GUJARAT HIGH COURT

Vijay Textile

Vs.

Union of India

C.A. No. 1552 of 1977

(B.J. Divan C.J. and S.B. Majmudar, J.)

24.01.1979

JUDGMENT

B.J. Divan C.J.

1. In this group of seven matters, every one of the petitioners is a processor of fabrics, that is , task of bleaching, dyeing and petition of fabrics which are already in existence, is done by these processors. Tree out of these petitioners are processors of cotton fabrics. These processors are only the owners of processing houses. They have no weaving or spinning departments. The fabric which is woven on power looms, mostly, is brought to them for being processed by bleaching, dyeing, and printing, so as to make the fabric more attractive to the consumer.

2. The objection by these processors is to the levy of excise duty under the First Schedule to the Central Excises and Salt Act, 1944, hereinafter referred to as the Act. Item 68 refers to "All other goods, not elsewhere specified," manufactured in a factory, but excluding (a) alcohol, all sort, including alcoholic liquors for human consumption; (b) opium, Indian hemp and other narcotic drugs and narcotics; and (c) dutiable goods as defined in section 2(c) of the Medicinal and Toilet Preparations Excise Duties Act, 1955, and the Explanation to Item 68 points out that in this item, the expression "factory" has the meaning assigned to it in section 2(m) of the Factories Act, 1948. Under section 2(f) of the Act, "manufacture" includes any process incidental or ancillary to the completion of a manufactured product. Item 18A of the Schedule to the Act refers to "Cotton Twist, yarm and thread, all sorts, containing not less than nine per cent by weight of cotton calculated on the total fibre content whether sized or unsized." Item 19 of the Schedule provides for the description of goods and rates duty. Item 19 covers cotton fabrics and is in these terms :

> "Cotton fabrics' means all varieties of fabrics manufactured either wholly or party from cotton and includes dhoties, sarees,chadders,bedsheets, bed-spreds, counter-panes, table-cloths, embroidery in the piece, in strips or in motifs and fabrics impregnated or coated

with preparations of cellulose derivatives or of other artificial plastic materials but does not include any such fabric if it contain:-
(i) 40 per cent or more by weight of wool;
(ii) 40 per cent or more by weight of silk;
(iii) 40 per cent or more by weight of rayon;or artificial silk, or
(iv) 50 per cent or more by weight of the jute (including Bimlipatam jute or mesta fibre):
Provided that in the case of embroidery in the piece, in strips or in motifs and fabrics-imp0ergnated or coated with preparation of cellulose derivatives or of other artificial plastic materials, the percentages referred to in (i) to (iv) above shall be in relation to the base fabrics which are embroidered or impregnated or coated, as the case may be."

Then the rates of duty are proceeded. Explanation I to Item 19 states:

"Base fabrics' means fabics falling under Sub-Item I of this item which are subjected to the process of embroidery or which are or coated with preparations of cellulose derivatives or of other plastic materials."

3. Section 3 is the charging section and says that:

"There shall be levied and collected in such manner as may be prescribed duties of excises on all excisable goods other than salt which are produced or manufactured in India and a duty on salt manufactured in, or imported by land into, any part of India, as and at the rates, set forth in the First Schedule."

By section 2(d) of the Act, "excisable goods" are goods specified in the First Schedule as being subjected to a duty of excise and includes salt. It is clear where section 3 and section 2(d) are read together that if any of the goods specified in the First Schedule are manufactured or produced, such manufacture or production is the excisable event on which duty of excise can be levied. If there is no production or manufacture of an excisable of an excisable article, o goods in the sense of goods specified in the First Schedule, there cannot be any levy of excise. Art Silk would fall under Item 22 which deals with man-made fabrics and the entry reads :

"Man-made fabrics' means all varieties of fabrics manufactured either wholly or party from man-made fibres or yarn and includes embroidery in the piece, in strips or in motifs and fabrics impregnated coated or laminated with preparations of cellulose derivatives or of other artificial plastic materials, in each of which man-made (i) cellulosic fibre or yarn. or(ii) non-cellulosic fibre or yarn, predominates in weight."

It is well- known that art silk fabrics are manufactured from cellulosic fibre or yarn and therefore the entry would cover are silk of the type under Item 22. It is to be noticed that so far as embroidery in piece and strips or motifs is concerned and fabrics impregnated or coated or

laminated with preparations of cellulosic derivatives or other artificial plastic materials are concerned, both as regards cotton fabrics as well as man-made fabrics, the description is the same both under Items 19 and 22, and in each of these two cases the Legislature has taken special care to point out that fabrics, whether man-made or cotton, on which embroidery in piece or strips or motifs is worked out when they are impregnated, coated or laminated with preparations of cellulosic derivatives or other plastic materials, they are deemed to be cotton fabrics if the basis fabrics is cotton and man-made fabric if the base fabric is man-made fabric. The whole argument before us turns upon the question whether grey cloth in the case of cotton fabrics which comes out from the production by power looms or other weaving textile mills which have no processing house of their own and which is processed by independent processors, can be said to be newly manufactured cotton fabric or man- made fabric, as the case may be, when it is processed by the processing house either by bleaching, dyeing or printing carried out in the processing house. It is undoubtedly true that in the case of cotton fabrics, cotton fabrics mean all varites of fabrics manufactured from cotton and similarly, under Item 22, man-madefabric means all varieties of fabrics manufactured either wholly or partly from man0made fibres of yarns. As to what exactly is meant by fabric, we have now the recent decision of the Supreme Court in ***Porritts &****Spencer v. State of Haryana*[1]*,* The question before the Supreme Court in that case was whether dryer felts manufactured by the assessee in that case fell within the category of all varieties of cotton, woollen and siken fabrics as specified in Item 13 of Schedule B to the Punjab Genral Sales Tax Act, 1948. While dealing the word `textiles' is not defined in the Act but it is well-settled, as a result of several decisions of the Supreme Court which were mentioned in the judgment, that in a taxing statute, words of everyday use must be construed not in their scientific or technical sense but in the sense as understood in common parlance. It was also pointed out that the word ` textiles' is derived from the Latin `taxere' which means `to weave' and it means any woven fabrics, When yarn, whether cotton, siken. woollen, rayon, nylon or of any other description or made out of any other material is woven into fabric, what comes into being is a 'textile' and it is known as such. It may be cotton textiles, sikl textile, rayon textile, nylon textile or kind other kind of textile. The method of weving adopted may be the warp and woof pattern as is generally the case in most textiles, or it may be any other process or techinque. There is csuch phenomenal advance in science and technology, so wondrous is the variety of fabrics manufactured from material hitherto unknown or unsought of any so many are the new techniques for making fabrics out of yarn that it would be most unwise to confine the weaving process to the warp and woof pattern. Whatever be the mode of weaving employed. woven fabric would be `textile.' What is necessary no more than weaving of yarn and weaving mean binding or putting together by some process so as to form a fabric. In the course of the same judgment, it was pointed out" But there the word `textiles' is not sought by the assessee to be given a scientific or technical meaning in preference to its popular meaning. It has only one meaning, namely, a woven fabric and that is that meaning which it bears in ordinary parlance."

4. So far as the word 'fabric' is concerned, the Oxford English Dictionary, Vol. IV, at page 2 defines 'fabric' to mean "A manufactured material : now only a `textile fabric',a woven stuff."

Therefore, a fabric must always be a woven stuff. Meaning 7 under the word fabric means "Of a textile article, the woven substance: tissue, fibre". It is therefore clear that when one speaks of manufacturing a fabric, what is meant is manufacture or production of a woven stuff or woven substance, and the only meaning which can be attributed to the words "manufacture of a cotton fabric or a man-made fabric. If fabric brings in the concept of woven stuff or woven substance, manufacturing a woven substance or woven stuff means weaving by the aid of power and mechanical means any cotton fabric or man-made fabric. No other meaning can be attributed of he words" manufacturing a fabric". It is from this angle that will have to examine the entries in the instant case.

1 Civil Appeal No. 2212 of 1977, decided by the SC on September 6, 1978

5. It has been held by the Supreme Court in *Union of India v. Gujarat Woollen Felt Mills*[2], that "The term 'Wollen fabrics' in entry 21 means all varieties of fabrics manufactured out of wool including blankets, lohis,rugs,shawis and embroidery in the piece, in strips and in motifs. In scientific and technical sense also term is wide enough to cover woven or knitted material which is wool based. Therefore, the word `fabrics' in tariff Item 21 has been used to mean woven material in which sense it is popularly understood and includes not only wollen garments but also wollen material used as covering or for similar other purpose. Therefore, according to the Supreme Court also, fabric means woven material.

6. For the purpose of this judgment, we will proceed on the footing that" processing with the aid of power" is "manufacture" as defined in Section 2(f) of the Act. But the question is whether, by manufacture in the sense of processing a fabric which is already woven and in existence, any manufacture of cotton fabric takes place or any manufacture of man-made fabric takes place. It may be borne in mind that under section 3, the taxable event or the event which attracts levy of excise is the production or manufacture of any excisable goods and excisable goods are goods specified in the First Schedule as being subject to a duty of excise. If processing a fabric made on powerloom of any other manner to during, printing or bleaching does not call for or involve any `manufacture' of a fabric then Item 19 would not in terms apply to this particular type of manufacture, namely, processing of fabrics. So far as embroidery in piece, in strips or in motifs is concerned, it would be embroidery by mechanical process on fabric already in existence. Similarly, impregnating or coating that preparation with cellatosic or of other artificial plastic materials of fabric which are already in existence is a separate manufacture of an excisable goods since embroidery in piece, in strips or in motifs and impregnated or coated fabrics are specifically mentioned in Items 19 and 22 in the First Schedule to the Act. Processed fabrics, whether cotton fabrics or man-made fabrics, are not specifically mentioned in these two Items 19 and 22 of the First Schedule to the Act, and the question is whether, as was urged by Mr. Shelat, processing of grey power loom cloth means production of a variety of fabric. If fabric means woven material or woven substance or woven stuff, such substance or stuff may be woven our of cotton or man-made fabric or yarn. Processing of cottons fabrics or man-made fabrics does not bring into existence any new woven stuff or sub-stance. It is merely processing in the sense of bleaching, dyeing or printing fabric which was already in existence.

7. In this connection, two decision, one by our High Court and another of the Court in England, should be brone in mind. In *Extrusion Processes Pvt. Ltd. v. N. R. Jadhav*[3], a Division Bench of this High Court consisting of J/B. Mehta and S. H. Sheth JJ. deslt with the question of excise duty levied on manufacture of extruded aluminum collapsible tubes and the question was whether printing and lacquering of aluminum tubes involved extrusion process. The Division Bench held :

> "Sub-item (3) of Item 27 of the First Schedule read with Section 3(1) of the Central Excise & Salt Act subject to payment of excise duty manufacture of extruded tubes of aluminum. Printing and lacquering do not involve the process of forming a tube from metal slug or dump which extrusion means. It is, therefore

[2]1977 E.L.T. (J 24)
[3](1974) 15 G.L.R. 161

> clear that since printing and lacquering of plain extruded tubes do not require application of any further process of extrusion, it cannot be covered by Sub-item (e) of Item 27. Secondly, by printing, and lacquering plain extruded tubes, it cannot be said that the petitioners manufacturing aluminum tubes. If such a commodity is subjected to central excise duty after it has once been paid on the plain extruded tubes, it will not be a duty on the manufacture of extruded aluminum tubes but it will be a duty on the sale of that commodity. Therefore, the printing and lacquering of plain extruded aluminum tubes do not fall within the ambit of Sub-item (e) of Item 27"
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> .

The decision of the Supreme Court in *South Bihar Sugar Mills Ltd. v. Union of India*[4], was taken into consideration. It was pointed out that the Supreme Court in the case of South Bihar Sugar Mills "the word `Manufacture' implies a change but every change in the raw material is not manufacture. There must be such a transformation that a new and different article must emerge having a distinctive name, character or use. The said Act does not define goods. The Legislature therefore must be taken to have used every word in its ordinary dictionary meaning. The dictionary meaning is that to become `goods' it must be something which can ordinarily come to be market to be bought and sold and is known to the market. In other words, a new substance must be brought into existence from raw materials." In the instant case before us, what has happened is that cotton fabric which was grey fabric, a man-made fabric, is being processed. It may be that from the point of view of market, a new substance has been brought in existence, but the question is whether it falls within the description of excisable goods wuithin the meaning of Item 19 or Item 22 of the First Schedule to the Act. The division Beach emphasized from the decision of the Supreme Court that central excise duty is a tax on manufacture and not on sale and so long as this taxable event, namely, manufacture, is borne in mind and it has to be borne in mind in the case before us that fabric means woven stuff or woven substance the question that we have to ask ourselves is whether processing fabric involves manufacture of woven stuff or woven

substance. The contentions of the excise authorities were therefore rejected and the conclusion that we have set out hereinabove was reached by the Division Bench.

8. In *Mc Nicol v. Pinch*[5], the question before the Court in England was whether enhancing the sweetness of sachharin already in existance amounted to manufacture of sachharin within the meaning of the Finance Act, 1901 and the Revenue Act, 1903. It was held by the court that manufacture of sachharin meant bringing into being as sachharin. The appellants before the Court subjected a certain `330 sachharin' (that is sachharin 330 times as sweet as sugar) to a chemical process, the result of which was that in some cases `550 sachhain ' (that is, sachharin 550 times as sweet as sachharin) was produced, in other a mixture sweets than 330, but not so sweet as 550 sachharin, it was held by the Court, per Bray and Darling JJ. Bidley J. dissenting, that the appellants, were not manufacturing sachharin within the meaning of the Finance Act, 1901, so as to be copelled to take out the excise licence required by Section 9 of that Act and Section 2 of the Revenue Act, 1903 and to obtain from an officer of Inland Revenue a book such as

[4] A.I.R. 1968 S.C.922

[5](1906) 2 KB 352

was prescribed No. 633 of the Statutory Rules, 1904, inasmuch as the substance the appellants dealt with was always sachharin both before and after their treatment of it. At page 359, Bray J. observed :-

> "We have to determine whether upon the facts stated in the case the appellants did manufacturing sachharin. Let us see what those facts are. One of the admitted facts is that sachharin is a substance produced from toluene sulphonamide. That is the definition of sachharin. This sacharin was not produced by the appellants from toluene sulphonamide;...but is was always sachharin; it was sachharin before it was trated, and it was sachharin after it was treated."

Darling J. observed at page 301 :

> "A carpenter uses wood : he beings with wood : he makes the wood into boxes. What would you say if you wanted to talk of his manufacturing Ordinery people would of say that he manufactured wood: they would say her manufactured boxes.But I am not quite sure it might not be strictly said that he manufactured the wood .He applies a process to it. I suppose etymologically `to manufacture' is `to make it by hy hand.' Everybody knows that you cannot absolutely make a thing by hand in the sense that you can create matter by hand, because in that sense you can make nothing : Ex-nihilonihil fit. you can only make one thing out of which it is made. Even if it could be strictly said that the carpenter `manufactures wood it could not be said that he 'makes' wood. The same with a man who makes boots: he takes leather, and he makes it into boots. If he simply made leather into leather nobody could possibly say that he was a leather manufacturer, but it would be possible to say that a man who took leather and made it into boots manufactured leather

> out made boots. I think it would be possible to say that , and I am not sure it would not be strictly accurate, but I cannot read this statute in that way. Whether it would be possible to read `manufacture' etymologically as something very different from `make', I think the Act of 1901 uses `manufacture' and `make' as being convertible terms, and that a man who manufacturers sachharin under S. 9 is doing the same thing as is called the making of sachharin under S. 5 the appellants did not make sachharin, because they began and ended with sachharin. They did not 'make' sachharin , and in my opinion, from the way in which the word is used by the statute, they did not manufacture sachharin, and therefore did not require a lances."

Using the Phraseology of the Court in England in the instant case, it can be said that the petitioners began with cotton fabrics or man-made fabrics before they started processing, and ended with cotton fabrics or man-made fabrics No. specified item, as in the case of embroidery or coated or laminated fabrics is to be found so far as processed cloth is concerned and therefore, processing of cotton fabric or man-made fabric cannot amounted to manufacturing of any verity of cotton fabric or man-made fabric.

9. Mr. Shelat relied on certain decisions in the context of sales tax law in support of his argument. Of course, it must be borne in mind as pointed out by the Supreme Court, that under the excise Act., it is the manufacture which is the taxable event and not the sale thereof and therefore the decisions rendered in the context of sale tax law should be read with this distinction clearly in mind.

10. In *Hiralal Jitmal v. Commissioner of Sales Tax*[6], a Division Bench of the Madhya High Court held that to constitute `manufacture' for the purpose of the Madhya Bharat Sales Tax Act, 1950. it was not necessary that there must be a transformation in the material and that the transformation must have progressed so far that the manufactured article become commercially known as another and different articles from the raw material. All that was necessary was that the material should have changed or modified by man's art or industry so as to make it capable of being sold in an acceptable from to satisfy some want, or desire,or fancy or taste of man. It was held that a person who was engaged in the work of printing and dyeing and dyed material was a manufacturer within the meaning of the definition given in section 2(k) Of the act. It was further held that the fact that sales tax had been recovered on the sale of the cloth by the manufacturing mills or by the importer will not prevent recovery of the sales tax on the sale of dyed and printed goods under section 5(1).

11. In *Commissioner of Sales Tax v. Harbilas Rai*[7], the Supreme Court held that the word 'manufacture' had various sheds of meaning , and in the context of sale tax legislation, if the goods to which some labour was applied remained essentially the same commercial article, it could not be said that the final product was the result of manufacture. At page 19 of the report, Sikri J. as he then was,speaking Court, observed:

"The learned counsel for the appellant relied ***G**.R. Kulkarni v. The State*[8], and *Hiralal Jitmal v. Commissioner of Sales Tax*[9], in support of his submission that bristles were manufactured goods within the meaning of section 2(h), Explanation II(ii). But, in our opinion the first case is distinguishable In the second case, it was held that a person who is engaged in the work of printing and dyeing textiles purchased by him and in the business of selling or supplying the printed and dyed material is a manufacturer.' The decision of the Madhya Pradesh High Court maight parhaps be justified on the ground that a printed or dyed cloth is commercially a different articles from the cloth which is purchased and printed or dyed.'

Thus, approval accorded by the Supreme Court to the decision of the Madhya Pradesh High Court in Hiralal Jitmal's case was on the footing of beginning into existence a new commercial articles. in *Commissioner of Sales Tax v. Hastimal Ratanlal*[10], the Court dealt with the case of an assesses who purchased white cotton yarn it into colours and then sold the coloured yarn and it was held that the dyeing of white cotton yarn was a process of manufacture within the meaning of Section 2(j) of the Act. In paragraph 5 at page 486, Bishambhar Dayal C.J. speaking for the Division Bench of the Madhya Pradesh High Court, observed :

"A very similar question arose in this Court in *Hiralal Jitmal v. Sales Tax Commissioner*. Where cotton was coloured by the assessee and sold as coloured cloth. Ti was held that it was a process of manufacture. This case was approved by

[6](1957) 8 S.T.C. 325 [8](1957 8 S.T.C. 294) [10](1972) 30 S.T.C.484
[7](1968) 21 S.T.C. 17 [9](1957) 8 S.T.C. 325)

their Lordships of the Supreme facture. This case was approved by their Lordships

of the Supreme Court in *Commissioner of Sales Tax v. Harbilas Rai & Sons*."

It is undoubtedly true that, according to these three decision in the context of sales tax law, dyeing or processing of cotton cloth , as in Hiralal Jitmal's case, or of cotton yarn, as in the case of Hastimal Ratanlal, was held to be manufacture within the meaning of the Madhya Pradesh Sales Tax Act, but question that we have to ask ourselves is whether there is `manufacture' of textile goods as falling within any of the items in the First Schedule to the Act.

12. Under these circumstances we are clearly of the opinion that these three decisions referred in the context of sale tax law where the taxable event was sale of goods, that is , sale of commercially known articles, cannot help us in deciding the case before us where the taxable event is the manufacture of an excisable article or excisable goods.

13. We may point out that in *Empire Dyeing and Manufacturing Co. Ltd v. V.P. Bhide and*

others[11]*, Miscellaneous Petition no. 244 of 1968 decided by a Division Bench of the Bombay High Court consisting of K.K.Desai J (as he then was) and J.L. Nain J. on 19/20th August, 1970*, a situation similar to the present one arose. There the Division bench of the Bombay High Court was dealing with Item 19 of the Schedule of the Act as it then stood and the question was whether cotton fabric not otherwise specified would cover the processed cloth. It was pointed out that the completed manufactured product which is excisable goods under the Item must be cotton fabric of the description contained in Sub-Items (a) to (e) as it then stood. Categories (a) to (e) were, (a) cotton fabric's, superfine (b) cotton fabrics, fine (c) cotton fabrics, medium (d) cotton fabrics coarse, and (e) cotton fabrics, not otherwise specified. It was pointed out by the Division Bench that the Scheme of the Act and the rules made there under did not contemplate and never intended collection of excise duty in respect of the same excisable goods twice over. It was pointed out that by virtue of the notification issued under sub-rule (1) of rule 8 of the Central Excise Rules, Sub-classification of cotton fabrics falling under the categories (a), (b), (c), (d) and (e) of Item 19, namely, superfine, fine, medium, coarse and not otherwise provided for, had been issued and under those notification 7 and/or 9 and 3 and/or 6 paise per square metre of cotton fabric were specifically mentioned as duty on certain items. However, no notification of sub-classification was issued in connection with the residuary item under Article 19, namely, cotton fabrics not otherwise specified. It was observed by the Division Bench.

> "Admittedly in this case, duty of excise is claimed against the petitioner company on the basis that the goods processed by the petitioner Company were cotton fabrics not otherwise specified thus falling in sub-item (5) of Item 19. The goods are the same as have been subjected to payment of excise duty when they were released from the factories of the manufacturers. In respect of the goods which have already borne excise duty and do not fall into a different item of excisable goods in the First Schedule, it is impossible that duty could come again to be levied and/or recovered."

[11]1977 E.L.T. (J 34)

We agree with the reasoning of the learned Judges of the Bombay High Court because our conclusion arrived at on the wording of Items 19 and 22 as they now stand does not permit of any other meaning except that the goods which were received by the petitioners before us remain the same, speaking in terms of excisable goods, namely, cotton fabrics or man-made fabrics. Processing did not involve any further manufacture of the woven stuff or woven substance and unlike embroidery and coated or laminated fabrics, there is no specific mention in the inclusive definition so far as processed cloth is concerned, either in Item 19 or 22.

14. Mr. Nanavati for the petitioners rightly pointed out that, with effect form July 15, 1977 under the notification issued by the Central Government in exercise of powers conferred by rule 8(1) of the Central- Excise Rules, the Central Govt. had exempted unprocessed cotton fabrics falling under Sub-item (2) of Item 19 of the First Schedule of the Act, manufactured fabrics commonly known as power loom cloth without finishing or processing, if the installation of such power

loom was with the written permission of the Textile Commissioner, from duty leviable thereon under the Central Excise & Salt Act, 1944. Similar notification were issued under the Addl. Duty of Excise (Goods of Special Importance) Act, 1957. Another Notification was also issued on July 15, 1977 in exercise of the powers conferred by rule 8(1) of the Central Excuse Rules read with section 3(3) of the Addl Duty of Excise (Goods of Special Importance) Act, 1957. Under this notification, the central Govt. exempted cotton fabrics falling under sub-item (1) of Item 19 of the First Schedule of the Central Excises & Salt Act, from duty leviable thereon as is in excess of the duty specified in the corresponding entry in column 3 thereof. It was urged by Mr. Nanavati that it was this notification- which applied to processors. However, Mr, Nanavati for the petitioner pointed out clause (vi) of the proviso and under clause(vi) fabrics on which duty has been paid at the appropriate rate, when subjected to finishing process or further finishing process or processes, shall be exempt from so much of the duty of excise leviable thereon, as has already been paid on such fabrics. It is clear that so far as grey cloth, that is, cotton fabric known as grey cloth manufactured in factories commonly known as power looms which have been installed with the written permission of the Textile Commissioner, were concerned, no duty is payable after July, 15, 1977. Therefore, the leasser, rates of duty mentioned in the other notification which we have just now referred of July 15, 1977, would not apply to the case of the petitioners if they are held to be manufacturing cotton fabrics.

15. It may be pointed out that so far as Item 22 is concerned, in the case of man-made fabrics, the Government has issued similar notification.

16. Mr. Shelat for the respondents urged that it was open to the petitioners in this group of matters to apply for the refund of excise duty after paying excise duty on the footing of the value of the material as it comes out from the processing house instead of paying duty Article 68 only on the value which they added by the processing of the cloth. He contended that elaborate manedinery has been laid down under the Act and therefore the petitions should not be entertain. Alternatively, he contended that there is an alternative remedy for refund under rule 11 and there is complete procedure for refund under the Act and therefore the petitions should not be entertained. He relied in this connection on the observations of the Supreme Court in suganmal v, State of Madhya Pradesh, A.I.R. 1965 S.C. 1740. There it was pointed out by the Supreme Court.

> "Though the High Court have power to pass any appropriate order in the exercise of the powers conferred on them under Act under Art. 226 of the Constitution, a petition solely praying for the issue of a writ of mandamus directing the State to refund the money alleged to have been Illegally collected by the State as tax is not ordinarily maintainable for the simple reason that a claim for such a refund can always be made in a suit against the authority which had illegally collected the money as a tax, and in such a suit it is open to the State to raise all possible defenses to the claim, defenses which cannot, in most cases, be appropriately raised and considered in the exercise of writ jurisdiction

17. However, it may be pointed out that, in two cases under the Excise Act, the Supreme Court gave directions in proceedings which arose under Article 226 of the Constitution in connection with Excise Act. In *Union of India v. Delhi Cloth and General Mills Ltd*[12]*.,* the manufacturers of 'Vanaspati' had filed three separate petitions under Article 226 of the Constitution in the Punjab High Court and the challenge was to the legality of the imposition of excise duty on what was called by the taxing authorities as manufacture of refined oil or raw oil and the Punjab High Court allowed those writ petitions and directed the excise authorities to withdraws impugned demand notice of excise duty on the petitioners. The Supreme Court observed in paragraph 20 at page 795: "We are therefore of the opinion that the High Court was right in its conclusion that there was no legal basis for the demands of excise duty which were made on the petitioners and in directing the authorities to withdraw these demands" So, even when the challenge is to the demand notices in connection with levy of excise duty, this decision of the Supreme Court in issuing directions under Article 226 directing the authorities to withdraw the demand notices. Similarly, in *South Bihar Sugar Mills Ltd. v. Union of India*[13]*,* also, the petitions were filed under Article 226 of the Constitution. The Supreme Court held in paragraph 17 at page 929 :

> "We hold that the demand notices served on these concerns are illegal and must be quashed. The respondents in these appeals as also in the writ petition will pay costs to the appellants and the petitioners in the writ petition."

One matter was directly under Article 32 of the Constitution and the others were appeals against the decision of the Punjab High Court in petitions filed under Article 226 of the Constitution. In the writ petitions under Article 226, the legality of the excise duty levied against them was challenged by the petitioners. In this case also, the question of the alternative remedy under the machinery of Excise act was not held to be a bar to the maintainability of the petitions. Hence, in our opinion, when excise levy is challenged as illegal and an application, under Article 226 is made, it is open to the High Court to examine the legality of the proposed levy or the demand notice issued under the Excise Act for the levy of excise duty and if the High Court finds that the proposed levy is illegal and not justified by the law relating to excise it is open to the High Court to quash and set aside the same. The question of alternative remedy in such a situation does not arise.

[12]1977 E.L.T.(J 199) : A.I.R. 1963 S.C. 791

[13] A.I.R. 1968 S.C. 922

18. It was next contended, that from 1958 onwards, the different petitioners had been paying excise duty of the processed cloth on the basis of the value of the cloth sold by them and they have never challenged the excise duty in the past, nor have they raised any protest against the same.

19. In *M/s. D. Cawasji and Co, v. State of Mysore*[14]*,* mathew J. speaking for the Supreme Court

observed in para 5 at page 814 :

> "In *State of Madhya Pradesh v. Bhailal, Bhai*[15], Das Gupta J. who delivered the judgment of the court, while holding that High Courts, have power, for the purpose of enforcement of fundamental rights and statutory rights to give consequential relief by ordering repayment of money realised by the Govt. without the authority of law, said that the special remedy provided in Article 226 is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defenses legitimately open in such actions and that among the several matters which the High Court rightly take into consideration in the exercise of that discretion is the delay made by the aggrieved party in seeking this special remedy and the excuse there is for it. He further said that if a person comes to the Court for relief under Article 226, on the allegation that he has been assessed to tax under a void legislation and having paid it under mistake is entitled to get it back, the court, if it finds that the assessment, was void, being made under a void provision of law, and the payment was made by mistake, it still is not bound to exercise its discretion directing repayment; and that whether repayment should be ordered in the exercise of this discretion will depend in each case on its own facts and circumstances and that it is not easy nor is it desirable to lay a general rule. He was of the view that if there has been unreasonable delay the court ought not ordinarily to land its aid to a party by the extraordinary remedy of mandamus."

20. It may be pointed out that in Special Civil Applications Nos. 909, 910 and 911 of 1970, decided by a Division Bench of this High Court on March, 17/18, 1972, the relevant case law regarding refund was taken into consideration and after examining the provisions on the point, the Division Bench, speaking through Sheth, J. observed :

> "....an order of assessment must in the context mean an order of assessment made under the charging statute. Since Section 2A could not levy at the relevant time any countervailing duty, there could not have been an order of assessment under that statute. The order of assessment therefore which was made de hours and ultra vires the statute. The position is not much different even when we look at the question from the point of view of customs duty. Since the orders of assessment in any view of the matter were ultra vires and de hours the statute were not attrached to them. Even without exhausting those remedies it was open to the petitioners to claim the refund of what they had paid by instituting a civil suit. In our opinion, they could have filed a civil suit within three years from the date on which they came to mknow that they had paid some amount under mistake of law. It was not only the petitioners who were ignorant of the exact position of law in that behalf.

[14] A.I.R. 1975 S.C. 813

[15] A.I.R. 1964 SC. 1006

> The decision of the Central Board of Excise and Customs recorded on 18th Sept., 1967 to which we have referred herein above goes to show unmistakably that even that body was completely ignorant until that date of the correct position of law. Obviously, therefore, the payment which the petitioners were called upon to make was the payment made by them, under a mistake of law with which was intermixed the misconception of law on the part of the customs authorities..... We are, therefore, of the opinion that in the instant case there was no statutory levy and there was no statutory assessment so far as the excess amount paid by the petitioners in respect of which they now claim refund is concerned. Therefore, no statutory remedy for obtaining refund of that amount was available to them. Therefore, the provision of sub-section (1) of Section 27 of the Customs Act, 1962 have no application to the instant case. Next, these petitions, as shown hereinabove, were filed by the petitioners within the time within which they could have instituted an action under the civil law. Until they filed these petitions they were vigilant in exploring all possible avenues to get back the moneys recovered from them without any authority of law."

To the same effect is the decision of the same Division Bench in Special Civil Application in Special Civil Application No. 1058 of 1972 decided on Jan 15, 1976, J. B. Mehta. J. speaking for the Division Bench dealt with the bar of rule 11 of the Central Excise Rules and observed : "In the present case, this was ultra vires levy made therefore, rule 11 would never be attracted to such a case." After citing the Supreme Court decision in Cawasji's case (supra) it was observed : ".....their Lordships have now settled legal position by pointing out that while excerpting discretion in such refund claims for such ultra vires levy, the Court should kee; in mind the limitation period in a Civil suit which is of three years. In that view of the matter, as per the settled legal position, there would be no bar to this petition because of the statutory rule for statutory refund, but, of course, this court would exercise its discretion to restrict the claim of refund only to a period of three years from the date of this petition." It may be pointed out that, in D Cawasji's case, Mathew J. pointed out in paragraph 7 :-

> "In a case where payment is made under a mistake of law as contrasted with a mistake of fact, generally the mistake becomes known to the party only when a court makes a declaration as to the invalidity of the law. Though a party could, with reasonable diligence, discover a mistake to fact even before a court makes an announcement, it is seldom that a person can even with a reasonable diligence, discover a mistake of law before a Judgment adjudging the validity of the law.
> 8. Therefore, where a suit will lie to recover moneys paid under a mistake of law, a writ petition for refund of tax within the period of limitation prescribed, i.e. within 3 years of the knowledge of the mistake, would also lie. For filing a writ petition to recover the money paid under a mistake of law, this court has said that the starting point of limitation is from the date of which the Judgment declaring as void the particular law under which the tax was paid was rendered, as that normally be the date on which the mistake becomes

known to the party. If any writ petition is filed beyond three years after that date, it will almost always be proper for the Court to consideration that it is unreasonable to entertain that petition though, even in cases where it is filed within three years, the Court has a discretion, having regard to the facts and circumstances of such cases, not to entertain the application.

Under these circumstances, we respectfully agree with the observations of the Division Bench of J. B. Mehta and S. H. Sheth JJ. in the High Court judgment cited above and we hold that refund can be granted in respect of excise duty paid by the processors within three years immediately proceeding the institution of the Special Civil Applications. In the instant case, the excise duty claimed on the basis of the market value of the processed cotton fabrics or man-made fabrics cannot be levied because, assuming that process amounts to manufacture, all that they have done is to manufacture processed cloth, processed fabric, either cotton or man-made and that not being a taxable event in the light of section 3 read with section 2(d) of the Act and Items 19 and 22, levy of excise duty on this basis was ultra vires and contrary to law Therefore, the petitioners are entitled to the refund of the excess of excise duty paid by them during the period of last three years immediately preceding the filing of the Special Civil Application over what they were bound to pay on the footing that processing of cotton fabrics is an excisable activity covered by them 68. Item 68 refers to "All other goods not specified elsewhere manufactured in a factory." Therefore processed cotton fabrics and processed man-made fabrics were manufactured in the factories of the petitioners and since they are not covered by Item 19 or 22 of the Schedule, they are liable to pay ad valoren duty only in respect of the value added by them at the time of processing because the only manufacturing activity which they have done is the manufacturing of processed fabrics from which was already in existence. The Excise authorities are therefore directed to calculated the ad voloren excise duty during the period of three years immediately proceeding the institution of each petition before us and calculate the excise duty payable by each of these petitioners under Item 68 only in respect of the value added by each of the petitioners by the processing of the concerned. The excise duty paid in excess of such ad valorem duty under Item 68 during the period of three years immediately preceding the institution of the respective Special Application is ordered to be refunded to the petitioners concerned in each of there petitioners. It must be emanhasized that these amounts which we are directing to be refunded, were collected by the Excise authorities without the authority of law and were illegal levies. The Central Government had use of these amounts during his period of three years and correspondingly the petitioner concerned was kept out of the use of these amounts during the said period. It is therefore just and proper that the respondents should pay interest at twelve per cent per annum (which is the proper rate looking to the conditions in the money market) from the dates of the collection of the said amounts directed to be refunded till the date of actual repayment. Rule is therefore made absolute in each of these petitions and the respondents in each of these matters will pay the costs of the petitioners.

21. After the above judgment was delivered in Open Court, Mr. Shelat on behalf of the

respondents applied for leave to appeal to the Supreme Court under article 133 of the Constitution. In view of the fact that the question of law involved in this case is a substantial question of general importance which needed to be decided by the Supreme Court, we grant the certificate. We direct the respondents to make the necessary calculations of the amount to be refunded within six weeks from today and we further direct them to make payment within two months thereafter. However, operation of the order passed in these matters is stayed barring the above direction for a period of six weeks to enable the respondents to obtain appropriate orders from the Supreme Court.

Petition dismissed.