[2025] 5 S.C.R. 2141 : 2025 INSC 733

M/s Patanjali Foods Limited (Formerly known as M/s Ruchi Soya Industries Ltd.) v. Union of India & Ors.

(Civil Appeal No(s). 3833-3835 of 2025)

19 May 2025

[Abhay S. Oka and Ujjal Bhuyan,* JJ.]

Issue for Consideration

1. Whether encashment of bank guarantees furnished under court orders can be treated as "payment of duty" for the purpose of refund under Section 27 of the Customs Act?
2. Whether the doctrine of unjust enrichment apply to amounts realized through such encashment?
3. Whether the Department was right in encashing the guarantees when the civil appeals were pending before this Court?

Headnotes†

Customs Act, 1962 – Encashment of bank guarantees furnished under interim orders of High Court – Whether such encashment amounts to "payment of duty" under Section 27 of the Act:

Held: Furnishing of a bank guarantee is a measure of securing revenue interest during litigation and cannot be equated with actual payment of duty – Encashment of such guarantees following dismissal of writ petitions does not amount to statutory duty 'paid' by the assessee within the meaning of Section 27 – The scheme of the Customs Act contemplates refund only where duty has been voluntarily or mandatorily deposited under assessment orders – In the present case, realization was only by coercive encashment of guarantees, and thus falls outside the ambit of Section 27 – Consequently, insistence on compliance with Section 27 requirements, including filing in prescribed form and proof of non-passing of incidence, was misplaced. [Paras 23, 30-31]

Doctrine of Unjust Enrichment – Applicability to amounts realized by encashment of bank guarantees:

* Author

Held: Doctrine inapplicable where no duty was 'paid' – Encashment of bank guarantee is realization of security and does not constitute a levy or collection of duty – Precedents in *Oswal Agro Mills Ltd. v. Asstt. Collector of Central Excise* (1994) 2 SCC 546 and *Somaiya Organics (India) Ltd. v. State of U.P.* (2001) 5 SCC 519 conclusively establish that such encashment cannot be treated as duty paid, and thus *unjust enrichment* principle has no application – High Court erred in relying on *DCW Ltd. v. Union of India* (2016) 15 SCC 789, which involved encashment expressly authorized after default of assessee. The facts in that decision are distinguishable and not comparable – Accordingly, *doctrine of unjust enrichment* not attracted in the present case. [Paras 19.2, 25-29]

Levy and Collection of Duty – Distinction emphasized in assessing validity of Revenue's action:

Held: Levy refers to imposition of duty; collection refers to actual realization – Furnishing of a bank guarantee is neither levy nor collection – Encashment without legal authority amounts to coercive realization, not a statutory collection – Constitution Bench in *Somaiya Organics (India) Ltd. v. State of U.P.* (2001) 5 SCC 519 underscored that what cannot be collected directly under law cannot be realized indirectly through guarantee encashment – Retention of such amounts is contrary to Article 265 of the Constitution, which prohibits tax collection without authority of law. [Paras 27-29]

Refund Claims Under Section 27, Customs Act – Scope and inapplicability in cases of coercive encashment:

Held: Section 27 states that any person claiming refund of any duty may make an application for refund of the same with interest to the Assistant Commissioner of Customs or Deputy Commissioner of Customs if he had paid the duty in pursuance of an order of assessment or borne by him and evidence either documentary or other to establish that the amount of duty and interest which is claimed as refund and that the incidence of such duty and interest had not been passed on by him to any other person has to be produced – Encashment of bank guarantees does not fall in this category and consequently, procedural rigour of Section 27, including filing of supporting financial documents, does not apply – A nine-Judge Bench of this Court in *Mafatlal Industries Ltd. v. Union of India* (1997) 5 SCC 536 considered various questions concerning

refund of excise and customs duty collected contrary to law including unjust enrichment – The amount of the disputed tax or duty that is secured by a bank guarantee cannot, therefore, be held to be paid to the revenue as held by in *Oswal Agro Mills Ltd. v. Assistant Commissioner of Central Excise, Division Ludhiana* (1994) 2 SCC 546 – Appellant entitled to refund directly on basis of this Court's ruling in *Union of India v. Param Industries Ltd.* (2016) 16 SCC 692 – Directions issued for refund with interest at 6% per annum from date of encashment until repayment. [Paras 23-24, 30-31]

Conduct of Revenue Authorities – Encashment of guarantees during pendency of appeal before the Supreme Court and claim of differential amount of duty – Whether justified:

Held: Revenue acted in undue haste in encashing guarantees in January 2013, despite the pendency of appeals against the High Court judgment before the Supreme Court – In *Oswal Agro Mills Ltd. v. Asstt. Collector of Central Excise, Division Ludhiana,* (1995) Supp. 3 SCC 65 the Supreme Court had held in similar set of facts that no bank guarantee could be encashed by the Revenue Department till the decision of the Court has become final – There was no direction by either High Court or Supreme Court permitting such encashment – Department could have insisted on extension of guarantees or awaited outcome – Retention of money even after this Court's decision in *Union of India v. Param Industries Ltd.* (2016) 16 SCC 692 declaring demand unlawful was wholly arbitrary and unsustainable – Such conduct condemned; refund with interest directed. [Paras 19.3, 25, 29, 31]

Case Law Cited

Oswal Agro Mills Ltd. v. Asstt. Collector of Central Excise **[1994] 1 SCR 650 : (1994) 2 SCC 546;** *Somaiya Organics (India) Ltd. v. State of U.P.* **[2001] 3 SCR 33 : (2001) 5 SCC 519;** *Oswal Agro Mills Ltd. v. Asstt. Commissioner of Central Excise* **(1995) Supp. 3 SCC 65 – relied on.**

Union of India v. Param Industries Ltd. **(2016) 16 SCC 692;** *Mafatlal Industries Ltd. v. Union of India* **[1996] Supp. 10 SCR 585 : (1997) 5 SCC 536;** *DCW Ltd. v. Union of India* **(2016) 15 SCC 789;** *Synthetics & Chemicals Ltd. v. State of U.P.* **[1989] Supp. 1 SCR 623 : (1990) 1 SCC 109;** *State of U.P. v. Synthetics and Chemicals Ltd.* **[1991] 3 SCR 64 : (1991) 4 SCC 139 – referred to.**

List of Acts

Customs Act, 1962; Central Excise Act, 1944; Constitution of India.

List of Keywords

Custom Act 1962; Section 27; Doctrine of unjust enrichment; Central Excise Act, 1944; Encashment of guarantees; Payment of duty Act, 265.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No(s). 3833-3835 of 2025

From the Judgment and Order dated 28.04.2016 of the High Court of Gujarat at Ahmedabad in SCA Nos. 14540, 14541 and 14542 of 2015

Appearances for Parties

Advs. for the Appellant:
Balbir Singh, Sr.Adv., Rajesh Rawal, Karan Sachdev, Ashwani Kumar.

Advs. for the Respondents:
Ms. Nisha Bagchi, Sr.Adv., Nalin Kohli, Sarthak Karol, Abhishek Singh, Pratyush Srivastava, B. Krishna Prasad.

Judgment / Order of the Supreme Court

Judgment

Ujjal Bhuyan, J.

The present civil appeals by special leave are directed against the judgment and order dated 28.04.2016 passed by the Division Bench of the High Court of Gujarat at Ahmedabad (briefly 'the High Court' hereinafter) in Special Civil Application Nos. 14540, 14541 and 14542 of 2015 (*Ruchi Soya Industries Limited Vs. Union of India & Ors.*).

2. Subject-matter of all the three appeals is identical and parties to the proceedings are common. Therefore, all the appeals were heard together and are being disposed of by this common judgment and

order. In fact, facts in all the appeals are similar except the quantity of refund involved.

3. For a proper perspective, relevant facts may be noted.

4. M/s M.P. Glychem Industries Limited ('M.P. Glychem' for short) imported certain quantity of crude degummed soyabean oil of edible grade in bulk at Jamnagar and filed bill of entry on 02.09.2002 seeking clearance of the imported goods for home consumption. Customs department (department) did not clear the goods on the ground that appellant was required to pay higher customs duty on the basis of tariff value fixed for the imported goods in terms of Section 14(2) of the Customs Act, 1962 (referred to hereinafter as 'the Customs Act'). Contention of the appellant was that at the time of the import of the goods the concerned notification issued by Government of India fixing tariff value under Section 14(2) of the Customs Act had not come into effect. Therefore, appellant was liable to pay duty only in terms of the provisions contained in Section 14(1) of the Customs Act.

5. Since there was an impasse with the imported goods being held up, appellant filed Special Civil Application No. 9308 of 2002 before the High Court challenging the validity of the notification issued by the Government of India fixing the tariff value of the imported goods i.e. crude degummed soyabean oil (also referred to hereinafter as the 'subject goods') as also the date of coming into effect of the said notification. One of the grounds of challenge was that the notification was not available for sale and was, therefore, not in the public domain. High Court passed an order dated 07.10.2002 admitting the writ petition and granted interim relief to the effect that for clearance of the goods in question, appellant should furnish a bank guarantee for the difference of duty of customs under Sections 14(1) and 14(2) of the Customs Act, clarifying that this arrangement would be subject to order of final assessment.

6. On 09.10.2002, appellant had furnished bank guarantee for the differential amount of Rs. 9,19,801.00 through its banker in favour of the department. In two other writ petitions, on the same issue, bank guarantees to the extent of Rs. 45,99,006.00 and Rs. 22,25,052.00 being the differential amounts of duty were furnished. Upon furnishing the bank guarantees as above by the appellant, the subject goods were allowed to be cleared by paying customs duty payable under Section 14(1) of the Customs Act.

7. In the meanwhile, M/s M.P. Glychem Industries Limited stood merged with M/s Ruchi Soya Industries Limited in terms of the order of the Bombay High Court dated 30.06.2006 and thereafter came to be known as M/s. Ruchi Soya Industries Limited.

8. Special Civil Application No. 9308 of 2002 alongwith the other two writ petitions were finally decided by the High Court *vide* the judgment and order dated 13.09.2012. All the three writ petitions were dismissed. Consequently, the interim relief granted earlier stood vacated.

9. Against the aforesaid judgment and order dated 13.09.2012, appellant approached this Court in Civil Appeal Nos. 1808-1813 of 2013.

10. While the civil appeals were pending before this Court, the department on 28.01.2013 encashed the bank guarantees and appropriated the sums covered by the bank guarantees.

11. Civil Appeal Nos. 1808-1813 of 2013 were heard alongwith other similar civil appeals by this Court and were disposed of by the common order dated 05.05.2015. This order has since been reported in (2016) 16 SCC 692 (*Union of India Vs. Param Industries Limited*). This Court held that though the notification might have been published on the date when the goods were cleared, it was not offered for sale by the Central Board of Excise and Customs (briefly 'the Board' hereinafter), which event took place much thereafter. Therefore, it was not justified and lawful on the part of the department to claim the differential amount of duty on the basis of the said notification. The appeals were accordingly allowed only on this point without going into the other issues.

12. On 04.06.2016, appellant filed three similar refund applications before the department seeking refund of the differential duty amounts which were secured by means of the bank guarantees. Quantum of differential duty amounts collected by the department by encashing the bank guarantees are as under:

    (i) first writ petition: Rs. 9,19,801.00;

    (ii) second writ petition: Rs.45,99,006.00; and

    (iii) third writ petition: Rs. 22,25,052.00.

13. Department issued letter dated 17.06.2015 to the appellant raising two issues: first was regarding non-filing of refund application in proper format and the second was with regard to non-submission of documents like balance sheet, profit and loss account etc. for

the relevant period to show that the claim of refund is not hit by the principle of unjust enrichment.

14. According to the appellant, in the facts of the present case, question of unjust enrichment did not rise and the said principle is certainly not applicable. Contention of the appellant is that the details sought for were in consequence of the requirements of Section 27 of the Customs Act but Section 27 which encapsulates the unjust enrichment principle has no applicability in the present case. No additional or differential duty was paid by it; the bank guarantees were furnished as security to secure the amounts of differential duty on orders of the High Court. Be that as it may, appellant submitted reply letter dated 30.06.2015 pointing out that though it had complied with the requirements of the letter dated 17.06.2015, the amounts covered by the bank guarantees encashed by the department had become refundable in terms of the judgment of this Court dated 05.05.2015 in *Param Industries Limited* (supra). Section 27 is not applicable in the facts of the case. It was, therefore, contended that the department should not insist on filing of the documents sought for to prove that the incidence of the differential duty had not been passed on to the customers and, therefore, there was no unjust enrichment by the appellant.

15. However, department ignored the above contention of the appellant and instead issued another letter dated 30.07.2015 again insisting upon submission of the same set of documents. According to the appellant, despite several personal meetings and oral requests, department remained adamant that appellant should discharge the burden that it had not unjustly enriched itself and, therefore, would be entitled to the refund.

16. At that stage, appellant filed Special Civil Application No. 14540 of 2015 before the High Court. Two other writ petitions were also filed being Special Civil Application Nos. 14541 and 14542 of 2015. Prayer made was for quashing of letters dated 17.06.2015 and 30.07.2015 and for a direction to the department to refund the amounts covered by the bank guarantees forcibly encashed by the department without insisting on compliance with Section 27 of the Customs Act.

17. By the common judgment and order dated 28.04.2016, High Court dismissed all the three writ petitions. However, it was observed that despite dismissal of the writ petitions, it would be open to the appellant to produce necessary documents before the department as demanded

in the context of the question of unjust enrichment. High Court directed that if such documents were produced by 31.07.2016, department should process the refund applications in accordance with law.

18. Aggrieved thereby, the related special leave petitions were filed. By order dated 22.08.2016, this Court had issued notice and directed that no coercive steps be taken in the meantime. Finally, while hearing the special leave petitions on 04.03.2025, leave was granted. In the hearing held on 04.03.2015, I.A. No. 41371 of 2024 was allowed, by which the name of the appellant was changed from M/s. Ruchi Soya Industries Limited to M/s. Patanjali Foods Limited.

19. Mr. Balbir Singh, learned senior counsel for the appellant, assailing the impugned judgment submits that High Court misdirected itself by holding that the doctrine of unjust enrichment is applicable to the facts of this case and thereby dismissing the writ petitions. Learned senior counsel submits that the real substantive issue is whether forcible encashment of bank guarantees by the department which were offered as security by the appellant in terms of the interim order of the High Court, following dismissal of the writ petitions can be said to be the duty or the differential duty 'paid' by the appellant.

    19.1. Learned senior counsel submits that provisions contained in Section 27 of the Customs Act is *pari materia* to Section 11B of the Central Excise Act, 1944 ('Central Excise Act' hereinafter). Encashment of bank guarantee cannot be equated with payment of duty as per language employed in Section 27 of the Customs Act or for that matter Section 11B of the Central Excise Act.

    19.2. This issue has already been set at rest by this Court in *Oswal Agro Mills Ltd. Vs. Asstt. Collector of Central Excise, Division Ludhiana*[1]which decision has been endorsed by a Constitution Bench of this Court in *Somaiya Organics (India) Ltd. Vs. State of U.P.*[2]. This Court has held that the doctrine of unjust enrichment will not come into play when bank guarantee is offered as security and the same is encashed by the revenue

1 (1994) 2 SCC 546

2 (2001) 5 SCC 519

after the case is lost by the assessee. It has been held that it cannot be said that assessee had paid the amount as duty; therefore, such encashment would be out of the scope of unjust enrichment.

19.3. Learned senior counsel submits that after this Court had allowed the appeals of the appellant in *Param Industries Limited* (supra) by holding that it was not justified and lawful on the part of the department to claim the differential amount of duty on the basis of the notification which was not offered for sale by the Board at the time when the goods were cleared, action of the respondents in retaining the money after forcibly encashing the bank guarantees offered by the appellant as security for the differential amount of duty has become completely untenable. In fact, respondents had acted in extreme haste while encashing the bank guarantees knowing fully well that the judgment of the High Court was under active consideration of this Court. Respondents could have, rather ought to have, awaited the decision of this Court. Now that this Court has upheld the contention of the appellant, on one pretext or the other, respondents are trying to frustrate the refund by raising the untenable plea of unjust enrichment. *Stricto sensu,* he submits, it is not a case of refund because no duty was 'paid' by the appellant. Section 27 of the Customs Act therefore would not be attracted. Appellant is thus not required to follow the procedure in terms of Section 27 of the Customs Act.

19.4. He submits that withholding of the amounts after unilaterally and arbitrarily encashing the bank guarantees though this Court has upheld the contention of the appellant that no differential duty was required to be paid for the imported goods, has become totally unsustainable in law. In the circumstances, respondents should be directed to forthwith release the amounts illegally retained to the appellant. Therefore, impugned judgment and order is liable to be set aside.

20. *Per contra,* Ms. Nisha Bagchi, learned senior counsel appearing for the respondents submits that appellant had furnished bank guarantees, in all total three bank guarantees, covering the differential amounts of duty, the details of which are as under:

Date	Amount
09.10.2002	Rs.9,19,801.00
10.10.2002	Rs.45,99,006.00
24.10.2001	Rs.22,25,052.00

20.1. After the writ petitions were dismissed by the High Court on 13.09.2012, respondents encashed the bank guarantee for Rs.9,19,801.00 on 22.01.2013 and the other two bank guarantees on 28.01.2013. Respondents were under no legal injunction not to encash the bank guarantees after dismissal of the writ petitions.

20.2. She submits that though the appellant had filed three refund applications on 04.06.2015, it did not attach any relevant document in support of the refund claims as required under Section 27 of the Customs Act. Therefore, respondent No. 3 had informed the appellant *vide* letter dated 17.06.2015 that the claims of refund were not filed in proper format and necessary documents were not attached. Though the claims were subsequently filed in proper format but still necessary documents were not annexed. Therefore, respondent No. 3 again wrote to the appellant on 30.07.2015 to submit the requisite documents. Instead of complying with such lawful request of respondent No. 3, appellant approached the High Court by filing writ petitions. High Court rightly dismissed the writ petitions but still gave liberty to the appellant to claim refund by submitting the requisite documents.

20.3. She further submits that in compliance to the impugned order appellant had submitted documents pertaining to the financial year 2015-16 only *vide* letter dated 25.07.2016 instead of submitting relevant documents in entirety certified by a chartered accountant which could duly establish how the differential amounts of duty have been accounted for in the books of account for the corresponding financial years 2001-02 and 2002-03. Despite non-cooperation of the appellant, respondent No. 3 sanctioned the refund in terms of Section 27 of the Customs Act but ordered for crediting the refund amounts to the Consumer Welfare Fund in terms of Section 28C read with Section 28D of the Customs Act for

non-compliance with the obligations under the doctrine of unjust enrichment.

20.4. Learned senior counsel submits that in the facts and circumstances of the case contention raised by the appellant is wholly misconceived. It is a case where appellant would be entitled to refund provided it satisfies the requirements under Section 27 of the Customs Act which it has failed to do. There is no merit in the appeals. Accordingly, the appeals are liable to be dismissed.

21. Submissions made by learned counsel for the parties have received the due consideration of the Court.

22. Since the respondent as well as the High Court has held that the doctrine of unjust enrichment would be applicable to the facts of the present case, and therefore, the appellant would be required to comply with the procedure and requirements under the said principle, let us briefly deal with this doctrine. Section 27 of the Customs Act and Section 11B of the Central Excise Act deal with the question of refund. Refund can be denied either in part or wholly by applying the doctrine of unjust enrichment. Before we examine the above concept, it would be apposite to refer to Section 27 of the Customs Act. Section 27(1) of the Customs Act as it stood at the relevant time reads thus:

> (1) Any person claiming refund of any duty-
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> (i) paid by him in pursuance of an order of assessment; or
>
> (ii) 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 that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section and the same shall be dealt with in accordance with the provisions of sub-section (2):

Provided further that the limitation of one year or six months, as the case may be, shall not apply where any duty and interest, if any, paid on such duty has been paid under protest:

Provided also that in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 25, the limitation of one year or six months, as the case may be, shall be computed from the date of issue of such order:

Provided also that where the duty becomes refundable as a consequence of judgment, decree, order or direction of the appellate authority, appellate tribunal or any court, the limitation of one year or six months, as the case may be, shall be computed from the date of such judgment, decree, order or direction.

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 under section 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.

23. Basic thrust of the aforesaid provision is that any person claiming refund of any duty 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 if he had paid the duty in pursuance of an order of assessment or borne by him. Such application besides being required to be filed within the stipulated period should also be accompanied by such documentary and other evidence to establish that the amount of duty and interest which is claimed by way of refund was collected from or paid by him and that the incidence of such duty and interest had not been passed on by him to any other person.

24. This doctrine was examined by a nine-Judge Bench of this Court in *Mafatlal Industries Ltd. Vs. Union of India*[3]. This Court considered various questions concerning refund of excise and customs duty collected contrary to law, in all its shades, and also examined the concept of unjust enrichment. Thereafter, the following propositions were culled out with the disclaimer that those are not exhaustive:

    i. Where a refund of tax/duty is claimed on the ground that it has been collected from the petitioner/plaintiff by misinterpreting or misapplying the provisions of the Central Excise Act or the Customs Act or by misinterpreting or misapplying any of the rules, regulations or notifications issued under the said enactments, such a claim has necessarily to be preferred under and in accordance with the provisions of the respective enactments before the authorities specified thereunder and within the period of limitation prescribed therein. While no suit is maintainable in that behalf, writ jurisdiction under Article 32 or under Article 226 would be available.

    ii. All refund claims will have to be filed and adjudicated under the provisions of the Central Excise Act or the Customs Act, as the case may be.

    iii. Where, however, a refund is claimed on the ground that the provisions of the concerned Act under which it was levied has

3 (1997) 5 SCC 536

been held to be unconstitutional, such a claim being a claim outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition. This principle is, however, subject to an exception. Where a person approaches the High Court or the Supreme Court challenging the constitutional validity of a provision but is unsuccessful, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground. This is because insofar he is concerned, the decision has become final and cannot be reopened on the basis of a decision on another person's case. A refund claim in such a situation cannot be governed by the provisions of the Central Excise Act or the Customs Act.

iv. A claim for refund can succeed only if the petitioner/ plaintiff establishes that he has not passed on the burden of duty to another person/other persons. His refund claim shall be allowed/ decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so passed on, as the case may be. This is because where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. In such a case, the real loss or prejudice is suffered by the person who has ultimately borne the burden. If such a person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that such amount is retained by the State. The amount is retained by the State on behalf of the people. There is no immorality or impropriety involved in such a proposition.

v. The doctrine of unjust enrichment is a just and salutary doctrine. It is based on the principle that no person can seek to collect duty from both ends. Power of the court is not meant to be exercised for unjustly enriching a person. This doctrine is, however, inapplicable to the State as the State represents the people and no one can speak of the people being unjustly enriched.

vi. It is not open to any person to make a refund claim on the basis of a decision of the court or tribunal rendered in the case of another person.

vii. In case of indirect taxes like central excise and customs duty, the tax collected without the authority of law shall not be refunded

to the claimant unless he alleges and establishes that he had not passed on the burden of duty to a third party and that he has himself borne the burden of the said duty.

viii. Both Section 11B of the Central Excise Act and Section 27 of the Customs Act provide for the purchaser making the claim for refund provided he is able to establish that he has not passed on the burden to another person. Section 11B of the Central Excise Act and Section 27 of the Customs Act therefore cannot be said to be a device to retain illegally collected taxes by the State.

25. In *Oswal Agro Mills Ltd. Vs. Asstt. Collector of Central Excise, Division Ludhiana*[4] (*Oswal Agro Mills Ltd.1*), this Court noted that there was a dispute between Oswal Agro Mills and the excise department as to whether the goods under dispute were liable to excise duty under tariff item No. 15(1) or 15(2). This Court upheld the contention of Oswal that the appellant was liable to pay excise duty under tariff item No. 15(1). Appeal before this Court was filed against the decision of the tribunal which had taken a contrary view. This Court had passed an interim order that 50 percent of the dues be paid in cash and for the remaining 50 percent of the dues, equivalent amount of bank guarantee be furnished with further direction to keep alive the bank guarantee till the decision in appeal. After Oswal succeeded before this Court, it moved the authorities for refund of the excess amount deposited in pursuance of the interim order of this Court. Since no decision was being taken, Oswal moved the High Court. A direction was issued to the revenue by the High Court to decide the application for refund on merit while directing Oswal to get the bank guarantee extended till disposal of the claim for refund. Notwithstanding the same, revenue encashed the bank guarantee to meet the duty demand. This Court found the behaviour of the excise department highly improper and held that bank guarantees were furnished to secure the interest of the parties till determination of matters pending before the Court. No bank guarantee could be encashed till the decision of the Court. Revenue had no power by using its executive *fiat* to get the bank guarantee encashed. Allowing

4 (1995) Supp. 3 SCC 65

the appeal, this Court directed the revenue to refund the money so collected by encashing the bank guarantee forthwith.

26. It appears that revenue filed review petition for review of the aforesaid order in *Oswal Agro Mills 1*. In review it was contended by the revenue that refund was not permissible having regard to the provisions of Section 11B of the Central Excise Act. In *Oswal Agro Mills Ltd. Vs. Assistant Commissioner of Central Excise, Division Ludhiana*[5]*, (Oswal Agro Mills Ltd. 2)*, this Court referred to Section 11B of the Central Excise Act and held that the said provision applies when an assessee claims refund of excise duty. A claim for refund is a claim for repayment. It presupposes that the amount of excise duty has been paid over to the excise authorities. It is then that the excise authorities would be required to repay or refund the excise duty. It is in this factual backdrop that this Court posed the question for consideration as to whether it could be said that furnishing of a bank guarantee for all or part of the disputed excise duty pursuant to an order of the court is equivalent to payment of the amount of excise duty. This Court answered the above question in the negative and held as follows:

> **10.** The question, therefore, is whether it can be said that the furnishing of a bank guarantee for all or part of the disputed excise duty pursuant to an order of the court is equivalent to payment of the amount of the excise duty. In our view, the answer is in the negative. For the purposes of securing the revenue in the event of the revenue succeeding in proceedings before a court, the court, as a condition of staying the demand for the disputed tax or duty, imposes a condition that the assessee shall provide a bank guarantee for the full amount of such tax or duty or part thereof. The bank guarantee is required to be given either in favour of the principal administrative officer of the court or in favour of the revenue authority concerned. In the event that the revenue fails in the proceedings before the court the question of payment of the tax or duty, the amount of which is covered by

5 (1994) 2 SCC 546

the bank guarantee, does not arise and, ordinarily, the court, at the conclusion of its order, directs that the bank guarantee shall stand discharged. Where the revenue succeeds the amount of the tax or duty becomes payable by the assessee to the revenue and it is open to the revenue to invoke the bank guarantee and demand payment thereon. The bank guarantee is security for the revenue, that in the event the revenue succeeds its dues will be recoverable, being backed by the guarantee of a bank. In the event, however unlikely, of the bank refusing to honour its guarantee it would be necessary for the revenue or, where the bank guarantee is in favour of the principal administrative officer of the court, that officer to file a suit against the bank for the amount due upon the bank guarantee. The amount of the disputed tax or duty that is secured by a bank guarantee cannot, therefore, be held to be paid to the revenue. There is no question of its refund and Section 11-B is not attracted.

26.1. Having held so this Court found no merit in the review petition and reiterated the direction it had issued in *Oswal Agro Mills 1* to repay the amount collected upon encashment of the bank guarantee.

27. In *Somaiya Organics (India) Ltd.* (supra), a Constitution Bench of this Court was adjudicating a batch of appeals filed as a sequel to a judgment of this Court in *Synthetics and Chemicals Ltd. Vs. State of U.P.* wherein it was held that in respect of industrial alcohol, the States were not authorized to impose the impost they had purported to do. By that decision, this Court had overruled its earlier decision in *State of U.P. Vs. Synthetics and Chemicals Ltd.* wherein the validity of such an impost was upheld. In the second Synthetics case, it was declared that the impugned provisions were illegal prospectively. The question which arose for consideration in the batch of appeals was whether the vend fee which had been levied by the appropriate state enactments but not collected either by reason of orders of the court or otherwise could be collected then when the said provisions had been held to be invalid prospectively. In the course of this decision, Constitution Bench referred to Article 265 of the Constitution of India

and observed that the words used therein are 'levy' and 'collect'. In a taxing statute the words 'levy' and 'collect' are not synonymous words; while levy would mean assessement or charging or imposing tax, collect would be physical realisation of the tax which is levied or imposed. Collection of tax is normally a stage subsequent to levy of the same. Constitution Bench approved the decision in *Oswal Agro Mills 2* and held as follows:

> **35.** Furthermore, in view of the enunciation of the law by this Court in *Oswal Agro Mills 2*, a bank guarantee which is furnished cannot be regarded as payment of excise levy which the Government is entitled to retain. The furnishing of a bank guarantee is ordered normally in order to ensure collection of dues. Where, however, the State, as in the present case, has been held not to be entitled to collect or realise vend fee after 25-10-1989 it cannot be allowed to invoke the bank guarantee and realise the amount of vend fee. What cannot be done directly cannot be done indirectly either. Furnishing of bank guarantee is only a promise by the bank to pay to the beneficiary the amount under certain circumstances contained in the bank guarantee. Furnishing of bank guarantee cannot tantamount to making of payment as it was to avoid making payment of the vend fee that bank guarantees were issued. The respondents, in other words, are not entitled to encash the bank guarantees and realise vend fee in respect of the period prior to 25-10-1989.

28. On the other hand, we find that the High Court had placed reliance on a two-Judge Bench decision of this Court in *DCW Limited Vs. Union of India*[6] and held that the doctrine of unjust enrichment would be clearly applicable. Therefore, burden would be on the appellant to establish that it had not passed on the duty to third parties. We are afraid High Court erred in placing reliance on the said decision. In that case, the dispute was as regards classification of the imported goods. As per the classification of revenue, applicant was required to pay higher duty which the applicant disputed. This dispute was ultimately settled by the tribunal as per which a certain sum of money

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became refundable to the applicant, being the difference between the duty payable and the duty actually paid. When the applicant filed application for refund, the same was rejected by the proper officer relying on the doctrine of unjust enrichment. It was held that applicant could not satisfy the authorities that the burden was not passed on to the ultimate consumers. Therefore, applicant was not entitled to refund. When this was challenged before the High Court, the prayer for refund was partially allowed. Regarding the partial rejection High Court held that the amount covered by the partial rejection were not paid by the applicant pursuant to order passed by the High Court; In fact, High Court had issued positive direction to the applicant for deposit of the said amount. In spite of order of the High Court applicant defaulted in payment, whereafter the interim protection was vacated. Following the same, revenue encashed the bank guarantee. It was in that factual backdrop this Court held that the authority had rightly applied the doctrine of unjust enrichment. Applicant had defaulted in making the payment despite order of the court as a result of which the stay order was vacated. Thereafter, revenue recovered the amount of duty on encashment of the bank guarantee. This Court noted that High Court had after vacating the stay order permitted the revenue to encash the bank guarantee. It was in this context this Court opined that as far as refund was concerned it had to be decided in the light of the doctrine of unjust enrichment which was clearly applicable to the facts of that case.

29. We fail to understand as to how this decision would be applicable to the facts of the present case. In *DCW Limited* (supra), it was the court which had permitted the revenue to encash the bank guarantee after vacating the stay order because of persistent default on the part of the applicant in paying the duty. Insofar the present case is concerned, it is true that in the initial round of litigation, High Court had dismissed the claim of the appellant that it was not required to pay higher customs duty in terms of Section 14(2) of the Customs Act but liable to pay duty only in terms of Section 14(1). After the High Court had dismissed the writ petitions, appellant had filed special leave petitions before this Court which upon leave being granted were registered as Civil Appeal Nos. 1808-1813 of 2013. It is also true that there was no interim order in those batch of civil appeals. But there was no direction either or leave granted by the High Court to the respondents to encash the bank guarantees

furnished by the appellant on orders of the High Court covering the differential amount of duty. Without waiting for this Court to take a decision in Civil Appeal Nos. 1808-1813 of 2013, revenue displayed extreme haste and encashed the bank guarantees on 22.01.2013 and 28.01.2013 respectively. Ultimately, those civil appeals were allowed by this Court in *Param Industries Limited* (supra) holding that the concerned notification was not offered for sale by the Board when the imported goods were cleared; therefore, it was not justified and lawful on the part of the department to claim the differential amount of duty on the basis of the said notification.

30. It is thus evident that respondents had recovered the differential duty amount by adopting coercive method i.e. encashment of the bank guarantees which were offered as security for the differential amount of duty on orders of the High Court. Under the scheme of the Customs Act, duty is assessed provisionally or finally whereafter an assessment order or order-in-original is passed. Post assessment order or order-in-original, the concerned importer is required to pay the assessed duty. If the importer does not pay the duty, revenue can enforce recovery under Section 142 of the Customs Act as recovery of sums due to the Government. The key word in Section 27 of the Customs Act is 'paid'. Refund thereunder is permissible only if any duty is 'paid' by the claimant which subsequently becomes refundable either fully or in part. In the facts of the present case encashment of bank guarantees offered as security cannot be treated as payment of customs duty. Respondents could have either awaited the decision of this Court or could have directed the appellant to renew the bank guarantees. This they did not do. Instead they resorted to arbitrary encashment of the bank guarantees. Such encashment of bank guarantees cannot be treated as payment of duty or duty paid by a claimant. In such circumstances, the doctrine of unjust enrichment or Section 27 of the Customs Act would not be applicable. It is evidently clear that respondents are holding on to money of the appellant which they are not authorized to do so as per judgment of this Court in *Param Industries Limited* (supra). They have no authority in law to hold on to such money and, therefore, the same has become totally untenable.

31. In the circumstances, we set aside the impugned judgment and order of the High Court dated 28.04.2016 and direct the respondents to immediately refund the amounts covered by the bank guarantees to

the appellant. Since retention of such amounts is unjust and unlawful, the same would carry interest at the rate of 6 percent from the dates of encashment till repayment. Let the repayments with applicable interest be released to the appellant within a period of four months from today.

32. Appeals are allowed. However, there shall be no order as to cost.

Result of the case: Appeals allowed.

†*Headnotes prepared by:* Swathi H. Prasad, Hony. Associate Editor
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