Bombay High Court Bussa Overseas And Properties ... vs Union Of India (Uoi) on 15 September, 2003 Equivalent citations: 2004 (2) BomCR 123, 2003 ECR 821 Bombay, 2003 (158) ELT 135 Bom Author: J Devadhar Bench: V Daga, J Devadhar JUDGMENT J.P. Devadhar, J. 1. At the outset, it must be stated that the Petitioners have fairly conceded before us that the refund of the amount claimed in the petition has already been recovered by the Petitioners from their customers. However, it is the case of the Petitioners that where refund arises on finalisation of the provisional assessment, the Customs authorities are obliged to refund the excess amount under Section 18(2) of the Customs Act even though the Petitioners have recovered that amount from the customers. In other words, the submission is that for refund arising under Section 18(2) of the Customs Act neither the limitation nor the principles of unjust enrichment incorporated in Section 27 of the Customs Act are applicable. 2. Petitioners are engaged in the business of importing various alcoholic preparations into India. During the period from February to July, 1986, the Petitioners had imported 7 consignments of compound alcoholic preparations on (concentrated extracts) for the manufacturing of Whisky and had filed bills of entry for home clearance. Since the goods were not allowed clearance, the Petitioners filed Writ Petition No. 2031 of 1986 in this Court. Pursuant to the interim order passed in the said Writ Petition No. 2031 of 1986, the 7 consignments were assessed provisionally under Section 18 of the Customs Act. Consequent to the provisional assessment, the Petitioners paid provisional duty of Rs. 99,32,438/-and cleared the goods. 3. On 9th October, 1990 [1991 (53) E.L.T. 165 (Bom.)], this Court disposed of a batch of Writ Petitions, including the above Writ Petition filed by the Petitioners. In accordance with that judgment, the Respondent No. 2 finally assessed the 7 Bills of Entry on 21-10-1990. On adjustment of the duty finally determined from the duty provisionally paid, excess duty of Rs. 39,71,412/- became refundable to the Petitioners under Section 18(2) of the Customs Act. 4. As the excess amount of duty arising on finalisation of the provisional assessment was not refunded, the Petitioners by their letters dated 26-12-1990 and 16-9-1991 called upon the Respondent No. 2 to refund the excess amount. By a letter dated 23-12-1991, the Second Respondent called upon the Petitioners to apply for refund under Section 27 of the Customs Act and also called upon the Petitioners to confirm as to whether the excess amount due to them has been recovered from the customers or not. By a letter dated 24-12-1991, the Petitioners informed the Respondent No. 2 that Section 27 of the Customs Act has no application in the present case, because under Section 18(2) of the Customs Act, if the amount finally assessed is less than the amount provisionally paid, then, the Customs Authorities were bound to refund the excess amount. By their letter dated 27-12-1991, the Petitioners once again informed the Respondent No. 2 that Section 27 of the Customs Act applies to refund of duty and has no application to the amount deposited by the Petitioners as 'revenue deposit'. Thereafter, the Petitioners addressed several letters seeking refund. However, by his letter dated 1-6-1992, the Respondent No. 2 maintained that Section 27 of the Customs Act is applicable to the case of the Petitioners. The present petition was filed on 25-11-1992 inter alia seeking an order to quash the

memo dated 23-12-1991 and the letter dated 1-6-1992 addressed by the Respondent No. 2 to the Petitioners and for an order directing the Respondents to refund the amount due on finalisation of the provisional assessment. 5. During the pendency of the petition, the Respondent No. 2 addressed a letter to the Petitioners on 23-11-1992 fixing a personal hearing on 4-12-1992. By their Advocates letter dated 1-12-1992, the Petitioners requested for an adjournment. The Respondent No. 2 declined to grant adjournment and by an ex parte order dated 4-12-1992 rejected the refund claim as time-barred. It was further held that the amount deposited by the Petitioners was not under the provisional assessment and in the absence of any documentary evidence to establish that the refundable amount has not been recovered from the customers, the claim is liable to be rejected as unsubstantiated and in admissible under Section 27 of the Customs Act. Petition has been amended to challenge the above ex parte order. The Constitutional validity of Section 27 of the Customs Act was also challenged in the petition, however, the same is not pressed at the final hearing. 6. Mr. Bharucha, learned Senior Advocate appearing on behalf of the Petitioners submitted that the impugned order incorrectly proceeds on the basis that the amount deposited by the Petitioners was not on account of provisional assessment made under Section 18 of the Customs Act. He submitted that from the endorsements made on the Bills of Entry and from the Bond executed by the Petitioners which is accepted by the Respondents, it is clear that the amount deposited at the time of clearance of the goods was pursuant to the provisional assessment made under Section 18(1) of the Customs Act, according to Mr. Bharucha, on final assessment, if the duty determined is less than the amount deposited under the provisional assessment, then, it is the obligation of the department to adjust the duty finally assessed against the amount paid and refund the excess amount under Section 18(2) of the Act and to such a refund, the provisions of Section 27 is not applicable. In other words, the submission was that the refund of the amount arising on finalisation of the provisional assessment is not governed by Section 27 of the Customs Act. 7. Mr. Bharucha submitted that Section 27 of the Customs Act applies to the refund of duty. He submitted that the amount deposited under Section 18 of the Customs Act is not duty and, therefore, for refund of the amount deposited under that Section, the provisions of Section 27 are not applicable. Since the word 'amount' is used in Section 18(2)(a) of the Act, Mr. Bharucha submitted that what is refundable under Section 18(2) on final assessment is the 'amount' and not 'duty' and, therefore, Section 27 of the Customs Act which applies to the refund of duty is not applicable to the excess amount refundable under Section 18(2) of the Customs Act. 8. According to Mr. Bharucha, Explanation II to Section 27 of the Customs Act applies only where refund applications are made after finalisation of the provisional assessments and not to the refund arising on finalisation of the the provisional assessment. To illustrate, Mr. Bharucha submitted that if the amount provisionally assessed on imported goods is Rs. 1,000/- and the duty finally assessed is Rs. 800/-, then to recover the excess amount of Rs. 200/-(Rs. 1,000 - Rs. 800) refund application under Section 27 of the Customs Act is not required to be made because, firstly, under Section 18(2), it is obligatory on the

part of the Customs authorities to refund such amount and secondly, the refund arising on finalisation of the provisional assessment is not duty. According to Mr. Bharucha, if according to the assessee the duty should have been limited to only Rs. 600/- then to recover Rs. 200/- (Rs. 800 - Rs. 600) the assessee will have to file a refund application under Section 27. In other words, according to Mr. Bharucha in the above illustration, the refund of Rs. 200/- arising on finalisation of the assessment is governed by Section 18(2) and for the refund of Rs. 200/- arising after finalisation of the assessment, the Explanation II to Section 27 of the Customs Act would apply. Accordingly, it was submitted that in the present case the refund arises on finalisation of the provisional assessment and, therefore, the refund is required to be made under Section 18(2) and not under Section 27 of the Customs Act. 9. In support of his contention Mr. Bharucha relied upon the decision of the Apex Court in the case of Mafatlal Industries Ltd. v. Union of India , particularly Para 95 of the said judgment, wherein it is held that where the duty provisionally assessed is in excess of the duty finally assessed, then, the excess amount refundable to the assessee consequent upon the adjustment under Rule 9B(5) will not be governed by Section 11B of the Central Excise Act, applying the same analogy, Mr. Bharucha submitted that the refund arising consequent upon the final assessment under Section 18(2), is not governed by the provision of Section 27 of the Customs Act. 10. In the case of Sinkhai Synthetics & Chemicals Pvt. Ltd. v. CCE, Aurangabad , the Apex Court, following the decision in Mafatlal Industries Ltd. (supra) held that where the excise duty is paid under protest, any recoveries or refunds arising on adjustment of duty finally assessed under Rule 9B(5) will not be governed by Section 11A or Section 11B of the Excise Act. Mr. Bharucha submitted that since Rule 9B of the Central Excise Rules is para materia with Section 18 of the Customs Act and Section 11B of the Central Excise Act, is para materia with Section 27 of the Customs Act, the ratio laid down by the Apex Court in the case of Sinkhai Synthetics (supra) is squarely applicable to the facts of the present case. 11. Mr. Bharucha relied upon the decision of the Madras High Court in the case of Collector of Central Excise v. India Tyre and Rubber Co. Ltd. reported in 1997 (94) E.L.T. 495 (Mad.) and submitted that once an assessment is provisional, it is provisional for all purposes and on finalisation of the assessment under Section 18(2) if refund is due, then, it is obligatory on the part of the Customs authorities to return the excess amounts deposited by the importer without applying the provisions contained in Section 27 of the Customs Act. 12. In the case of Hindustan Metal Pressing Works v. Commissioner of Central Excise reported in 2003 (153) E.L.T. 11 (S.C.), the Apex Court held that where the refund of the excise duty paid in excess was granted in 1989 while assessing the RT 12 returns, the principles of unjust enrichment incorporated in Section 11B of the Excise Act with effect from 20-9-1991 were not applicable. Mr. Bharucha relying upon the above decision submitted that on finalisation of the provisional assessment refund became due to the Petitioners under Section 18(2) before the amendment to Section 27 and, therefore, the principles of unjust enrichment incorporated in Section 27 with effect from 20-9-1991 is not applicable to the present case. 13. In the case of Serai Kella

Glass Works Pvt. Ltd. v. Collector of C. Excise , the Apex Court held that to a demand arising as a consequence of finalisation of provisional assessment, show cause notice under Section 11A of the Central Excise Act, 1944 is not required to be given because under Rule 173F read with Rule 173J of the Central Excise Rules, 1944, the assessee is required to pay the deficiency in duty by adjustment in account current within ten days of receiving the assessed return. Relying upon this Judgment, Mr. Bharucha submitted that to a refund arising on finalisation of the assessment under Section 18(2), there is no question of filing a separate refund application. He submitted that any recoveries or refund consequent upon finalisation of the provisional assessment under Section 18(2) are not governed by Section 28 or Section 27 of the Customs Act. 14. Mr. Desai, learned Senior Advocate appearing on behalf of the Respondents, on the other hand submitted that the amount deposited by the Petitioners at the time of clearance of the goods represents deposit of provisional duty. He submitted that Section 27 refers to refund of duty paid pursuant to an order of assessment. The term 'assessment' is defined under Section 2(2) of the Customs Act to include provisional assessment. Therefore, the application required to be made under Section 27 for refund of duty includes refund of duty paid under the provisional assessment. Accordingly, it was submitted that the Customs Authorities were justified in insisting upon the Petitioners to apply for refund under Section 27 of the Customs Act. 15. Mr. Desai further submitted by his oral and written submissions that the ratio laid down by the Apex Court in the case of Mafatlal Industries Ltd. (supra) that any recovery or refund consequent upon the adjustment under Rule 9B(5) of the Excise Rules will not be governed by the provisions of Section 11A or 11B of the Central Excise Act, is not applicable to the present case, because, the findings of the Apex Court are based on the provisions of the Central Excise Act and not the Customs Act. He submitted that under the Customs Act, liability to pay the customs duty arises as soon as the goods enter the territorial limits of India and if any person does not want to clear the goods, then the said goods can be sold in the market and the duty can be recovered. However, under the Excise Act, though the liability to pay the excise duty arises upon the manufacture of goods, the duty can be recovered only when the goods are removed from the factory. In view of this fundamental difference between the two Acts, it was submitted, that Section 12 read with Section 47 of the Customs Act are distinguishable from the provisions of Rule 9B of the Central Excise Act. Accordingly, Counsel for the Revenue submitted that the ratio laid down in Para 95 of the Judgment of the Apex Court in the case of Mafatlal Industries Ltd. (supra) is applicable only to the proceedings arising out of the Central Excise Act and the said ratio same is not applicable to the cases under the Customs Act. 16. Mr. Desai drew our attention to Para 95 of the Judgment in the case of Mafatlal Industries Ltd. (supra), relevant portion of which reads as under :- "However, if the final orders passed under Sub-rule 5 are appealed against or questioned in Writ Petition or suit, as the case may be, assuming that such a writ or suit is entertained and is allowed/decreed then any refund arising as a consequence of the decision in such appeal or such other proceedings, as the case may be, would be governed by Section 11B." As per

the above ratio laid down by the Apex Court, Mr. Desai submitted that, if the refund arising out of the adjustment made under Rule 9B(5) is subject matter of a Writ Petition, then any order passed in a Writ petition or suit granting refund would be governed by the provisions of Section 11B of the Central Excise Act. Applying the same analogy, Mr. Desai submitted that, in the present case, the refund arising under Section 18(2) of the Customs Act being the subject matter of the present Writ Petition, if any order for refund is passed in this Writ Petition then it will be governed by the provisions of Section 27 of the Customs Act. 17. Mr. Desai referred to the decision of the Apex Court in the case of Union of India v. Jain Spinners Ltd. and submitted that Section 27 is the only section under the Customs Act which deals with the refund and in view of the amendment to Section 27 with effect from 20-9-1991 refund can be granted only if the duty element is not passed on to the customer. In the present case, admittedly the duty element is passed on to the Customer and, therefore, the Petitioners are not entitled to any relief in the present petition. 18. In rejoinder, Mr. Sankhlecha submitted that once it is held that Section 27 of the Customs Act is not applicable to a refund arising or finalisation of the provisional assessment under Section 18(2) of the Customs Act, then, as held by the Apex Court in the case of Mafatlal Industries Ltd. (supra), there is no requirement in law on the part of the Petitioners to establish that there has been no unjust enrichment. Referring to the Customs (Provisional Duty Assessment) Regulations, 1963, Counsel for the Petitions submitted that the amount deposited with the Government at the time of provisional assessment is an estimate of duty most likely to be levied and such deposit is in the nature of security deposit. It was submitted that to get refund of security deposit, the Petitioners are not required to establish that there is no unjust enrichment. It was submitted that this issue is settled by the decision of the Tribunal in the case of Alcatel Modi Net Works Systems v. Commissioner of Customs reported in 2000 (117) E.L.T. 522 (Tribunal) and the said decision has been upheld by the Apex Court, by dismissing the Civil Appeal filed by the Revenue [see 2002 (146) E.L.T. A96 (S.C)]. It was submitted that on dismissal of the Civil Appeal filed by the Revenue, the order of CEGAT merges into the order of the Supreme Court and the same is binding on the Revenue. Counsel relied upon the decision of the Apex Court in the case of Kunhyammed v. State of Kerala reported in 2001 (129) E.L.T. 11 (S.C.) and submitted that once Civil Appeal is dismissed by the Apex Court with or without reasons, merger takes place and the law is declared. Therefore, once the decision of CEGAT in the case of Alcatel Modi (supra) is upheld by the Apex Court, the decision of the Tribunal becomes a binding precedent. 19. It was further submitted that the Writ sought in the present case is to direct the Officers to act in accordance with the provisions of the Customs Act, 1962. It was submitted that while exercising the Writ jurisdiction, the High Court can neither direct the respondents to disobey the Customs Act nor the High Court can direct the Customs Officers to act contrary to law as held by the Apex Court in the case of Kirloskar Pneumatic Co. reported in 1996 (84) E.L.T. 401 (S.C.) 20. It was further submitted that when the Parliament in its wisdom has thought it fit to incorporate the concept of

unjust enrichment in Section 27 of the Customs Act only for refund of duties and not to refund of amounts due under Section 18(2) of the Customs Act, then, it would not be open to the Court to substitute its decision on economic policy matters. He submitted that the Court cannot assess or evaluate what would be the impact of a particular immunity and whether it would serve the purpose in view or not. The Court cannot substitute its views for the Judgment of the legislative bodies. He submitted that when the Parliament amended the Customs Act in 1991 and brought in the concept of unjust enrichment for grant of refund of duties, it was felt by the Parliament that such concept of unjust enrichment would not be applicable for refund of excess amount due to the assessee on finalisation of the provisional assessment. Therefore, the Counsel submitted that the Court must respect the legislative wisdom and not introduce the concept of unjust enrichment for refund of the excess amount arising on finalisation of provisional assessment under Section 18 of the Customs Act, 1962, especially when the Parliament has not made the said concept applicable to such refund. 21. It was urged that in view of specific statutory provision contained Section 18 of the Customs Act, even while granting relief in a Writ Petition, the concept of unjust enrichment cannot be made applicable to the refund arising consequent to finalisation of provisional assessment. Relying upon the decision of this Court in the case of Killick Caribonium v. Union of India reported in 2002 (143) E.L.T. 491 (Bom.), it was submitted that the concept of unjust enrichment has been applied by Courts only in respect of refund of duties and not in respect of amounts deposited with the Government as a security deposit. It was submitted that the amount found in excess on finalisation of the provisional assessment is not duty and for refund of such excess amount the concept of unjust enrichment is not applicable. 22. It was submitted that even though the Petitioners have already recovered the amount of refund from their customers, in view of the concept of unjust enrichment being not applicable to the present case and there being no legislative mandate to the Government to credit the amounts due consequent on finalisation of assessment to the consumer welfare fund, the Respondents must be directed to act according to the mandate contained in Section 18 of the Customs Act and grant refund of the excess amount in their possession to the Petitioners with interest. It was submitted that the Petitioners had a vested right to obtain refund of the excess amount deposited under Section 18 of the Customs Act. It was submitted that even assuming Section 27 applies to the present case, the vested right of refund having accrued to the Petitioners prior to the incorporation of the principles of unjust enrichment in Section 27 with effect from 20-9-1991, the refund due the Petitioners cannot be denied. It was submitted that the Legislature has not made any law permitting the department to keep the amounts deposited with them provisionally after the finalisation of the assessment and, therefore, the excess amount due on finalisation of the provisional assessment must be directed to be refunded with interest. 23. We have heard the Counsel on both sides at length and we have perused the records as well as the written submissions filed by both sides. 24. The contention of the Petitioners in nutshell is that the refund of the excess amount arising on finalisation of the provisional assessment

must be granted, even if that amount is recovered by the Petitioners from their customers, because : (i) Under Section 18(2), there is an obligation on the part of the Customs Authorities to refund the excess amount arising on finalisation of the provisional assessment.

(ii) Explanation II to Section 27 applies to refund arising after the finalisation of the

(iii) Section 27 applies to the refund of duty. The refund that arises under Section 8(2) is

(iv) Assuming Section 27 applies, the principles of unjust enrichment incorporated in Section 27 with effect from 20-9-1991 does not affect the vested right to refund accrued to the petitioner prior to 20th September, 1991.

(v) Even though the Petitioners have recovered the amount from the customers, their being

25. Let us take the last contention first. According to the Petitioners, even though they have recovered the amount from the customers, there is no right with the Government to retain the amount of refund and, therefore, the Government must be directed to refund the amount with interest. This contention of the Petitioners is wholly misconceived and is untenable in the light of the decision of the Apex Court. While upholding the constitutional validity of Section 27 of the Customs Act both before and after the 1991 amendment, the Apex Court in the case of Mafatlal Industries Ltd. (supra) inter alia held at Para 108 as follows:
"The doctrine of unjust enrichment is a just and salutory doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched."

Thus, the Nine Judges Bench of the Apex Court in the case of Mafatlal Industries (supra) held that the powers of the Court is not to be exercised for unjustly enriching a person. While holding that all claims for refund must be filed and adjudicated under Section 27 of the Customs Act, the Apex Court in Paras 99 and 107 of its judgment carved out two exceptions, namely, one pertaining to refund of unconstitutional levy and another in the case of goods used in captive consumption. Thus, as per the dictum laid down by the Apex Court in the case of Mafatlal Industries (supra) all claims of refunds arising under the Customs Act except in two cases set out hereinabove are governed by the principles of unjust enrichment contained in Section 27 of the Customs Act. 26. Later on, the Apex Court in the case of Union of India v. Solar Pesticides Limited overruling the Bombay High Court decision held that even in respect of duty paid on raw materials imported and captively consumed in

the manufacture of finished goods, the refund can be allowed only when the incidence of such duty has not been passed on to the purchaser of finished goods. Subsequently, in the case of S.R.F. Limited v. Assistant Collector of Central Excise , the Apex Court held that even in the case of unconstitutional levy, the assessee would not be entitled to refund unless it is established that the incidence of duty has not been passed on to others, Thus, the ratio laid down by the Apex Court in the case of Mafatlal Industries (supra), Solar Pesticides Pvt. Ltd. (supra) and S.R.F. Limited (supra) conclusively establish that all claims of refund under the Customs Act must pass the test of 'unjust enrichment' contained in Section 27 of the Act and unless it is established that the duty element has not been passed on to others, no refund can be granted. In the light of the above dictum laid down by the Apex Court, it is not open to the Petitioners' to contend that in respect of the refund arising under Section 18 of the Customs Act, the principles of unjust enrichment contained in Section 27 of the Customs Act are not applicable. In the present case, since the incidence of duty element has been admittedly passed on to the consumer, no direction can be given to the Customs Authorities to refund the amount as it results in unjust enrichment to the Petitioners. 27. The contention of the Petitioners that once the refund is due under Section 18(2), then the Customs authorities are under an obligation to refund the amount is also without any merit because, from a bare perusal of Section 18 of the Customs Act it is seen that no such obligation is cast upon the Customs authorities. Section 18 merely entitles the assessee to get refund if the duty finally determined in less than the duty paid provisionally. Moreover, Section 18 cannot be read in isolation. It has to be read with Section 27 of the Customs Act. Explanation II to Section 27 of the Customs Act (Explanation 1 prior to 1-8-1998) provides that to obtain refund of any duty paid provisionally under Section 18, an application for refund must be made within the period of limitation prescribed therein. The limitation prescribed under Section 27 of the Customs Act requiring filing of an application for refund of duty arising on finalisation of the provisional assessment in the case of import made by any individual for his personal use or by Government or by any educational research or charitable institution or hospital, is, before the expiry of one year and in any other case before the expiry of six months from the date of adjustment of duty after the final assessment. In other words, the refund of duty arising on finalisation of the provisional assessment is governed by the limitation prescribed under Section 27 of the Customs Act. Therefore, even though the Petitioners are entitled to the refund on finalisation of the assessment under Section 18, to obtain that refund, the Petitioners are required to make an application within the period of limitation prescribed under Section 27 of the Customs Act. That is the scheme of the Customs Act. If the Customs authorities were under an obligation to refund the amount due under Section 18 of the Act then the Explanation II to Section 27 becomes redundant or nugatory. Therefore, the construction put forth by the Petitioners which runs counter to the express provision of the statute cannot be accepted. In fact, the Apex Court in the case of Mafatlal Industries Ltd. (supra) at Para 99 of its judgment has held that all refund claims except in the case of unconstitutional

levy must be filed and adjudicated under Section 27 of the Customs Act. Later on it is held by the Apex Court that even the unconstitutional levy is governed by the principles of unjust enrichment. Therefore, the contention of the Petitioners that Section 27 does not apply to refund due under Section 18 and the Customs authorities are obliged to refund the amount due under Section 18 without the application of Section 27 cannot be accepted. 28. The next contention of the Petitioners that the Explanation II to Section 27 applies to the refund arising after the finalisation of the assessment and not to the refund arising on finalisation of the assessment is also without any merit. According to the Petitioners, if the amount paid provisionally is Rs. 1000/-and the duty finally assessed is Rs. 800/- then to obtain refund of Rs. 200/- (Rs. 1000 - Rs. 800) the Explanation II to Section 27 is not applicable. According to the Petitioners, it is only when the assessee feels that the amount of duty should have been limited to Rs. 600/- then to recover the differential amount of Rs. 200/- (Rs. 800 - Rs. 600) the Explanation II to Section 27 would apply. This ingenious argument is wholly unsustainable. Once the duty is paid provisionally under Section 18(1) 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. 29. It was next contended that the refund arising under Section 18 of the Act is not refund of duty and, therefore, Section 27 which applies to refund of duty, is not applicable to the present case. There is no merit in this contention as well. Section 47 of the Customs Act provides for clearance of the goods for home consumption only after the importer pays the import duty as assessed. Assessment can be either under Section 17 or 18. In this petition, we are concerned with the provisional assessment of duty under Section 18 of the Customs Act. Section 18(1) of the Act permits provisional assessment pending (a) production of such documents or (b) furnishing of such information or (c) completion of such test or enquiry as are deemed necessary by the proper officer for the purpose of assessment of duty. Duty determined on provisional assessment is the provisional duty which is required to be paid before clearance of the goods. If the amount of duty determined provisionally falls short of, or is in excess of the duty finally assessed under Section 18(2), then, the importer is required to pay the deficiency in duty or be entitled to refund duty as the case may be. Customs (Provisional Duty

Assessment) Regulations, 1963 provides for the mechanism of determining the provisional assessment of duty. What is determined on provisional assessment is the provisional, duty payable on the imported goods. On final assessment, if the duty determined is less than the duty provisionally paid, then the differential amount of duty is liable to be refunded. Therefore, the words 'amount so paid' in Section 18(2)(a) are referrable to the amount of duty paid on provisional assessment. It cannot be said that because the words 'amount so paid' is used in Section 18(2)(a), the payment made provisionally is not payment of provisional duty. The heading of Section 18 of Customs Act itself is 'provisional assessment of duty'. Moreover, Section 18(1) expressly uses the words 'duty provisionally assessed'. Therefore, what is assessed provisionally under Section 18 is the duty and the imported goods are cleared for home consumption under Section 47 of the Customs Act only on payment of duly, whether assessed provisionally or finally. In either case, the amount paid is duty. If, on final assessment, the duty paid provisionally is found to be more then, the differential amount become refundable, subject to the limitation prescribed under Section 27 of the Customs Act. The contention of the Petitioners that the amount paid on provisional assessment is not duty cannot be accepted, because without payment of duty, the goods are not allowed clearance under Section 47 of the Customs Act. Therefore, what is paid on provisional assessment is the provisional duty and what becomes refundable on final assessment is the differential duty between the duty provisionally paid and the duty finally assessed. Section 27 of the Customs Act, applies to refund of duty paid pursuant to an order of assessment. Section 2(2) of the Customs Act defines the word "assessment" to include provisional assessment. Therefore, refund of duty paid on provisional assessment is squarely covered by Section 27 of the Customs Act. 30. The next contention of the Petitioners is that even if 27 of the Customs Act applies to the present case, the principles of unjust enrichment incorporated in Section 27 with effect from 20-9-1991 will not apply to the case of the Petitioners because vested right to refund accrued to the Petitioners prior to the amendment of Section 27. This contention of the Petitioners is also unacceptable. First proviso to Section 27 of the Customs Act expressly provides that the applications for refund made before the commencement of the 1991 amendment, shall be dealt as per the amended provisions of Section 27 of the Customs Act. Therefore, although vested right of refund accrued to the Petitioners prior to 20-9-1991 any refund to be given after, 20-9-1991 is governed by the principles of unjust enrichment incorporated in Section 27 of the Customs Act. 31. Let us now consider various decision cited before us. On behalf of the Petitioners. Heavy reliance was placed by the Counsel for the Petitioners on Para 95 of the judgment of the Apex Court in the case of Mafatlal Industries (supra) wherein it is held that any recoveries or refunds consequent upon the adjustment under Rule 9B(5) of the Central Excise Rules are not governed by Section 11A or Section 11B of the Central Excise Act. Relying upon the above observation it was contended that the principles of unjust enrichment contained in Section 27 are not applicable to the refund arising under Section 18 of the Customs Act. This contention of the Petitioners is totally misconceived. Although Section 18 of the Customs Act is substan-

tially similar to Rule 9B of Central Excise Rules, there was material difference between the two Acts at the relevant time. It must be remembered that the Apex Court in the case of Mafatlal Industries (supra) has held that only in case of recoveries or refunds consequent upon the adjustment of Industries (supra) has held that only in the case of duty determined on finalisation of provisional assessment under Rule 9B(5) will not be governed by the provisions contained in Section 11A or Section 11B of the Central Excise Act. The Apex Court has not laid down that even in case of finalisation of the provisional assessment under Section 18 of the Customs Act, the provisions of Section 27 of the Customs Act are not applicable. There is a sound reason behind it. Under the Customs Act, since inception, the recoveries or refund arising on finalisation of the provisional assessment have been expressly subjected to the limitation prescribed under Section 27 of the Customs Act. Initially Explanation I to Section 27 provided for the limitation to claim refund of duty provisionally assessed under Section 18 of the Customs Act. By Act 21 of 1998 (with effect from 1-8-1998), the Explanation I to Section 27 has been renumbered as Explanation II. Thus, under the Customs Act, the refund of duty arising on finalisation of the provisional assessment has always been subject to the procedure prescribed under Section 27 of the Customs Act. 32. As stated hereinabove, provisions of Excise law were different at the material time. Explanation to Section 11B(1) of the Central Excises & Salt Act, 1944, as enacted originally provided that the refund arising on finalisation of provisional assessment will be subject to the limitation prescribed under Section 11B of the Excise Act. That explanation to Section 11(B)(1) was omitted by Act 44 of 1980. As a result, the procedure prescribed under Section 11B was not applicable to the refunds arising on finalisation of the provisional assessments. In view of this lacuna, the Apex Court in the case of Mafatlal Industries (supra) held that the recoveries or refund arising on finalisation of provisional assessment under Rule 9B are not governed by the provisions of Section 11A or Section 11B of the Central Excise Act. 33. This lacuna in the statute pointed out by the Apex Court in the case of Mafatlal Industries (supra) has been remedied by the Legislature, by Act 21 of 1998 Clause (eb) has been inserted to the definition of 'relevant date' contained in Section 11B of the Central Excise Act with effect from 1-8-1998. Similarly by Notification No. 458 (E), dated 25-6-1999, Rule 9B of the Central Excise Rules, 1944 has been amended. As a result of these amendments, the refunds arising on finalisation of provisional assessment under Rule 9B is subjected to the procedure established under Section 11B(2) of the Central Excise Act. The amended provisions of Rule 9B has been recently considered by the Apex Court in the case of Commissioner of Central Excise v. T.V.S. Suzuki Ltd. and it is held by the Apex Court that the refund claims arising under Rule 9B prior to 25-6-1999 will not be governed by the restrictions in Section 11A and Section 11B of the Central Excise Act. In other words, after 25-6-1999, even the refunds arising under Rule 9B(5) are governed by the provisions of Section 11B of the Central Excise Act. Thus, in view of the above lacuna in the Central Excise Law, the Apex Court in the case of Mafatlal Industries held that the refund arising under Rule 9B is not subjected to Section 11A or Section 11B of the Central Excise Act. There was

such lacuna in the provisions contained under the Customs Act. Therefore, the contention of the Petitioners that in view of the judgment of the Apex Court in the case of Mafatlal Industries (supra), the refund arising under Section 18 of the Customs Act cannot be subjected to the provisions of Section 27 of the Customs Act, cannot be accepted. Since refunds arising under Section 18 of the Customs Act has been expressly subjected to the procedure prescribed in Section 27 of the Customs Act, it is not open to the Petitioners to contend that the Parliament in its wisdom thought it fit not to subject the refunds arising on finalisation of provisional assessment within the purview of Section 27 of the Customs Act. 34. The decision of the Apex Court in the case of Sinkhai Synthetics & Chemicals Private Limited (supra) does not in any way support the case of the Petitioners because it merely follows the decision of the Apex Court in the case of Mafatlal Industries. As stated here in above the decision of the Apex Court in the case of Mafatlal Industries (supra) is distinguishable on facts. Similarly, the decision of the Apex Court in the case of Serai Kella Glass Works (supra) is also distinguishable on facts. 35. The decision of the CEGAT in the case of Alcatel Modi Networks systems v. Commissioner of Customs, New Delhi reported in 2000 (117) E.L.T. 522 (T) cannot be said to be good law because, the decision of the Tribunal is based on the decision of this Court in the case of Solar Pesticides v. Collector reported in 1992 (57) E.L.T. 201 (Bom.) and the decision of this Court in the case of Solar Pesticides (supra) has been overruled by Judges Bench of the Apex Court [Union of India v. Solar Pesticides pvt. Ltd.] Therefore, the decision of the Tribunal in the case of Alcatel Modi (supra) must be held to be contrary law. 36. It is true that the Tribunal in the case of Alcatel Modi (supra) following the decision of the Apex Court in the case of Mafatlal Industries has held that the refund of duty or recovery of duty as a result of the finalisation of provisional, assessment has to be given suo motu by the Customs authorities. The decision of the Tribunal is based on total misreading of the law laid down by the Apex Court in the case of Mafatlal Industries, As stated hereinabove, the ratio laid down by the Apex Court in Mafatlal Industries (supra) is that in respect of refunds arising under Rule 9B(5), the provisions of Section 11B of the Central Excise Act are not applicable. That was the position in law under the Central Excise Act at the relevant time. But, that was not the position under the Customs Act, because Section 27 of the Customs Act has always been made applicable to the refunds arising under Section 18 of the Customs Act. Moreover, now the Excise Law has been amended so as to bring the Excise Law on par with the Customs Act. Under the circumstances, the findings recorded by the Tribunal in the case of Alcatel Modi (supra) that the refund arising on finalisation of the provisional assessment must be granted by the Customs authorities suo motu without the application of Section 27 of the Customs Act, is totally incorrect and contrary to law. 37. It is also true that the appeal filed by the revenue against the decision of the Tribunal in the case of Alcatel Modi has been dismissed by 3 Judges Bench of the Apex Court on 13th March, 2001 by passing the following order : [see 2002 (146) E.L.T. A96]. "We find no merit in this appeal. It is dismissed with costs." In the ordinary course, on dismissal of the Civil Appeal,

the order of the Tribunal would get merged with the order of the Apex Court and would be binding. However, in the present case, the very foundation of the order of the Tribunal is based on the decision of this Court in the case of Solar Pesticides Limited and the judgment of this Court in the case of Solar Pesticides has been overruled by the 3 Judges Bench of the Apex Court [see ]. Therefore, if the decision of the Tribunal in the case of Alcatel Modi is held to be approved by the 3 Judges Bench of the Apex Court, then the decision of the Apex Court in the case of Alcatel Modi becomes directly in conflict with the 3 Judges Bench decision of the Apex Court in the case of solar Pesticides Limited (supra). 38. While dismissing the Appeal filed by the revenue against the decision of the Tribunal in the case of Alcatel Modi, the 3 Judges Bench of the Apex Court did not doubt the correctness of the 3 Judges Bench decision of the Apex Court in the case of Solar Pesticides Limited (supra). Therefore, as held by the Apex Court in the case of Vijaylaxmi Cashew Co. v. CTO decision of a Bench not doubted by any later Bench cannot be treated as overrules by implication. Accordingly it must be held that the ratio laid down by the Apex Court in the case of solar Pesticides Limited still holds the field. The Apex Court in the case of S. Shanmugavel Nadar v. State of Tamil Nadu has held that the reasons given in the judgment of the lower forum can be said to have merged only if the superior Court, either adopts or reiterates the reasoning or expressly records its approval of the reasoning. While dismissing the appeal of the revenue in the case of Alcatel Modi, the Apex Court has neither adopted nor expressly recorded its approval of the reasoning given by the Tribunal. In this view of the matter, we hold that on dismissal of the Appeal filed by the revenue against the decision of the Tribunal in the case of Alcatel Modi, only the operative part of the decision of the tribunal stood merged with the order of the Apex Court and the remaining part of the order of the Tribunal, that is, the reasons given by the Tribunal cannot be said to have merged with the order of the Apex Court. 39. The decision of the Apex Court in the case of Hindustan Metal Pressing Works (supra) which is relied upon by the Petitioners is distinguishable on facts because in that case the amount of refund was already granted before the principles of unjust enrichment were incorporated in Section 27 of the Customs Act, on 20th September, 1991. Similarly, the decision of this Court in the case of Killick Caribonium (supra) is also distinguishable on facts. In that case deposit made pursuant to an order under Section 35F of the Central Excise Act was held to be security deposit and not duty and hence the principles of unjust enrichment are not applicable. In the present case, we have held that the amount paid on provisional assessment represents payment of duty and therefore, refund of that amount even if it is a vested right, it is governed by the principles contained in Section 27 of the Customs Act. 40. Even otherwise, while exercising the Writ jurisdiction, if the Writ Court finds that any direction to refund results in unjust enrichment to the Petitioner, then it is open to the Writ Court to decline to exercise its Writ jurisdiction, even though the Petitioner has a right to obtain refund. This reasoning of ours is supported by the Full Bench decision of this Court in the case of New India Industries v. Union of India reported in 1990 (46) E.L.T. 23 (Bom.) = 1990 (1) BCR 515,

as well as the decision of the Apex court in the case of Mafatlal Industries Ltd. (supra at Para 95). In the present case, admittedly, the Petitioners have passed on the incidence on duty to the customers and have recovered the amount due to them. In this view of the matter, we declined to issue Writ in favour of the Petitioners. 41. For all the aforesaid reasons, the petition fails and the same is dismissed. However, in the facts and circumstances of the case, there will be no order as to costs. 42. The oral application made by the learned Counsel for the Petitioners seeking leave to file appeal to the Supreme Court is rejected as the petition has been decided on the basis of the judgment of the Apex Court.