(2007) 207 ELT 324 : (2006) 14 SCALE 40 : (2007) 2 SCC 503 : (2006) SCR 1197 Supp : (2007) 5 STR 177 : (2007) 7 STT 152

Supreme Court of India

Case No: Civil Appeal No. 5836 of 2006 (Arising out of S.L.P (Civil) No. 2985 of 2005)

Triveni Chemicals Limited		APPELLANT
	Vs	
Union of India (UOI) and Another		RESPONDENT

Date of Decision: Dec. 15, 2006

Acts Referred:
Central Excise and Customs Laws (Amendment) Act, 1991 â€” Section 11B, 3#Central Excises and Salt Act, 1944 â€” Section 11B, 11B(2), 11B(3), 12A#Contract Act, 1872 â€” Section 72

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Hon'ble Judges: S. B. Sinha, J; Markandey Katju, J

Bench: Division Bench

Advocate: Jay Savla and Reena Bagga, for the Appellant; Mohan Parasaran, A.S.G. and B. Krishna Prasad, for the Respondent

Final Decision: Allowed

Judgement

S.B. Sinha, J.
Leave granted.

2. Appellant is a manufacturer of ''Adhesive'' falling under Tariff Item No. 68 of the erstwhile schedule to the Central Excise and Salts Act, 1944.

It was classified as such. It deposited the excise duty under protest. A dispute arose as it was held to be classifiable under Tariff Entry No. 68 by

an order dated 11.11.1985. Indisputably, the said order attained finality. The question which arises for consideration is as to whether the appellant was entitled to refund of the excess amount of the excise duty paid by it. An application therefore was filed on 19.03.1985. The said application

was rejected. An appeal was preferred there against before the Collector of Central Excise (Appeals). By an order dated 07.09.1989, the said

appeal was allowed stating :

...The refund arising due to this order cannot be rejected on the plea that the department has preferred an appeal against the order of CEGAT in

the case of Nevichem Synthetic Industries on the basis of which the above order was passed. The facts and circumstances of the appellant''s case

and that of Nevichem Industries and distinguishable. It is seen that the Asstt. Collector has not based his conclusion upon the ratio of the said

CEGAT judgment. A casual reference has been made to the said CEGAT order by the Asstt. Collector after reaching a findings on the

classification of the impugned product. In view of the matter the appeal filed by the department against the CEGTAT order will have no effect on

the appellants even if it is decided in favour of the department.

Appellant thereafter filed several representations dated 21.09.1989 and 11.07.1991 for refund of the said amount. As despite the said

representations, the amount in question was not refunded, a notice of hearing was given to it on 06.08.1991.

3. It filed a writ petition. By reason of the impugned judgment, the writ petition of the appellant was dismissed, opining :

In view of the above, learned Standing Counsel Shri Malkan for the respondents was very much right in submitting that the respondents were not

required to file any reply to such type of petition. He has rightly submitted that at first instance there was gross delay of about 2 years in

approaching this Court by way of petition for the claim of their refund and no one had remained present on 26.8.1991, therefore, the respondent

no. 2 has not passed any order on the refund application of the petitioner. He submitted that in absence of any written order passed by the respondent no. 2, this Court should not entertain this petition. There is a lot of substance in this submission. If the respondent no.2 had at all

conveyed orally to the representative of the petitioner on 26.8.1991 that the petitioner was not entitled for any refund on the ground of unjust

enrichment then the petitioner could have requested the respondent No.2 in writing to pass such order in writing. But, nothing is done and it seems

that because of the delay of 2 years after sending reminder to the respondent No. 2 for refund, the petitioner approached this Court in October,

1991 by way of this petition taking advantage of the letter dtd. 6.8.1991 issued by the respondent No.2.

In view of the above discussion, this petition fails and is dismissed. Rule is discharged. However, there shall be no order as to costs.

4. Section 11B of the Central Excise Act, 1944, (for short, "the Act") as was applicable at the relevant point of time, read as under :

Section 11B: Claim for refund of duty.- (1) Any person claiming of any duty of excise may make an application for refund of such duty to the

Assistant Collector of Central Excise before the expiry of six months from the relevant date.

Provided that the limitation of six months shall not apply where any duty has been paid under protest.

(2) If on receipt of any such application, the Assistant Collector of Central Excise is satisfied that the whole or any part of the duty of excise paid

by the applicant should be refunded to him, he may make an order accordingly.

(3) Where as a result of any order passed in appeal or revision under this Act refund of any duty of excise becomes due to any persons the

Assistant Collector of Central Excise may refund the amount to such person without his having to make any claim in that behalf.

5. It underwent an amendment on or about 20.09.1991 by reason of Section 3 of the Central Excise and Customs Laws (Amendment) Act, 1991,

which reads as under :

Section 11B: Claim for refund of duty.- (1) Any person claiming refund of any duty of excise may make an application for refund of such duty to

the Assistant Commissioner of Central Excise before the expiry of six months from the relevant date in such form and manner as may be

prescribed and the application shall be accompanied by such documentary or other evidence including the documents referred to in Section 12A

as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from, or paid by,

him and the incidence of 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 Excise and Customs Laws (Amendment)

Act, 1991, such application shall be deemed to have been made under this Sub-section as amended by the said Act and the same shall be dealt

with in accordance with the provisions of Sub-section (2) substituted by the Act.

Provided further that the limitation of six months shall not apply where any duty has been paid under protest.

(2) If, on receipt of any such application, the Assistant Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise

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 of excise as determined by the Assistant Commissioner of Central Excise 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) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are

exported out of India;

(b) unspent advance deposits lying in balance in the applicant''s account current maintained with the Commissioner of Central Excise;

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;

(e) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person;

(f) the duty of excise borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify;

Provided further that no notification under Clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the

incidence of duty has not been passed on by the persons concerned to any other person.

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any

other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in

Sub-section (2)

The short question which arises for consideration before is as to whether in the peculiar facts and circumstances of this case, Section 11B, as

amended by Section 3 of the Central Excise and Customs Laws (Amendment) Act, 1991, would be applicable.

6. We have noticed hereinbefore that the application for refund was rejected by the Assessing Authority. It was, however, allowed by the

Appellate Authority. It is not in dispute that no further appeal was taken therefrom. The said order, therefore, attained finality. It matters little as to

whether the application for refund was in the prescribed form or not. The respondents herein could raise all contentions before the Appellate

Authority. In fact, before the original authority, a plea of unjust enrichment was raised. Such a plea, however, appears to have not been raised

before the Appellate Authority. If no such plea was raised, only because the appellant herein filed an application to be dealt with on the

administrative side for refund subsequently, the same would not, in our considered view, attract the provisions of Section 11B as inserted by the

Amending Act of 1991.

7. The application filed subsequently by the appellant was required to be filed to proceed with the matter on administrative side. Appellant had all

along been contending that despite such order, the amount in question had not been refunded. It was, therefore, obligatory on the part of the

concerned authorities to comply with the order passed by the Collector. The authorities were bound to do so in view of the doctrine of judicial

discipline. The same having not been done, in our opinion, the plea sought to be raised now that it was for the appellant to prove that the burden of

the duty had not been passed to the customers cannot be accepted.

Section 11B was inserted with retrospective effect. However, the retrospective effect and retroactive operation given to the said provision

confined only to cases where the applications for refund were pending. The said provision did not apply to a case where the proceeding had come

to an end before coming into force of the said amending provision.

8. Reliance placed by the learned Additional Solicitor General upon a decision in 299223 , in our opinion, is misplaced. Therein this Court

categorically held that the provision of Section 11B as amended in the year 1991 would not apply to a case where proceeding for refund had

come to an end. B.P. Jeevan Reddy, J. speaking for the majority, observed :

(xi) Section 11B applies to all pending proceedings notwithstanding the fact that the duty may have been refunded to the petitioner/plaintiff pending

the proceedings or under the orders of the Court/Tribunal/Authority or otherwise. It must be held that 272755 and 263750 have been correctly

decided. It is, of course, obvious that where the refund proceedings have finally terminated - in the sense that the appeal period has also expired -

before the commencement of the 1991 (Amendment) Act (September 19, 1991), they cannot be re-opened and/or governed by Section 11B(3)

(as amended by the 1991 (Amendment) Act). This, however, does not mean that the power of the appellate authorities to condone delay in

appropriate cases is affected in any manner by this clarification made by us.

K.S. Paripoornan, J. in his separate judgment observed:

...Sections 11B(2) and (3) cannot be made applicable to refunds already ordered by the court or the refund ordered by the statutory authorities,

which have become final. It follows from a plain reading of Section 11B, Clauses (1) (2) and (3) of the Act. The provisions contemplate the

pendency of the application on the date of the coming into force of the Amendment Act or the filing of an application which is contemplated under

law, to obtain a refund, after the Amendment Act comes into force. I am of the opinion, that if the said provisions are held applicable, even to

matters concluded by the judgments or final orders of courts, it amounts to stating that the decision of the court shall not be binding and will result

in reversing or nullifying the decision made in exercise of the judicial power. The legislature does not possess such power. The court''s decision

must always bind parties unless the condition on which it is passed are so fundamentally altered that the decision could not have been given in the

altered circumstances. It is not so herein. 265314

S.C. Sen, J. who delivered the minority opinion, observed :

I shall now examine the other provisions of the newly added sections. Sub-section (1) of Section 11B requires an application for refund to be

made. Sub- section (2) requires the Assistant Commissioner to pass an order of refund provided the conditions set out therein are fulfilled. Sub-

section (3) merely lays down that no refund shall be made except as provided in Sub-section (2). There is a non obstante clause that this will

operate notwithstanding anything to the contrary contained in any judgment, decree, order etc. It is obvious that new provisions will apply in cases

where applications for refund were made before the new provisions came into force and also subsequently. Sub-section (3) has no retrospective

effect. When a case has been finally heard and disposed of and no application for refund need be made, Sub-section (3) cannot apply. If there is a

judgment, decree or order which has to be carried out, the Legislature cannot take away the force and effect of that judgment, decree or order, except by amending the law retrospectively on the basis of which the judgment was pronounced.

We are not oblivious of the fact that this Court therein also dealt with the applicability of the provisions of Section 72 of the Indian Contract Act,

1872, but then such a contention was specifically required to be raised. If the same had not been raised, the Revenue at a latter point of time could

not be permitted to raise the said plea.

9. Strong reliance has been placed on 275334 . Therein, the question which arose for consideration was as to whether despite a concession made

by the assessee that it had passed on the burden to its sole distributor, the provision of Section 11B of the Act was attracted or not. The distributor

moved an application on 11.02.1997 for refund u/s 11B of the Act. It was in the aforementioned fact situation, this Court held that the burden to

prove that the incidence of duty was not passed on the applicant seeking refund. The said decision cannot be said to have any application in the

instant case.

10. For the reasons aforementioned, we are of the opinion that the High Court was not correct in opining that the appellant was bound to prove

that the incidence of duty was not passed on to its customers. The impugned judgment is set aside. The appeal is allowed with costs. Counsel'' fee

assessed at Rs. 10,000/-.