

(2009) 06 BOM CK 0124

In the Bombay High Court

Case No : Customs Appeal No. 56 of 2008

United Spirits Limited (Formerly known as Shaw Wallace Distilleries)

APPELLANT

Vs

The Commissioner of Customs (Import)

RESPONDENT

Date of Decision : 25-06-2009

Acts Referred:

Central Excise Rules, 1944 — Rule 9B, 9B(1), 9B(5)
Customs Act, 1962 — Section 111, 115(2), 11A, 11B, 11B(2)

Citation : (2009) 6 BomCR 401 : (2009) 111 BOMLR 2810 : (2009) 167 ECR 80 : (2009) 240 ELT 513

Hon'ble Judges : R.S. Mohite, J; Ferdino I. Rebello, J

Bench : Division Bench

Advocate : V. Sreedharan and Prakash Shah, instructed by, P.D.S. Legal, for the Appellant; P.S. Jetly, for the Respondent

Judgement

Ferdino I. Rebello, J.—The Appellants herein, were formerly known as "Maharashtra Distilleries Limited" (MDL). They are engaged in the business of manufacture, sale and distribution of Indian Made Foreign Liquor (IMFL) and have been manufacturing "Royal Challenge Whisky" since 1982. The manufacture of "Royal Challenge Whisky" requires the addition of undenatured Ethyl Alcohol (malt spirit) which is the essence. The essences added are procured locally from manufacturers and suppliers in India. Some of the essences required and purchased by the Appellants, in fact, are imported by various suppliers and subsequently sold to the Appellants.

2. On or about 07.10.1991, the Senior Superintendent of the Department visited the Appellants' factory in Aurangabad in respect of investigation regarding purchase of essences from M/s Finacord Chemicals Private Limited and M/s S.R.Nagpal and Company. According to the Appellants, they cooperated with the officers and furnished whatever documents which were available. The officers required the Appellants to furnish the copies of bills of entries and the purchase orders for the essences. The Appellants could not furnish the same as they were

not the importers. Subsequent thereto, the officers made out the Panchanama and Supratnama for safe custody and handed over the same to the Factory Manager of the Appellants. The Appellants made a request for release of the essences against security. However, the Officers of the Department indicated that it would not be possible. After exchange of correspondences, the Appellants opposed the seizure by filing Writ Petition No. 3220/1991. An order came to be passed in terms of the minutes. This Court ordered that upon the Appellants (MDL) depositing an amount of Rs. 1,56,64,500/with the Additional Collector of Customs, Mumbai, the Appellants be allowed to utilize the undenatured Ethyl Alcohol which was the subject matter of the Supratnama dated 07.10.1991. A further application was made praying that the amount be deposited in Nationalized Bank in fixed deposit. This plea was rejected by the order dated 30.10.1991. This Court, however, issued the following direction:

Looking to this circumstance the amount need not be invested on condition that in the event of it being held that the petitioners are entitled to this amount or any part thereof, on adjudication, the same shall be refunded to the petitioners together with interest at the rate of 13% per annum which is the rate of interest at present paid by Nationalized Banks on fixed deposits.

3. Subsequent to that, an order of adjudication came to be passed against M/s Finacord Chemicals Private Limited by the Commissioner of Customs whereby the transaction value declared by the Appellants was rejected and the goods were reassessed by taking higher assessable value and the goods were ordered to be confiscated and a fine was imposed and also penalty. By the said order of 28.02.1995, the Collector of Customs appropriated a sum of Rs. 1,05,02,087/out of the amount deposited pursuant to the order of this Court. M/s Finacord Chemicals Private Limited preferred an appeal before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT). CESTAT by its order dated 10.09.2003 was pleased to hold that import of goods was unauthorized and therefore, upheld their confiscation. CESTAT, however, recorded a finding that the goods were not undervalued and accordingly, set aside the demand for differential duty. Insofar as the redemption fine is concerned, after going into the issue, the fine was reduced insofar as M/s Finacord Chemicals Private Limited to Rs. 10 Lac. In the other appeal filed by M/s S.R.Nagpal and Company the fine was reduced to Rs. 15 Lac. The imposition of penalty was set aside. Revenue has preferred appeals before the Supreme Court which are admitted and pending for final decision.

4. The Appellants herein had also preferred an appeal against the order dated 28.02.1995 passed by the Commissioner of Customs. By the order dated 15.09.2005, in view of the order passed in case of Finacord Chemicals Private Limited and S.R.Nagpal and Company, the learned CESTAT upheld the order of confiscation of goods. The Tribunal further observed that the duty demand has already been set aside and the redemption fine has also been reduced to Rs. 10 Lac on M/s Finacord Chemicals Private Limited. The Appellants herein, therefore, were entitled to consequential relief of refund of an amount of Rs. 01,05,02,087/

appropriated towards the differential duty and refund of the amount appropriated towards the redemption fine in excess of Rs. 10 Lakhs, in accordance with law. The order of refund was directed in favour of erstwhile Maharashtra Distilleries Limited (MDL), however, it was subsequently rectified in the name of the Appellants herein.

5. The Appellants, thereafter, made a request for the refund of Rs. 1,46,64,500/ along with interest at the rate of 13% from the date of deposit i.e. 11.11.1991. Correspondence ensued between the Appellants and the Respondent. The Appellants were informed that an application for refund be made by the prescribed application, which was subsequently done by the Appellants herein.

6. Subsequent to the application, a show cause notice was served on the Appellants. On 08.02.2006 the Appellants showed cause. The Assistant Commissioner, Customs, Central Refund Cell, JNCH, Nhava Sheva sanctioned the refund of Rs. 1,46,64,500/and ordered that the same should be credited to the Consumer Welfare Fund instead of being paid to the Claimants. It may be mentioned that a sum of Rs. 01,05,02,087/out of the amount deposited was appropriated towards differential duty and the balance amount of Rs. 51,62,413/ was appropriated towards redemption fine.

7. The Appellants, aggrieved, preferred an appeal before the Commissioner of Customs (Appeals) u/s 128(1) of the Customs Act, 1962. The Appellate Authority held that the Appellants had not discharged the burden that the Appellants had not passed on the duty to the buyer or any other person and accordingly, dismissed the appeal.

8. Aggrieved, the Appellants preferred an appeal before the CESTAT. Various contentions were raised, which are set out in paragraph No. 5 of the impugned order. The learned Tribunal both in respect of additional duty and redemption fine was pleased to hold that the Appellants have not established that the incidence of the amounts in question has not been passed on to anybody else. Hence, the amount of refund claimed, has been rightly credited to the Consumer Welfare Fund. Accordingly, the Tribunal dismissed the appeal. Hence, the present appeal.

9. In this appeal, the Appellants have raised the following substantial questions of law:

(a) It is submitted that in the event the Appellants had not redeemed the goods and had contested the matter in appeal and the confiscation had been set aside, the Appellants would have been entitled either to the goods or the value of the goods and the test of unjust enrichment could not have been applied. It will, therefore, not make any difference even if the amount deposited towards the value of goods is appropriated on adjudication, suomoto, partly towards duty and balance towards the fine imposed. In the present case what is sought to be claimed is the value of goods and not any duty paid by the Appellants.

(b) In the alternate, it is submitted that in view of the express language of

Section 27 of the Customs Act, 1962 only the duty and interest can be subject to unjust enrichment and the refund of fine and penalty cannot be subject to unjust enrichment more so in view of the customs rules. In the instant case, an amount of Rs. 51,62,413/has been adjusted towards the value of redemption fine, which is clearly illegal.

(c) Placing reliance on the provisions of the Customs Act, 1962 and Rules and also on Rule 9(B) of the Central Excise Rules, 1944 and the provisions of the Central Excise Act, it has been additionally contended that the doctrine of unjust enrichment is not applicable in a case of provisional assessment and after finalization thereof.

10. On the other hand, on behalf of the Respondent, it has been submitted that the refund claim arising out of provisional assessment and finalization thereof has to stand the test laid down in Section 27 of the Customs Act, 1962. The provisions of the Customs Act, 1962 are different as compared to Rule 9(B) of the Central Excise Rules, 1944. Reliance is placed on the judgment of this Court in case of Bussa Overseas and Properties Pvt. Ltd. Vs. Union of India (UOI), , which has been confirmed by the Supreme Court and reported in 2004 (164) ELT 177 (SC). Further reliance is placed on the provisions of Sub-section (3) of Section 18 of the Customs Act, 1962 which has been inserted by the Taxation Laws (Amendment) Act, 2006 w.e.f. 13.07.2006. It is submitted that if the refund emanates out of finalization of the provisional assessment u/s 18, the same has to be considered u/s 27 of the Customs Act, 1962. Hence, the refund if any, even consequent to finalization of the provisional assessment has to pass the test of unjust enrichment. Alternatively, it is submitted that all claims for refund must meet the test of unjust enrichment as held in paragraph 48 by the Supreme Court in the case of Sahakari Khand Udyog Mandal Ltd. Vs. Commissioner of Central Excise and Customs, .

11. From the above contentions and submissions, the following questions will arise for determination:

1. Where an amount is deposited pursuant to provisional assessment, will the doctrine of unjust enrichment be applicable to refund consequent upon final assessment?
2. Where the order of confiscation is set aside and the assessee had earlier deposited an amount towards the value of the goods which amount was adjusted partly towards duty and partly towards fine, will the doctrine of unjust enrichment apply?
3. Whether the fine which has been ordered to be refunded is subject to the doctrine of unjust enrichment?

12. The law on the subject of unjust enrichment has been explained by various judgments of the Supreme Court from time to time. We may gainfully refer to the judgment in case of Sahakari Khand Udyog Mandal (supra), where the

Supreme Court observed as under:

Stated simply "Unjust enrichment" means retention of a benefit by a person that is unjust or inequitable. "Unjust enrichment" occurs when a person retains money or benefits which in justice, equity and good conscience, belong to someone else.

Explaining further the Supreme Court observed, "The doctrine of "unjust enrichment", therefore, is that no person can be allowed to enrich equitably at the expense of another. A right of recovery under the doctrine of "unjust enrichment" arises where retention of a benefit is considered contrary to justice or against equity. The juristic basis of the obligation is not founded upon any contract or tort but upon a third category of law, namely, quasicontract or the doctrine of restitution." Reference was made to *Fibrosa v. Fairbairn* (1942) 2 All ER 122 to the judgment of Lord Wright and in case of *Nelson v. Larholt* (1947) 2 All ER 751 to the judgment of Lord Denning. Lord Denning had observed "The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution if the justice of the case so requires." Lord Wright observed "The remedy in case of unjust enrichment in English law is generically different from the remedies in contract or in tort, and is recognized to fall within a third category of the common law which has been called quasicontract or restitution." Summing up, the Supreme Court observed "From the above discussion, it is clear that the doctrine of "unjust enrichment" is based on equity and has been accepted and applied in several cases. In our opinion, therefore, irrespective of applicability of Section 11B of the Act, the doctrine can be invoked to deny the benefit to which a person is not otherwise entitled. Section 11B of the Act or similar provision merely gives legislative recognition to this doctrine. That, however, does not mean that in absence of statutory provision, a person can claim or retain undue benefit. Before claiming a relief of refund, it is necessary for the petitioner/appellant to show that he has paid the amount for which relief is sought, he has not passed on the burden on consumers and if such relief is not granted, he would suffer loss.

13. Following this judgment, in *Sahakari Khand Udyog Mandal* (supra) this Court in case of *Shree Vindhya Paper Mills v. Union of India* 2005 (187) ELT 442 (Bom.) in respect of refund of cess and in case of *Sharda Synthetics Bombay P. Ltd. v. Union of India* 2006 (205) ELT 49 (Bom.) in respect of tax liability under the *Kar Vivad Samadhan Scheme*; even in absence of the statutory provisions applied the doctrine of "unjust enrichment" and denied the claim of refund on that ground.

14. With this background, let us deal with the first question as raised on behalf of the Appellants by the learned Counsel. Similar arguments as now advanced were advanced that Explanation II to Section 27 of the Customs Act, 1962 applies to the refund arising on finalization of the provisional assessment and not otherwise. After considering the various provisions, this argument was repelled

by this Court in the following words in case of Bussa Overseas and Properties Pvt. Ltd. (supra):

28...This ingenious argument is wholly unsustainable. Once the duty is paid provisionally u/s 18 of the Act, any refund of that amount would arise only on final assessment and not otherwise. An importer cannot apply for refund of duty paid provisionally unless there is final assessment order and refund arises on such final assessment order. If the duty determined on final assessment is modified by the Customs authorities at the instance of the importer, then the duty determined as per the modified order will represent the final assessment order. It cannot be said that if the final assessment order is modified at the instance of the importer the modified order does not represent the final assessment order. In other words, if a final assessment order is modified at the instance of the importer, then, the refund arising on final assessment order as well as the additional refund arising on modification of the final assessment order would be governed by Explanation II to Section 27 of the Customs Act. Therefore, there is no distinction between refund arising on finalisation of provisional assessment and refund arising after finalisation of provisional assessment and both refunds are subject to the provisions of Section 27 of the Customs Act.

A SLP filed against the judgment was dismissed by the Supreme Court. See 2004 (164) ELT 177 (SC).

15. On behalf of the Appellants, learned Counsel submits that the judgment in Bussa Overseas (supra) was delivered on 15.09.2003. It is submitted that since then, the Supreme Court in case of Commissioner of Central Excise, Mumbai-II Vs. Allied Photographics India Ltd., , has taken a view that the doctrine of unjust enrichment would not apply in the case of provisional assessment and consequently Bussa Overseas (supra) stands impliedly overruled. The question is what is the law laid down in Allied Photographics India Limited (supra) and whether it would be applicable to the refund of duty or additional duty under the provisions of the Customs Act, 1962.

16. To understand the argument, we may first gainfully refer to some of the provisions under the Central Excise Act and Rules made thereunder. Rule 9B of the Central Excise Rules, 1944, as it then stood read as under:

Rule 9B: Provisional assessment to duty

(1) Notwithstanding anything contained in these rules:

(a) where the proper officer is satisfied that an assessee is unable to produce any document or furnish any information necessary for the assessment of duty on any excisable goods; or

(b) where the proper officer deems it necessary to subject the excisable goods to any chemical or any other test for the purpose of assessment of duty thereon; or

(c) where an assessee has produced all the necessary documents and furnished full information for the assessment of duty, but the proper officer deems it necessary to make further enquiry (including the inquiry to satisfy himself about the due observance of the conditions imposed in respect of the goods after their removal for assessing the duty;

the proper officer may, either on a written request made by the assessee or on his own accord, direct that the duty leviable on such goods shall, pending the production of such documents or furnishing of such information or completion of such test or inquiry, be assessed provisionally at such value (which may not necessarily be the rate or price declared by the assessee) as may be indicated by him, if such assessee executes a bond in the proper form with such surety or sufficient security in such amount, or under such conditions as per the proper officer deems fit, binding himself for payment of the difference between the amount of duty as provisionally assessed and finally assessed.

(2) * * * * *

(3) The Commissioner may permit the assessee to enter into a general bond in the proper form with such surety or sufficient security in such amount or under such conditions as the Commissioner approves for the assessment of any goods provisionally from time to time:

Provided that, in the event of death, insolvency or insufficiency of the surety or where the amount of the bond is inadequate, the Commissioner may, in his discretion, demand a fresh bond and may, if the security furnished for a bond is not adequate, demand additional security.

(4) The goods provisionally assessed under Sub-rule (1) may be cleared for home consumption or export in the same manner as the goods which are not so assessed.

(5) when the duty leviable on the goods is assessed finally in accordance with the provision of these rules, the duty provisionally assessed shall be adjusted against the duty finally assessed, and if the duty provisionally assessed falls short of, or is in excess of the duty finally assessed, the assessee shall pay the deficiency or be entitled to a refund, as the case may be.

Rule 9B of the Central Excise Rules, 1944 was amended on 25.06.1999 by the Central Excise Rules (Thirteenth Amendment of 1999). The amended Rule 9B inserted a proviso in Sub-rule (5) which reads as follows:

Provided that, if an assessee is entitled to a refund, such refund shall not be made to him except in accordance with the procedure established under Sub-section (2) of Section 11B of the Act.

It is thus clear that under Sub-Rule (5) under the Central Excise Act the amount in excess of the final assessment had to be refunded till the proviso was added.

17. Section 27 of the Customs Act, 1962 was substituted by the Central Excise

and Customs Laws (Amendment) Act 40 of 1991 w.e.f. 20.09.1991 and with its subsequent amendments reads as under :

27. Claim for refund of duty.

(1) Any person claiming refund of any [duty and interest, if any, paid on such duty]:

(a) paid by him in pursuance of an order of assessment; or

(b) borne by him, may make an application for refund of such [duty and interest, if any, paid on such duty] to the [Assistant Commissioner of Customs or Deputy Commissioner of Customs]:

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, before the expiry of one year;

(b) in any other case, before the expiry of six months; from the date of payment of [duty and interest, if any paid on such duty], in such form and manner as may be specified in the regulations made in this behalf and the application shall be accompanied by such documentary or other evidence (including the documents referred to in Section 28C as the applicant may furnish to establish that the amount of [duty and interest, if any, paid on such duty] in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such [duty and interest, if any, paid on such duty] had not been passed on by him to any other person:

PROVIDED....

PROVIDED FURTHER

PROVIDED ALSO....

PROVIDED ALSO...

Explanation I for the purposes of this sub-section, "the date of payment of [duty and interest, if any, paid on such duty]", in relation to a person, other than the importer, shall be construed as "the date of purchase of goods" by such person.

Explanation II Where any duty is paid provisionally u/s 18, the limitation of one year or six months, as the case may be, shall be computed from the date of adjustment of duty after the final assessment thereof.

(2) If, on receipt of any such application, the [Assistant Commissioner of Customs or Deputy Commissioner of Customs] is satisfied that the whole or any part of the [duty and interest, if any, paid on such duty] paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:

PROVIDED that the amount of [duty and interest, if any, paid on such duty] as

determined by the [Assistant Commissioner of Customs or Deputy Commissioner of Customs] under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to:

(a) the [duty and interest, if any, paid on such duty] paid by the importer [or the exporter, as the case may be], if he had not passed on the incidence of such [duty and interest, if any paid on such duty] to any other person;

(b)

(c)

(d)

(e)

(f)

PROVIDED FURTHER....

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal [the National Tax Tribunal] or any Court or in any other provision of this Act or the regulations made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).

(4)

(5)

18. 18. Provisional assessment of duty.

(1)

(2) When the duty leviable on such goods is assessed finally in accordance with the provisions of this Act, then

(a) in the case of goods cleared for home consumption or exportation, the amount paid shall be adjusted against the duty finally assessed and if the amount so paid falls short of, or is in excess of [the duty finally assessed] the importer or the exporter of the goods shall pay the deficiency or be entitled to a refund, as the case may be;

(3)

(4) Subject to sub-section (5), if any refundable amount referred to in clause

(a) of sub-section (2) is not refunded under that sub-section within three months from the date of assessment of duty finally, there shall be paid an interest on such unrefunded amount at such rate fixed by the Central Government u/s 27A till the date of refund of such amount.

(5) The amount of duty refundable under Sub-section (2) and the interest under sub-section (4), if any, shall instead of being credited to the Fund, be paid to the importer or the exporter, as the case may be, if such amount is relatable to:

(a) the duty and interest, if any, paid on such duty paid by the importer, or the exporter, as the case may be, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(b) the duty and interest, if any, paid on such duty on imports made by an individual for his personal use;

(c) the duty and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(d) the export duty as specified in Section 26;

(e) drawback of duty payable under Sections 74 and 75.

The refund under Sub-section (2) of Section 18(2)(a) will have to be read with the relevant provisions of Section 27(2) r/w 27(3) of the Customs Act, 1962.

19. On behalf of the Appellants in support of the contentions that they are entitled for refund, reliance was placed on paragraph 95, of the judgment of the Supreme Court in case of *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, . The para referred to dealt with Rule 9B as it stood before the amendment. The Supreme Court was pleased to hold that any recoveries or refunds consequent upon the adjustment under Sub-rule (5) of Rule 9B will not be governed by Section 11A or Section 11B, as the case may be. The Court, however, added that if the final orders passed under Sub-rule (5) are appealed against and if said appeal is allowed then only refund will be subject to Section 11B. Following this, the Supreme Court in case of *Commissioner of Central Excise, Chennai Vs. T.V.S. Suzuki Limited, Hosur*, , held that the doctrine of "unjust enrichment" will not be applicable to refund consequent upon the final assessment. The Supreme Court then finding inconsistencies in the case of *Sinkhai Synthetics and Chemicals Pvt. Ltd. Vs. Collector of Central Excise*, ; *TVS Suzuki Limited (supra)* and the decision of the nine judges Constitution Bench in *Mafatlal Industries Limited (supra)*, referred the matter to a Larger Bench in *Allied Photo Graphics India Ltd. (supra)*, on the question, whether, a claim for refund after final assessment is governed by Section 11B of the Central Excise Act, 1944?

20. In *Allied Photo Graphics India Ltd. (supra)* certain refund claims had been filed on behalf of M/s AGIL. These claims were rejected. Claims were made in 1986. Writ Petition came to be filed in the High Court. The learned Single Judge held that the action of the Department collecting the duty not on the sale price of NIIL to M/s AGIL was illegal and, therefore, NIIL was entitled to refund. As the question of "unjust enrichment" was debatable, the question was referred to the Full Bench. After the decision of the Full Bench, the petition was reposted, and

Union of India was directed to prove that the tax burden has in fact been shifted to consumers. Pending further examination, the Department was directed to deposit the amount in Court. When the petition came for hearing, NIIL conceded that it had passed on the burden to M/s AGIL the sole selling distributors of NIIL. The refund claims of NIIL were rejected. The learned Judge directed M/s AGIL to file affidavit stating whether it had passed on the burden to its dealers or not? After further inquiry, it was held that the Union of India had failed to prove that M/s AGIL had passed on the burden to its dealers and accordingly, ordered refund of the amount. In an intra Court appeal, the Division Bench took a view that since NIIL had conceded of having passed on tax burden to M/s AGIL, the question of further examining as to whether M/s AGIL has passed on burden to its dealers, would not arise and accordingly, the appeal was allowed. Aggrieved, an SLP was preferred and the same was dismissed with clarification that the said order will not prevent M/s AGIL from adopting appropriate remedy as open to it in law. M/s AGIL then filed a Writ Petition. Subsequent to the judgment of Mafatlal Industries Limited (supra), M/s AGIL moved an application for refund before the Department. Refund was ordered against which the matter reached the Supreme Court. On behalf of the Department, it was contended that under the second proviso to Section 11B if duty is paid by the manufacturer under protest the limitation of six months was not applicable, however, the purchaser of duty paid goods, after finalisation of assessment of excise duty payable by the manufacturer, was not entitled to rely upon the said proviso. That in any event, the claim for refund would be governed by Section 11B. Reliance was placed on Mafatlal's case (supra). Per contra on behalf of the claimant therein, it was submitted that when a provisional assessment is made under the Act or when excise duty is paid under protest by the claimant, all payments of excise duty are on account payments which are to be adjusted and appropriated only on vacating of the protest or finalisation of assessment. Considering the above arguments, the Supreme Court framed the following point for determination:

Whether the doctrine of unjust enrichment in Section 11B of the Act is applicable to the facts of this case, having regard to the fact that NIIL (manufacturer) had paid the differential disputed excise duty under protest from 01.03.1974 to 31.10.1984 when the assessment was finalised in favour of NIIL in view of the judgment of this Court in the case of Union of India (UOI) and Others Vs. Bombay Tyre International Ltd. and Others, ?

To answer the issue, two points were framed for determination. Firstly, whether refund of duty paid under provisional assessment is similar to duty under protest as both are "on account" payments adjustable on vacation of protest. Secondly, if in the course of such adjustment or vacation of protest if any amount is payable by the Revenue to the manufacturer, is it open to the purchaser to contend that he has stepped into the shoes of the manufacturer seeking refund of "on account payments" and therefore, he was not bound to comply with Section 11(B) of the said Act.

The Court noted that there is nothing in para 95 of *Mafatlal (supra)* to suggest that payment of duty under protest does not attract the bar of unjust enrichment. Paragraph No. 104 only states that if refund arises upon finalization of provisional assessment, Section 11(B) will not apply. Relying on this paragraph, it was argued that payment under protest and payment of duty under provisional assessment are both "on account" payments under the Act. This submission was rejected. The Court held that there is basic difference between duty paid under protest and duty paid under Rule 9B. The duty paid under protest falls u/s 11B and duty paid under provisional assessment falls under Rule 9B. Section 11B deals with the claim for refund whereas Rule 9B deals with making of refund in which case the assessee has not to comply with Section 11B. Therefore, Section 11B and Rule 9B operate in different areas. Proceeding further the Court in paragraph No. 14 observed as under:

14. As stated above, para 104 of the judgment in the case *Mafatlal Industries Ltd. (supra)* states that if refund arises upon finalisation of provisional assessment, Section 11B will not apply. Para 104 of the said judgment does not deal with payment under protest. In the light of what is stated herein, we may now consider the judgment of this Court in the case *Sinkhai Synthetics and Chemicals Pvt.Ltd. (supra)*. In that matter, the assessee was a manufacturer. The assessee claimed exemption which was denied by the Department. The assessee went in appeal to CEGAT. Pending appeal, assessee paid excise duty under protest. The assessee succeeded before the CEGAT and claimed refund on 17.01.1991. Refund was denied by the Department. Therefore, it was a case of payment of duty under protest. However, in the said decision, this Court applied para 104 of the judgment of the Constitution Bench in the case of *Mafatlal Industries Ltd. (supra)*, which with respect, had no application. As stated above, para 104 of the judgment in the case of *Mafatlal Industries Ltd. (supra)* dealt with refund consequent upon finalisation of provisional assessment. Para 104 does not deal with refund of duty paid under protest. As stated above, there is a difference under the Act between payment of duty under protest on one hand and refund consequent upon finalisation of provisional assessment on the other hand. This distinction is missed out, with respect, by the judgment of this Court in the case of *Mafatlal Industries Ltd. (supra)*. We may also point out that the judgment in the case of *Sinkhai Synthetics & Chemicals Pvt.Ltd. (supra)* is based on the concession made by the Counsel appearing on behalf of the Department. That judgment is, therefore, per incuriam. Learned Counsel for the respondent herein placed reliance on the judgment of this Court in the case of *TVS Suzuki Ltd. (supra)*. In that case, application for refund was filed. This was on completion of final assessment. On 09.07.1996, the Department issued a show cause notice as to why the refund claim should not be rejected for noncompliance of Section 11B. By order dated 17.07.1996, the refund claim was rejected on the ground that it was beyond limitation. On appeal, the Commissioner (Appeals) observed that the bar of unjust enrichment was not applicable as the assessee claimed refund consequent upon final assessment. He allowed the refund claim. CEGAT

agreed with the view of Commissioner (Appeals). Before this Court, the Department conceded rightly that in view of para 104 of the judgment of this Court in *Mafatlal Industries Ltd. (supra)*, bar of unjust enrichment was not applicable in cases of refund consequent upon adjustment under Rule 9B(5). The judgment of this Court in the case of *TVS Suzuki Ltd. (supra)*, therefore, supports the view which we have taken herein above that refund consequent upon finalisation of provisional assessment did not attract the bar of unjust enrichment.

The Supreme Court, therefore, held that in order to get refund the Respondent was bound to comply with Section 11B of the Act. (Para 104 is as set out in SCC which corresponds to para 95 in ELT). What was therefore being considered was Rule 9B(5) of the Central Excise Rules before the proviso was inserted w.e.f. 15.06.1999.

21. It would, thus, be clear that what was under the consideration was the provisions of the Central Excise Act 1944 and Rules framed thereunder as in 1986. This is not an authority for the proposition that in case of provisional assessment under the Customs Act, the doctrine of unjust enrichment will not apply considering Sections 27(2) and (3) of the Customs Act. The doctrine of unjust enrichment will only apply when the assessment is finally completed. There can be no application for refund before the final assessment is made.

22. Insofar as the Customs Act, 1962 is concerned, u/s 27(3), no refund of duty and interest can be made without satisfying the requirements of Sub-section (2). Therefore, even though u/s 18, Sub-section (5) has been introduced w.e.f. 13.07.2006, the issue of refund was always subject to the provisions of Section 28(3), considering that Sections 18(2)(a) applies to final assessment. We may only note that the order of this Court dated 30.10.1991 in the matter of restitution would be subject to the provisions of Section 27(2) of the Customs Act, 1962.

23. Our attention was also invited to the judgment in case of *Parle International Ltd. Vs. Union of India*, , that was the case where the amount was deposited by the Petitioner therein during the adjudication proceedings and that amount was regarded as deposit and not duty. The doctrine of unjust enrichment was held by Gujrat High Court as not applicable. The judgment of Gujrat High Court was set aside by the Supreme Court, whilst remanding the matter. It is reported in 2005 (188) ELT 81 (SC).

24. Various judgments were cited to contend that since the amount was deposited in pursuance to the orders of this Court and directions for refund were also ordered by this Court, the refund had to follow. In *Oswal Agro Mills Ltd. and Another Vs. Asstt. Collector of Central Excise, Division Ludhiana and Others*, , in case of *M/s. Somaiya Organics (India) Ltd. Vs. State of Uttar Pradesh and Another*, and in case of *Oswal Agro Mills Ltd. and Another Vs. Asstt. Collector of Central Excise, Division Ludhiana and Others*, , the issue was invocation of the

Bank guarantee. The Supreme Court in all those judgments was pleased to hold that the Bank guarantee which was furnished by the assessee cannot be regarded as payment towards excise duty, therefore, there is no question of its refund and Section 11B is not attracted. These judgments on the Bank guarantee are clearly distinguishable as no amount has been appropriated and consequently, the question of refund would not arise. In the judgment of Commissioner of C. Ex., Shillong Vs. Woodcraft Products Ltd., , the issue was "unjust enrichment" was not the issue. In that case, in pursuance to the direction given by the Tribunal, the Revenue made an order of refund. That order was reversed by the Supreme Court. In these circumstances, the Supreme Court held that the assessee was bound to make restitution.

25. We are, therefore, clearly of the opinion that insofar as the additional duty is concerned, the provisions of Section 28 of the Customs Act, 1962 would squarely apply and on this count the order of the Tribunal cannot be faulted. We are also unable to accept the proposition that the judgment of the Court in Bussa (supra) stands impliedly overruled. Secondly, under the Customs Act, considering that Section 18(2) speaks of refund after finalisation of assessment, the provisions of Section 27(2) would be clearly attracted. The first and second questions are accordingly answered in favour of Revenue.

26. We then come to the second question insofar as the fine imposed in pursuance to the confiscation. As noted, in appeal the amount of fine has been reduced. The question is whether redemption fine is also subject to the principles of "unjust enrichment"? In the judgments referred earlier, the principles of "unjust enrichment" have been applied in a case of duty, cess, tax, fees and the like. No judgment has been brought to our attention insofar as fine or penalty is concerned. Insofar as the case of Sahakari Khand Udyog (supra) is concerned, what was in issue was duty. The observations in paragraph No. 31 would be applicable to the retention of a benefit by a person that is unjust or inequitable. This is based on the premises that the duty, fees or the like has been passed on. The law is settled that even if there is no statutory provision in the matter of refund, the principle of "unjust enrichment" would still be attracted. The question is whether fine or penalty is also subject to the doctrine of unjust enrichment. The Customs Act, 1962 has specifically provided in Section 27(2) that when a person is claiming refund of duty and that if applicant is entitled to refund the amount will be credited in the fund subject to the proviso. In the instant case Clause (a) to the first proviso. Section 2(15) defines "duty", which means a duty of customs leviable under this Act. It does not include fine or penalty. Section 12 sets out the duties on goods. Section 111 provides for confiscation of improperly imported goods as set out therein. Section 125 of the Customs Act, 1962 reads as under:

125. Option to pay fine in lieu of confiscation:

(1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation

whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods [or, where such owner is not known, the person from whose possession or custody such goods have been seized,] an option to pay in lieu of confiscation such fine as the said officer thinks fit:

PROVIDED that, without prejudice to the provisions of the proviso to Sub-section (2) of Section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

(2) Where any fine in lieu of confiscation of goods is imposed under Sub-section (1), the owner of such goods or the person referred to in Sub-section (1) shall, in addition, be liable to any duty and charges payable in respect of such goods.

27. The Act itself, therefore, provides that instead of goods being confiscated on a fine being imposed and passed, the goods can be released. The fine, therefore, is in the nature of recompensation to the State for the assessee having committed a wrong. That section further provides under Sub-section (2) that the fine in lieu of confiscation is in addition to the duty and charges payable in respect of such goods. u/s 126, if confiscation was ordered the goods would vest in the Government. Therefore, the fine basically is for a wrong done. It is, therefore, not a duty, tax, cess, fees or the like which can be passed on to a consumer.

28. In the instant case on the Appellants partly succeeding in their appeal, on paying the fine as reduced, would have been entitled to release of the goods. The question, therefore, of adjusting the balance amount of the original fine from the amount deposited would not have arisen. The principles of "unjust enrichment", therefore, would not arise in a case of redemption fine. No authority has been brought to our attention by either side where the principles of "unjust enrichment" have been applied insofar as the fine or penalty is concerned. In our opinion both on general principles and considering that the Act itself imposes restriction only on refund of duty u/s 28, it would not be possible to attract the principles of "unjust enrichment" insofar as the redemption fine is concerned. Therefore, the fine as reduced by the Tribunal only can be adjusted and the Appellants in terms of the order of this Court would be entitled as a matter of restitution for refund of balance amount of redemption fine along with interest at the rate of 13% per annum as ordered by this Court by its order dated 25.10.1991. The third question is answered accordingly in favour of assessee.

The appeal is, accordingly, disposed of.