authority is not precluded from determining the employment, the decision of the appointing authority to terminate the appointment may be based only upon the result of an enquiry held in a manner consistent with the basic concept of justice and fairplay"

(8) To byepass the law, the respondent-authorities thought of a novel method of transferring the Chairman of the statutory Board to the post of Chief Engineer which post he held prior to his appointment. As the notings will show the Administrator had thought that withdrawing of the notification with respect to appointment might create some legal complications and it wanted to avoid the same. The petitioner was not given an opportunity of being heard and his appointment was terminated in an arbitrary manner by passing orders Annexures P-5 and P-6 though he was not suffering from any disqualification at the time of his appointment, nor did he acquire any disqualification during his tenure within the meaning of Section 6 of the Act.

(9) Keeping the foregoing discussion in view, we hereby accept the writ petition and quash the impugned orders Annexures P-5 and P-6 and direct that the petitioner shall hold the office of the Chairman of the Board and be deemed to have continued to hold that office with all consequential benefits irrespective of the passing of the said orders. The respondent-authorities shall also pay costs of the writ petition, which are assessed at Rs. 2,000.

R.N.R.

Before A. L. Bahri, J.

M/S VENUS PLYWOODS PVT. LTD., JALANDHAR,—*Petitioner.*

versus

Y. D. BANGA,—*Respondent.*

Civil Original Contempt Petition No. 986 of 1990.

1st April, 1991.

Central Excise and Salt Act, 1944—S. 11-A—Central Excise Tariff Act, 1985—Chapter 44—Contempt of Courts Act, 1971—S.12—Petitioner held entitled to refund of excise duty—High Court directing refund of Refusal of excise department on plea of unjust enrichment—Such doctrine—Cannot be pleaded—Contempt petition admitted.

M/s Venus Plywoods Pvt. Ltd., Jalandhar *v.* Y. D. Banga
(A. L. Bahri, J.)

Held, that the doctrine of unjust enrichment is not to be pressed into service by the authorities under the Act while dealing with the cases of refund of duty illegally collected. Section 11 as interpreted in the judgments referred in the present case casts a duty upon the Authority to make refund of the duty collected under orders of the Authorities which have been set aside on appeal or revision. When on judicial side the Court had adjudicated that the doctrine of unjust enrichment would not be applicable to refund, application under section 11-A of the Act, instructions to the contrary issued by the State Government could not have any precedence. If the intention of the State Government was to nullify the effect of the judicial pronouncements regarding interpretation of the statute, the same could only be achieved by amendment of the statute and not by issuing executive instructions.

(Paras 8 & 9)

Petition under Section 12 *of the Contempt of Courts, Act,* 1971 *praying that appropriate proceedings envisaged under section* 12 *of the Contempts of Courts Act,* 1971, *be initiated against the respondent for having deliberately and wilfully disobeyed the orders dated* 5*th October,* 1990, *contained in Annexure P-*1, *issued by this Hon'ble Court and he be suitably punished for the same.*

M. L. Lahoty, Advocate with Sumeet Mahajan, Advocate, *for the Petitioners.*

A. Mohunta, Advocate with Naveen Mahajan, Advocate, *for the Respondents.*

JUDGMENT

A. L. Bahri, J.

(1) The petitioner's Company is registered under the Companies Act as Private Limited Company. The business of the Company is of manufacturing of plywood and other articles of wood falling under Chapter 44 of the Central Excise Tariff Act. The factory is situated at Pathankot Road, Village Raowali, Jalandhar City. Excise duty was charged from the Company. However, the Customs, Excise & Gold (Control) Appellate Tribunal, on January 22, 1990, ordered on the appeal filed by the Company that the goods were covered under the classification under Tariff sub-heading 4410—90 and thus the Company was entitled to the consequential relief. Annexure P-2 is the copy of the order of the Tribunal. The Company preferred an application on April 18, 1990 for refund of the Excise Duty illegally collected. Two amounts were claimed by refund Rs. 13, 36, 329.74 and Rs. 56,000, which covered the period from

February 6, 1987 to March 17, 1990. Exhibit P-3 is the copy of the refund application. The Assistant Collector, ultimately ordered refund of Rs. 56,000, but no action was taken for refund of Rs. 13,36,329.74 as stated above. This led the Company to file Civil Writ Petition No. 10037 of 1990 in this Court for a direction to the respondent to implement the order of the Tribunal by granting refund of the aforesaid amount.

(2) The Division Bench on October 5, 1990 passed the final order on the writ petition directing the respondent to implement the order of the Tribunal aforesaid with a period of two months provided there was no stay order against the implementation of the same from the Supreme Court. It was further ordered that as a result of the implementation, if any amount was found due, the same should be released forthwith.

(3) In spite of the directions given in the order of the High Court, as aforesaid, the amount due was not refunded. Instead, the respondent issued a show-cause notice to the Company as to why their application for refund be not rejected, as the duty in question was not borne by the Company but by the customers ultimately. This led the Company to file present Shri Y. D. Banga, Assistant Collector, Central Excise Division, Jalandhar City, who had issued the notice aforesaid and had violated the order passed by the High Court in the writ petition. The notice was issued by the respondent a day before the expiry of two months time allowed by the Division Bench for implementing the order of the Tribunal.

(4) On a notice to show-cause, why proceedings under the Contempt of Courts Act be not taken against the respondent, reply has been filed, *inter alia*, alleging that the notice aforesaid was issued by the respondent in response to instructions issued by the department by Telex (Copy Annexure R-1), withdrawing previous instructions on the subject and directing that refund claim should not be sanctioned to manufacturers and importers on the ground of unjust enrichment.

(5) Learned counsel for the petitioner has argued that present is a case of deliberate disobedience of the directions given by this Court in the writ petition aforesaid in not implementing the Award of the Tribunal. Reference has been made to section 11 of the Act *ibid* which imposes a duty on the Authorities to refund the duty illegally collected on acceptance of appeals etc. preferred against the

orders imposing such duties. Reliance has been placed on some decisions of the Bombay High Court holding that the doctrine of unjust enrichment is not applicable to the authorities under the Act while deciding cases of refund under section 11 of the Act. On the other hand, learned counsel for the respondent has argued that a policy decision was taken by the Department (Government) not to sanction refund of the duty collected if the assessee had shifted the burden to the customers i.e. the assessee had charged duty from the customers. Reference has been made to some decisions on the subject where the Supreme Court and the High Court had pressed into service the doctrine of unjust enrichment, in such like matters. Further, it has been argued that only a show-cause notice has been issued as to why application for refund be not rejected leaving the Company to satisfy the Assistant Collector that the liability was not shifted to the customers and the Company was entitled to the refund.

(6) In *M/s Shiv Shanker Dal Mills etc., etc.*, v. *State of Haryana and others etc.* (1), while holding that market-fee was illegally recovered from the dealers to the extent of 1 per cent framed a scheme directing the deposit of such amount with the Registrar of the High Court and leaving the assessees to make claims for the refund which was to be allowed on establishing that the liability was not shifted to the consumer. Again the Supreme Court in *State of Madhya Pradesh* v. *Vwankatlal and another* (2), *A.I.R.* 1985 Supreme Court 901 declined the refund of sugar fund illegally recovered on the ground of unjust enrichment holding that the burden of paying the amount was transferred by the factory to the purchasers and allowing such a refund to the factory would amount to unjust enrichment. It was held further that it was only on those persons on whom lay the ultimate burden to pay the amount, would be entitled to get a refund of the same. It was not possible to identify such person, the amount of the fund could be utilised by the Government for the purpose for which it was created. The aforesaid decisions are not helpful in deciding the present case. Each case of refund of tax or duty, illegally collected, has to be decided on the language of statute dealing with the subject. Furthermore, the Supreme Court and the High Court in the exercise of vast jurisdiction conferred under Articles 32 and 226 of the Constitution, respectively, could pass orders and give directions as considered necessary for

(1) A.I.R. 1980, S.C. 1037.
(2) A.I.R. 1985, S.C. 901.

just and proper decision of the case. The Supreme Court in *Mahabir Kishore and others* v. *State of Madhya Pradesh*, (3), held that non-refund of the money collected under mistaken view law would amount to unjust enrichment of the State. That was a case covered by Section 72 of the Contract Act.

(7) Learned counsel for the respondent referred to the decision of the Bombay High Court in *Roplas (India) Limited and another* v. *Union of India and another* (4), where claim for refund was made by the Company and it was held that the Company was not entitled for the refund as the duty was found to have been recovered by the Company from the customers. Their claim for such a refund amount to a fraud on consumers and the society, as observed. It was further observed that any indulgence in their favour would amount to helping them to enrich them unjustly. Thus they were not entitled to refund the claim. Learned counsel for the respondent, relying upon the aforesaid decision, has argued that the notice was rightly issued to the petitioner to show cause why the refund claim be not rejected as the Company had collected the amount of the duty from the purchasers. A bill (invoice) was produced in a photostat copy to show that duty was charged from the customer by the Company. This contention cannot be accepted. *Roolas's case* (supra) was considered subsequently by the Bombay High Court and was held to be not good law in view of Full Bench decision of the Bombay High Court in *New India Industries Ltd.* v. *Union of India* (5). Those decisions are : *Collector of Central Excise* v. *Weldekar Laminates Pvt. Ltd.* (6), *Roche Products Ltd.*, v. *Union of India*, (7); *Bombay Burmah Trading Corporation Ltd.* v. *Union of India* (8). In the *Roche Products Ltd.'s case* (supra) duty was paid under protest, the refund of which was claimed after the Revisional Authority had set aside the decision of the lower forum. It was held in para 6 of the judgment that the duty recovered by the department on an erroneous principle was bound to be refunded to the Company. Similar view was taken by the Bombay High Court in *Kirloskar Cummins Ltd.* v. *Union of India* (9). In this judgment interest was

(3) (1989) 4 Sec. I.
(4) A.I.R. 1989, Bombay, 183.
(5) 1990 (46), E.L.T. 23.
(6) 1990 (47), E.L.T. 610.
(7) 1991 (51), E.L.T. 238 (Bom.).
(8) 1991 (52), E.L.T. 195 (Bom.).

also allowed on the amount refundable. The Full Bench decision in the case of *New India Industries Ltd.* (*supra*) was followed.

(8) From the ratio of the decisions aforesaid it is quite clear that the doctrine of unjust enrichment is not to be pressed into service by the authorities under the Act while dealing with the cases of refund of duty illegally collected.

(9) The explanation offered in the reply filed by the respondent that notice to show cause why application for refund be not rejected on the ground of unjust enrichment on the basis of Government instructions-Annexure R-1 cannot be accepted. If the instructions are issued by the Government which are in accordance with the provisions of the Act or the Rules framed thereunder, they are to be followed by the Authorities under the Act. However, if such instructions are contrary to the provisions of the Act they cannot take the place of law substituting the express provision of the statute. Section 11-A as interpreted in the judgments referred to above casts a duty upon the Authority to make refund of the duty collected under orders of the Authorities which have been set aside on appeal or revision. When on judicial side the Court had adjudicated that the doctrine of unjust enrichment would not be applicable to refund, application under section 11-A of the Act, instructions to the contrary issued by the State Government could not have any precedence. If the intension of the State Government was to nullify the effect of the judicial pronouncements regarding interpretation of the statute, the same could only be achieved by amendment of the statute and not by issuing executive instructions. In the proceedings of the like-nature it is not necessary to determine as to whether the amount of the duty illegally collected should or should not be refunded to the Company taking in view the doctrine of unjust enrichment ? The question for consideration is short and simple as to whether the respondent has violated order passed by this Court in the writ petition as referred to above which directed the respondent to implement the order of the Tribunal and to refund the amount of duty, if found due to the Company. This was to be done within a period of two months from passing of the aforesaid order. Since, admittedly the Supreme Court has not stayed operation of the order of the High Court though S.L.P. is stated to have been pending and the matter was heard by the Supreme Court when order dated

(9) 1991 (51), E.L.T. 325 (Bom.).

December 21, 1990 was passed which has been produced. In the fact stated above, the respondent was expected to pass the orders of refund on the claim of the Company which was to the tune of Rs. 13,36,329.74 and doctrine of unjust enrichment could not be pressed into service by the respondent.

(10) The contempt petition is admitted. The respondent is directed to put in appearance in person on the next date i.e., May 3, 1991, for which date the case stands adjourned for further proceedings.

P.C.G.

Before N. C. Jain & J. L. Gupta, JJ.

JATINDER KUMAR DAHIYA AND OTHERS,—*Petitioners.*

versus

THE STATE OF HARYANA AND OTHERS,—*Respondents.*

Civil Writ Petition No. 1201 *of* 1991.

2nd April, 1991.

Constitution of India, 1950—Arts. 14 & 16—Punjab Civil Service (Executive Branch) Rules, 1930—Rls. 5 &6—Special Recruitment—Filling up of 21 posts to the H.C.S. by special recruitment—Procedure under proviso to Rl. 5 approved by Cobinet—Chief Secretary requesting F.Cs. for recommending eligible candidates from amongst class II and III serving officers in various departments—Screening of candidates conducted by C.S.—Final selection made in consultation with HPSC—Rl. 6 naming sources of special recruitment—Recruitment not confined to sources mentioned in Rl. 6—Resort to sources other than those specified in Rl. 6 is justified—Interpretation of proviso to Rl. 5—Harmonious and not restricted construction—State—Not restricted to sources specified in Rl. 6—Proviso to rl. 5 cannot be said to be conferring unguided and unbridled power on the State—Change in eligibility criteria not based on extraneous consideration—Claim for de-novo consideration turned down—Selection upheld.

Held, that after all, method is "the mode of operating" or "the means of attaining an object". The object was to select the best persons out of those serving the State. For attaining that object, the State has been considering the claims of officers/officials working in different departments. In doing so, it did not violate the express provisions of the rules. We are of the view that rules 5 & 6 only