REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.3039 OF 2011

COMMISSIONER OF CENTRAL EXCISE,
MUMBAI – 1 ..APPELLANT(S)

VERSUS

M/S. MORARJEE GOKULDAS
SPG. & WVG. CO.LTD. .. RESPONDENT(S)

J U D G M E N T

M. R. Shah, J.

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 24.09.2008 passed by the High Court of Judicature at Bombay in Central Excise Appeal No.186 of 2008 by which the Division Bench of the High Court has dismissed the said appeal preferred

by the Revenue and has affirmed the judgment and order passed by the Appellate Tribunal by which the Appellate Tribunal held that the show cause notice under Section 11A of the Central Excise Act, 1944 is required to be issued in case of erroneous refund of the duty, the Revenue has preferred the present appeal.

2. The short question which is posed for consideration before this Court is whether the separate notice under Section 11A of the Central Excise Act is necessary for the recovery of the amount when an erroneous refund is granted through the speaking order is reviewed under Section 35E of the Act?

2.1 The facts leading to the present appeal in nutshell are as under:

2.2 The respondent herein was at the relevant time a manufacturer of cotton yarn which it consumed captively in its composite mills for weaving of fabric. In October, 1980 vide judgment in the case of **M/s. J.K. Cotton**

Spinning & Weaving Mills Company Ltd. vs. Union of India 1981 (8) ELT 887, the Delhi High Court held that removal of yarn which was consumed within the factory for production did not amount to removal within the meaning of Rules 9 & 49 of the erstwhile Central Excise Rules, 1944 and hence set aside the duty demand made on such captively consumed yarn. That the respondent company filed a revised classification list wherein, they declared that no duty was payable on the yarn captively consumed. By an order issued in April, 1981 the classification list was rejected by the Department and the respondent – company was directed to file a fresh classification list. The respondent – company filed a writ petition before the Delhi High Court being Writ Petition No.1190 of 1981 *inter alia* challenging the levy and collection of duty on the said yarn captively consumed by them. By judgment and order dated 11.01.1983 the High Court disposed of the said writ petition upholding the validity of Rules 9 and 49 and holding that the recovery

could only be done as per the time limit prescribed in Section 11A. That in the year 1983 the respondent – company filed a civil appeal against the said judgment before this Court being Civil Appeal No.320 of 1983. The Company also files application for stay of the operation of the judgment. On 15.03.1983, this Court passed an interim order in the following terms:

> "In respect of future payment of Excise Duty there will be no stay. In so for as the post dues are concerned, 50% of the past dues shall be paid to the authority concerned within a period of 3 months from today. In regard to the balance 50% the appellants shall give bank Guarantee to the satisfaction of the Registrar of this Court within the same period. If the Bank Guarantee have already been given in any case in pursuance of the directions of the Delhi High Court it will continue in operation and shall be kept alive from time to time."

2.3 In pursuance to the interim directions granted by this Court on 15.03.1983, the bank guarantee given by the respondent – company was kept alive from time to time. By final judgment and order dated 17.01.1995 this Court decided the case and *inter alia* directed that if notice under Section 11A has not been served the Revenue

would be entitled to do so within the time limit prescribed by Section 11A of the Act. On the basis of the judgment and order passed by this Court, the Divisional Assistant Commissioner issued a show cause notice on 07.04.1995 demanding a duty amounting to Rs.2,96,14,265.05. Subsequently by passing O-I-O dated 27.03.1996, the Assistant Commissioner confirmed the demand. Out of the amount demanded, Rs.1,48,07,132.84 was paid on different dates between 18.04.1983 to 28.12.1984, as per the directions of this Court. Balance of Rs.1,48,07,132.91 was recovered on 28.03.1996 by encashing bank guarantees executed by the respondent – company. Being aggrieved with the decision of the Assistant Commissioner dated 27.03.1996, the respondent assessee/company went in appeal before the Commissioner (Appeals). The Commissioner (Appeals) dismissed the said appeal and upheld the decision of the Assistant Commissioner by order dated 13.06.1996. Thereafter the respondent – assessee went in appeal

before the Tribunal against the order of the Commissioner (Appeals). The Tribunal set aside the order passed by the Commissioner (Appeals) by order dated 15.05.2000 on the ground that there was no demand issued by the Department under Section 11A of the Central Excise Act. The Revenue challenged the order passed by the Commissioner (Appeals) dated 15.05.2000 which came to be dismissed by order dated 17.02.2005. In the meantime, since the company filed a refund claim it was found that the refund claim was not sustainable. A show cause notice dated 19.09.2000 was issued for deciding the issue of Section 11B of the Central Excise Act. Notice dated 19.09.2000 came to be adjudicated by the Deputy Commissioner of Central Excise who vide his order dated 21.12.2000 set aside the show cause notice and ordered refund of the entire amount to the respondent – assessee/company. The said order held that the amounts were paid under the protest by the party and therefore the time limit will not apply.

The issue of unjust enrichment was not examined in the order. That thereafter the Revenue in exercise of powers conferred under Section 35E(2) of the Central Excise Act, preferring an appeal before the Commissioner (Appeals) prayed for setting aside the order passed by the Deputy Commissioner dated 21.12.2000 sanctioning the refund, on the grounds set out therein including that there was unjust enrichment and that the refund claimed was time barred under Section 11B of the Central Excise Act. By order dated 13.05.2005 the Commissioner Central Excise (Appeals), Mumbai allowed the appeal filed by the Revenue by *inter alia* upholding grounds of unjust enrichment and time bar under Section 11B of the Central Excise Act.

2.4 Being aggrieved, the assessee filed the appeal before the Tribunal challenging the points of the merits upheld by the Commissioner Central Excise (Appeals) vide order in appeal dated 13.05.2005. Pending the said appeal and consequent to the order dated 13.05.2005, setting aside

the Order-in-Original sanctioning the refund claim of Rs.2,96,14,264/- and in absence of specific stay against the said order in appeal, the Revenue proceeded with recovery of an amount of Rs.20,00,000/- by way of appropriation of refund claims payable to the assessee under O-I-O dated 04.01.2007. Therefore, in the pending appeal on 25.01.2007, the respondent assessee filed an application seeking directions to the Department to refund the said sum of Rs.20,00,000/- sanctioned to it by way of refund. That before the Tribunal, the assessee filed an application for additional grounds seeking to amend the appeal against the order in appeal dated 13.05.2005 on the following points of law:

> "(i) No notice under Section 11A of Central Excise Act, 1944 is issued to the applicants seeking to recover the refund granted pursuant to the Order in Original dated 19.12.2000.
>
> (ii) The order of the Commissioner of Central Excise (Appeals), impugned in the above Appeal, without issuing notice under Section 11A of the Act, is therefore not capable of being implemented and liable to be set aside on this ground alone."

2.5 That the Tribunal by its Order dated 12.10.2007 considered and decided only the points of law raised vide Misc. Application for additional grounds and vide order dated 12.10.2007 allowed the said appeal and set aside the order in appeal with consequential relief to the assessee. Against the order passed by the Tribunal dated 12.10.2007, the Revenue preferred the present appeal before the High Court. By the impugned judgment and order the High Court has dismissed the said appeal relying upon the decision of the Division Bench of the High Court in the case of **Bajaj Auto Ltd. vs. UOI, 2003 (151) ELT-23 (Bom)**. At this stage it is required to be noted that before the High Court the Revenue strongly relied upon the decision of this Court in the case of **Asian Paints (India) Ltd. vs. CCE, Bombay 2002 (142) ELT-522 (SC)**

2.6 Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court, the

Revenue has preferred the present appeal.

3. Ms. Aishwarya Bhati, learned ASG and Ms. Ameyavikrama Thanvi, learned counsel have appeared on behalf of the appellant and Mr. V. Sridharan, learned Senior Advocate has appeared on behalf of the respondent.

4. Ms. Aishwarya Bhati, learned ASG appearing on behalf of the Revenue has vehemently submitted that in the facts and circumstances of the case the High Court has materially erred in relying upon the judgment of the Bombay High Court in the case of **Bajaj Auto Ltd (supra)** which was delivered on 15.02.2002.

4.1 It is submitted that before the High Court the Revenue heavily relied upon the decision of this Court in the case of **Asian Paints (India) Ltd. (supra)** which was subsequent to the decision of the Bombay High Court in the case of **Bajaj Auto Ltd (supra)**. It is submitted that therefore, the decision of this Court in the case of **Asian**

Paints (India) Ltd. (supra) was binding on the High Court. It is submitted that as such the impugned order passed by the High Court is silent on the reasoning as to why the reliance placed by the Revenue on the decision of this Court in the case of **Asian Paints (India) Ltd. (supra)** was misplaced.

4.2 It is submitted by Ms. Bhati, learned ASG that in the case of **Asian Paints (India) Ltd. (supra),** this Court has specifically observed and held that Sections 35E and 11A of the Central Excise Act operate in different fields and are invoked for different purposes. It is submitted that it is observed that different time limits are, therefore, set out therein. It is submitted that in the said decision this Court has not accepted the submission on behalf of the assessee that the recovery of the excise duty cannot be made pursuant to an appeal filed after invoking the provisions of Section 35E if the time limit provided in Section 11A has expired. It is observed to so read the provisions would be to render Section 35E virtually

ineffective, which would be impermissible. It is submitted that therefore the present case as such is clearly covered by the decision of this Court in the case of **Asian Paints (India) Ltd. (supra).**

4.3 It is further submitted by Ms. Bhati, learned ASG that even otherwise from the Scheme of the Central Excise Act, 1944, it is quite apparent that where the proceedings under Section 35E are initiated and the appeal is filed against the order sanctioning refund, there is no need to issue any notice under Section 11A. It is submitted that a notice under Section 11A would be meaningless with a review under Section 35E, of the order sanctioning the refund. It is submitted by the interpretation given by the Revenue affirmed by the High Court that without notice under Section 11A, amount becoming due to proceeding under Section 35E cannot be recovered, renders Section 35E ineffective and redundant. It is submitted that therefore, the correct position of law has been laid down by this Court in the case of **Asian Paints (India) Ltd.**

(supra) which has been subsequently followed by the Chennai Bench of the Tribunal in the case of **CCE, Chennai vs. Sha Harakchand Samanthmal, 2004 (177) ELT 990 (T).**

4.4 It is further submitted by Ms. Bhati, learned ASG that as such the Tribunal has not at all considered the grounds on merits against the order passed by the O-I-O that the assessee shall be entitled to refund or not. It is submitted that as such number of grounds were raised before the Tribunal on the ground that the refund was not payable to the assessee including the unjust enrichment as envisaged in Section 11B of the Central Excise Act. It is submitted that question of unjust enrichment has not at all been examined by the Tribunal and the Tribunal only considered the grounds set out in the additional grounds which was by way of amendment/raising the additional grounds.

4.5 It is further submitted that neither the Tribunal nor even the High Court has considered the fact that while

claiming the refund the assessee had claimed that the initial payment was under protest or while contesting the demand that the assessee took the stand that assessment was final and without notice under Section 11A amount cannot be recovered. It is submitted that however while claiming the refund the assessee claimed that payment was under protest so that the refund claim was not time barred. It is therefore submitted that the assessee is approbating and reprobating the issue whether the initial payment of duty was final or not.

4.6 It is submitted that in any case when the Department preferred an appeal under Section 35E against the order in original sanctioning the refund and when the said proceedings under Section 35E terminated in favour of the Revenue thereafter the necessary consequences shall follow and for recovery of any amount pursuant to the order passed under Section 35E of the Act there shall not be any separate notice issued under Section 11A of the

Act as observed and held by the High Court as well as the Tribunal.

Making above submissions it is prayed to allow the appeal.

5. While opposing the present appeal learned Senior Counsel appearing on behalf of the assessee has vehemently submitted that as such the Tribunal heavily relied upon the earlier decision in the case of **Collector of Central Excise, Bhubaneshwar vs. Re-Rolling Mills, reported in 1997 (94) ELT 8**. It is submitted that in the case of **Re-Rolling Mills (supra)** the Tribunal specifically observed and held that the time limit of Section 11A governs the issue of the demand under that Section and that Section alone and therefore if no demand in accordance with Section 11A is issued, nothing else can take its place. It is submitted that therefore the Tribunal took the view that the demand has to be issued for the erroneously refunded money within the time limit

prescribed by Section 11A.

5.1 It is submitted that subsequently the same question arose before the Bombay High Court in **Bajaj Auto Ltd. (supra)** and after referring to the Board's Circular No. 423/56/98-CX, dated 22-9-1998 and the case of **Re-Rolling Mills (supra)** it was held that the erroneous refund cannot be recovered by mere filing an application under Section 35E(2) of the Central Excise Act, unless the notice under Section 11A is issued within the stipulated time.

5.2 It is submitted that therefore in absence of any notice under Section 11A of the Central Excise Act which was required to be issued within six months from the date of actual refund, the Tribunal as well as the High Court has rightly set aside the demand and passed an order of refund. It is submitted that since the time limit for filing the appeal under Section 35E(2) is longer than the time limit prescribed under Section 11A, the show cause notice should precede the proceedings under Section

35E(2).

5.3 It is submitted that therefore the issue of show cause notice under Section 11A of the Central Excise Act is a condition precedent for recovery of the alleged erroneous refund within the normal period of limitation prescribed under Section 11A of the Act notwithstanding proceedings under Section 35E being initiated by the Revenue against the order granting refund.

Making above submissions it is prayed to dismiss the present appeal.

6. We have heard learned counsel appearing on behalf of the respective parties at length.

7. The short question which is posed for consideration before this Court is whether Notice under Section 11A of the Central Excise Act is necessary for the recovery of the amount when the refund granted is reviewed under Section 35E of the Act and whether a separate notice under Section 11A of the Act to be issued within the time

limit prescribed under Section 11A and before the proceedings under Section 35E of the Act are initiated and/or the notice under Section 11A of the Act shall precede the proceedings under Section 35E of the Act?

7.1 While considering the aforesaid issue it is required to be noted that as such in the present case the original authority while passing the O-I-O allowed the refund. That the order-in-original sanctioning the refund was the subject matter of review under Section 35E of the Act. On merits the Reviewing Authority set aside the order-in-original sanctioning the refund. Therefore, as such *stricto sensu* it can be said to be giving effect to the order passed under Section 35E of the Act. As such the assessee is claiming the refund on the basis of O-I-O sanctioning the refund which as such has been set aside in the proceedings under Section 35E of the Central Excise Act.

7.2 Now so far as the submissions made on behalf of the Assessee relying upon the decisions of the Tribunal in the

case of **Re-Rolling Mills (supra)** and **Bajaj Auto Ltd (supra)** that for refund of the duty a separate show cause notice under Section 11A of the Act is reviewed and that too within the time limit prescribed under Section 11A and that as such notice under Section 11A must precede within the time limit prescribed under Section 11A before the notice under Section 35E of the Act is concerned, as such the aforesaid issue is now not *res integra* in view of the direct decision of this Court in the case of **Asian Paints (India) Ltd. (supra)**.

7.3 In the case of **Asian Paints (India) Ltd. (supra),** the decision which has been rendered subsequent to the decision of the High Court in the case of **Bajaj Auto Ltd (supra)** it is observed and held as under:

> "We have read the judgments of the larger Bench of the Customs, Excise and Gold (Control) Appellate Tribunal, which are impugned in these appeals. We are of the view that the judgments viewed Section 35-E and 11-A of the Central Excise Act in the proper perspective. The two sections operate in different fields and are invoked for different purposes. Different time-limits are, therefore, set out therein. We do not accept the

> contention that recovery of excise duty cannot be made pursuant to an appeal filed after invoking the provisions of Section 35-E, if the timelimit provided in Section 11-A has expired. To so read the provisions, would be to render Section 35-E virtually ineffective, which would be impermissible."

7.4 Before this Court in the case of **Asian Paints (India) Ltd. (supra)** the judgments of the larger Bench of the Tribunal were under challenge. The Special Bench of the Tribunal took the view that Section 35E and Section 11A operate in different fields and are invoked for different purposes and different time limits are therefore set out therein. This Court in the case of **Asian Paints (India) Ltd. (supra)** specifically negated and/or did not accept the submission on behalf of the assessee that the recovery of excise duty cannot be made pursuant to an appeal filed invoking the provisions of Section 35E if the time limit under Section 11A has expired.

7.5 The law laid down by this Court in the case of **Asian Paints (India) Ltd. (supra)** as such was binding on the High Court and despite the same was pointed out and

pressed into service by the Revenue before the High Court, the High Court has without giving any reasons how the same is misplaced has ignored to follow the decision of this Court in the case of **Asian Paints (India) Ltd. (supra)** and rather has followed its earlier decision in the case of **Bajaj Auto Ltd (supra)** which admittedly was prior to the decision of this Court in the case of **Asian Paints (India) Ltd. (supra)**.

8. As observed hereinabove, once the order in original sanctioning the refund came to be set aside in a proceeding under Section 35E of the Act and the proceedings under Section 35E was initiated within the time prescribed under Section 35E of the Act, thereafter there is no question of any further notice under Section 11A of the Central Excise Act as observed by the Tribunal affirmed by the High Court on quashing and setting aside the order in original sanctioning the refund in exercise of powers under Section 35E of the Act which otherwise is prescribed under the Act within the time stipulated

under Section 35E of the Act, thereafter necessary consequence shall follow and thereafter there is no question of any refund pursuant to order in original.

9. In view of the above and for the reasons stated above, present appeal succeeds. The impugned judgment and order passed by the High Court and that of the Tribunal are hereby quashed and set aside and the order passed by the Commissioner (Appeals), Mumbai dated 13.05.2005 is hereby restored.

However, in the facts and circumstances of the case there is no order as to costs.

.....J.
(M. R. SHAH)

.....J.
(KRISHNA MURARI)

New Delhi,
March 24, 2023