (Del.).

(2) Modi Rubber Ltd. Vs. The Board of Central Excercise and Customs, .

In the case of Indian Aluminium Company the question was with regard to certain benefits having been passed on to the consumers. The benefits

were in nature of incentives to the manufacturer. The question was whether certain directions could have been given by the department which may

denude the manufacturer of the benefits sought to be conferred on him by the notification in question. In that connection the Delhi High Court has

held that such directions could not have been given and in the context of the particular notification which was under consideration it was held that

such direction was not binding and was not legally valid. This decision does not apply to the facts and circumstances of this case. In the case of

Modi Rubber Ltd., (supra) also, after the notification having been issued direction was given that to avail of the benefit the manufacturer concerned

should show that the benefit was passed on to the consumers, and such direction was held to be illegal and void. In the instant case the question is

not that of any incentive being given to the plaintiff company, or to any other individual. Assuming for a moment that any incentive is being given, it

does not entitle a manufacturer to tax the people and then retain the same with

it. Be that as it may. That question is not before us and, therefore, we do not wish to discuss the same in further detail. Suffice it to say that this decision also does not help the plaintiff. In view of the settled legal position as far as this High Court is concerned, and since we are in respectful agreement with all the aforesaid decisions of this High Court, we do not propose to discuss in further details the aforesaid decisions of Delhi High Court and other decisions of different High Courts referred to and relied upon by the learned counsel for the respondent-plaintiff.

19. The plaintiff-Company has made its claim on equitable consideration. We fail to understand what equity is there in favour of the plaintiff-

Company. The plaintiffs claim refund of excise duty. It is common knowledge that the tax levied in the shape of excise duty is an indirect tax. It is a

tax on manufacture. It is not a tax on any individual, but it is a tax on commodity. As and when the commodity is manufactured the tax attaches to

the commodity and that very commodity carries burden of the tax with it. Ultimately the person who consumes the commodity and pays for the

same bears the burden of the same. Therefore in economic jargon many a times, and rightly, this tax is called commodity tax. When the commodity

carries the burden of tax with it, no-one, right from the manufacturer till the ultimate trader who sells it to the consumer, bears the burden of excise

duty. It is ultimately the consumer, who pays for the commodity, bears the burden. Therefore for claiming equity or any relief whatsoever on the

ground of equity, the plaintiff must show that it has suffered injury meaning thereby, he must show that the burden of tax has been suffered by him.

On the contrary in the instant case the case of the plaintiffs is that because they have committed the mistake let them reap the benefit of mistake

committed by them. In other words if the mistake is common then the case of the plaintiffs would be that because both the parties (i.e. plaintiff as

well as defendant) have committed mistake let the pockets of people who consume the commodity be fleeced and "let one reap the fruits of

mistake". Is this equity ? We fail to understand how such a claim can be based on equitable ground at all. On the contrary the first principle of

equity is that one who claims equity must do equity. Therefore on moral grounds also unless the plaintiffs show that the burden of the tax has been

suffered by them and the consumers have not been put to any injury

whatsoever, the plaintiffs have no legal or moral right whatsoever to claim refund.

20. As far as the question of limitation is concerned, it is submitted by the learned counsel for the appellants that Rule 114 as it then stood would be applicable to the facts of the case. In the facts and circumstances of the case we hold that such a suit as filed by the plaintiffs is not maintainable at all. But assuming for a moment that the suit is maintainable, then the limitation provided under the general law i.e. under the provisions of Article 113 read with Section 17 of the Limitation Act, 1963 would be applicable. This will be so for the purposes of filing the suit. However, for the purpose of claiming refund before the Excise authorities the limitation would be as prescribed under the provision of Rule 11 of Central Excise Rules.

21. In above view of the matter the judgment and decree passed by the trial court is required to be reversed and set aside. In the result the appeal is allowed. The judgment and decree passed by the trial court is reversed and set aside and the suit of the plaintiffs is ordered to be dismissed. The appeal is allowed with cost throughout.

22. Since the appeal is allowed as stated above, the cross-objections filed by the appellants claiming interest from the date of application for refund, i.e. November 18, 1970 does not survive, and the same is required to be dismissed. Hence the cross objections filed by the respondents-plaintiffs are hereby dismissed with no order as to costs.