CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.II

Excise Appeal No.70241 of 2021

(Arising out of Order-In-Appeal No.61-CE-ALLD-2021, dated : 24.02.2021 passed by Commissioner (Appeals) CGST & Central Excise, Allahabad)

Bharat Heavy Electricals Ltd. **.....Appellant**
(P.O. Village Khailar, Jhansi, Uttar Pradesh 284129)

VERSUS

Commissioner, CGST & Central Excise, Kanpur

....Respondent
(GST Bhawan, 117/7 Sarvodaya Nagar, Kanpur)

APPEARANCE:

Shri Z. U. Alvi, Advocate for the Appellant
Shri Santosh Kumar, Authorized Representative for the Respondent

CORAM: HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.-70884/2025

DATE OF HEARING : 13.10.2025
DATE OF DECISION : 18.12.2025

SANJIV SRIVASTAVA:

This Appeal is directed against the Order-In-Appeal No.61-CE-ALLD-2021, dated 24.02.2021 passed by Commissioner (Appeals) CGST & Central Excise, Allahabad. By the impugned order following has been held:-

> *"4.2 I observe that the Appellate Authority in its O.LA dated 26.03.2019 has already decided that for the purposes of the clearances pertaining to this refund claim, the relevant date cannot be date of adjustment of duty after the final assessment (clause (B)(eb) of the Explanation in Section 11B of the Act) and it has to the date of payment of duty clause (B)(1) of the Explanation in Section 11B of the Act).*

4.3 It is admitted fact that the appellant has filed refund claim on 24.03.2015 for the total duty amounting to Rs. 1,53,36,799/- involved for the month of Jan 2014 to March 2014. On examination of the refund claim the adjudicating authority has observed that refund portiou for the month of Jan 2014 was Rs. 56,85,511/- & for the month of Feb 2014 was Ra 58,27,036/ The appellant has filed ER-1 returns for the month of Jan 2014 on 08.02.2014 and for the month of Feb 2014 on 08.03.2014, therefore, last date of filing of refund claim pertaining the month of Jan 2014 & Feb 2014 is 07.02.2015 & 07.03.2015 respectively, Since the appellant has filed refund claim of 24.03.2015, therefore, refund claim for the month of Jan 2014 & Feb 2014 are barred by limitation period of one year as prescribed under Section 11B of the Central Excise Act, 1944. i find no infirmity in the findings of the adjudicating authority.

4.4 As for as refund for the month of March 2014 is concerned the appellant has filed ER. 1 return for the month of March 2014 on 09.04.2014 by paying duty on 05.04.2014and refund claim was filed on 24.03.2015, therefore, refund claim for the month of March 2014 amounting to Rs.38,24,252/-has rightly been allowed by the adjudicating authority.

5. In view of the above, I uphold the impugned order & reject the appeal filed by the appellant."

2.1 The Appellant is a public sector undertaking having Central Excise Registration No.AAACB4146PXM001 for manufacturing transformers, diesel locomotive & parts.

2.2 The Appellant made an application for refund of Rs.1,53,36,799/- electronically, on 24.03.2015, under Section 11B of the Central Excise Act, 1944 on the grounds that:-

(i) They had paid Central Excise duty of Rs.1,53,36,799/- against invoices issued during 30.01.2014 to 29.03.2014.

(ii) The products cleared against these invoices, were exempt from payment of Central Excise duty vide Sl. No. 336 of the Notification No. 12/2012-CE dated 17.03.2012.

(iii) Their buyer had not paid/ reimbursed Central Excise duty to them and had provided them necessary requisite certificates for Central Excise duty exemption.

2.3 By Order-In-Original No. 27-CE/REF/AC/2018 dated the refund claim was rejected. This order was challenged by the Appellant before the Commissioner (Appeals) who vide his Order-In-Appeal No.47/CE/Alld/2019 dated 26.03.2019 set aside the Order-In-Original and remanded the matter back to the Original Authority with directions to decide the refund claim after verifying the submissions of the Appellant regarding payment of duty and after discussing/verifying the aspect of unjust enrichment.

2.4 By Order-In-Original No.08-CE/REF/DC/JHS/2020 dated 29.06.2020 the Adjudicating Authority allowed the refund claim amounting to Rs.38,24,252/- and rejected the remaining amount of Rs.1,15,12,547/-.

2.5 Aggrieved Appellant filed appeal before the Commissioner (Appeals) which has been dismissed by the impugned order.

2.6 Hence this appeal.

3.1 We have heard Shri Z. U. Alvi, Advocate for the Appellant and Shri Santosh Kumar, Authorized Representative for the Respondent-Revenue.

3.2 Arguing for the Appellant learned Counsel submits as follows:-

"1(a) It is submitted that Assessments of Appellant's ER-1 returns have been period-oriented and not on Contact-to-Contract basis, since Appellant effect clearance each month

against a large number of small and big contracts and clearances against any single(large value) Contract are spread over a long period-sometimes one/two years or even more.

(b) Accordingly, as is evident from Assessment Finalisation Order Dated: 16.01.2015, that it covers all the month's clearances -billed vide Provisional Invoices listed in ER-1 of that particular month.

(c) As per CBEC Manual Chapter-3 para 2.67(Part IV) finalisation of Provisional Assessment means finalisation of an issue/ground and thereafter each ER-1 (Ref para-15, p 103) ACCE's OIO No: 27 DT: 17.12.2008)

Thus the assessment of provisionally issued C.Excise Invoices during Jan 2014 & Feb 2017 were finalised only vide Finalisation Order DT: 16.01.2015, irrespective of the fact as to whether the valuation varied or not and whether the monthly Excise duty paid provisionally on 08.02.2014 & 08.03.2014 varied or not.

In the event duty was found to be short paid, the relevant date for issuance of SCN u/s 11A would have been the date of finalisation of assessment, and limitation period for issuance of Show Cause Notice for recovery of the short paid duty would not be reckonable from the date of payment of duty but from the date of finalisation of assessment only. And in case even if differential duty paid is also short that the relevant date would be the date of payment of differential duty.

(d) Thus the relevant date would be the later of the two dates

- Date of finalisation of assessment, if no differential duty is found to be payable.

- Date of payment of differential duty, if such payment found shortof duty payable legally.

And in no case the date of Original payment of duty vide Provisional Excise Invoice.

2 (a) The view expressed vide letter dt: 14.01.2013to the effect that the lodging of claim of Refund excess duty paid provisional assessment period prior to finalisation of the assessment for that period was based on the legally sound reasoning that the payment of duty under a particular Invoice even if it may be in excess of legally leviable and may not be subject to revision, nonetheless the seal of finality did not yet got attached to it. And the refund can only be granted after assessments are finalised and commensurate payments, if any made.

(b) As held by Hon'ble Supreme Court Departmental Adjudicating Authority can not be permitted to take contrary view in identical fact situation involving same legal issue and same assesse, especially over a small period without any substantive change in provisions of law.

Appellant's refund claim was returned on (14.01.2013) the ground of being pre-mature, since related to the period wherefor assessments was not finalised. And, then on resubmission after finalisation of assessment the refund claim was sanctioned duly vide OIO No: 123-CE/Ref/AC/JHS/2014 DT:13.10.2014.

(c) The Impugned OIA No: 47 DT: 26.03.2019 was in defiant opposition to Hon'ble Supreme Court's enumeration of the principles of adjudication and thus the OIO No: 08 dt: 29.06.2020 and the OIA No: 61 DT: 09.03.2021 re-affirming the OIO DT: 26.06.2020 are bad-in-law and liable to be set-aside.

7.3 The refund claim was concededly filed on 26.03.2015, within almost 2-months of assessment Finalisation Order 16.01.2015 as such was within limitation period prescribed under S-11B(5)B(eb) C.E.A.1944, S-11B(5)B(eb) is the applicable provision and not S-11b(1) r/w S-11B(5) B(i) C.E.A.1944.

7.4 The Appellant are also eligible for interest u/s 11BB from 25.06.2015-3 months after due date of filling of refund claim."

3.3 Learned Authorized Representative for the Revenue reiterates the findings recorded in the Appeal and during the course of argument.

4.1 We have considered the impugned order alongwith the submissions made in the appeal. Initially we observe that by Order dated 17.12.2018 in first round of litigation refund claim of the Appellant was rejected by the Original Authority observing as follows:-

> *"15. In this case the party had filed a refund claim worth Rs.1,53,36,799/- for refund of the excise duty paid by them on the goods cleared under the excise invoices issued between the period 30.01.2014 to 29.03.2014, on the grounds that the product cleared by them on these invoices were exempted from payment of duty vide S.No.336 of Notification No. 12/2012-CE, dated 17.03.2012 and that their buyer had not paid/reimbursed excise duty to them. The department had, however, issued a show cause notice on 23.09.2015 to the party whereby the said claim was sought to be rejected in the light of finding of Hon'ble Supreme Court of India in the case of M/s Priya Blue Industries Ltd., Vs. Commissioner of Customs(Preventive) in Civil Appeal No.9045 of 2003. The SCN further alleged that the benefit of exemption was not allowable to the party as the provisional assessment was finalized by the Asstt. Commissioner, CE, Jhansi on 16.01.2015. Moreover, as per clause 2.6 (Part-IV) of Chapter-3 of CBEC's Central Excise Manual, finalization of provisional assessment means finalization of an issue/ground and thereafter finalization of each ER-1. The department's stand was that the final assessment order issued on 16.01.2015 covering the period October, 2013-March, 2014 had been passed after taking into account all the documents/material facts submitted by the assessee at the time of final assessment.*

16. The party in their defence submitted that the memorandum of Finalization of Provisional Assessment dt. 16.01.2015 was passed and assessment finalized without any notice whatsoever and without affording any opportunity of personal hearing of any issue involved with the assessment; they also pleaded the violation of principles of natural justice in issuance of the said finalization order. They further pleaded that the jurisdictional authorities for processing and sanction of the refund claim U/S 11B have been taking stand that the filing of the refund claim prior to the passage of assessment finalization order is pre-mature, irrespective of the fact that the refund claim happened to pertain to the clearance under the contract which did not involve variation of price. They referred to a previous claim finalized by the AC.

17. I find that the party had opted for provisional assessment of their goods with regard to payment of excise duty under Rule-7 of CER, being unable to determine the value of excisable goods or determine the rate of duty applicable thereto. It does not cover the aspect/point if the party clear their goods on payment of duty which later found to be exempted from payment of duty under a specific Notification. As per Rule-7(5) of CER an assessee is entitled for a refund consequent to order for final assessment under Rule-7 (3) of CER subject to condition where there is price variation/reduction etc. on the goods sold to the buyer and not for any other purpose. I also note that the party vide their letter dated 06.07.2015 while re-submitting their claim have re-iterated that "the differential excise duty worked out and paid under the supplementary invoices with respect to final assessment order dated 16.01.2015 are not inclusive of the price variation in respect of the invoices for which refund is claimed".

18. I also observe that the party vide their letter Ref BHE/JHS/Fin/CEx./15-16, dated 12.08.2015 has further stated that they have already communicated that upto

16.01.2015 (i.e. the date of final assessment) no supplementary invoices have been raised with respect to original supply invoices against which refund claim for Rs.1,53,36,799/- have been re-filed on 06.07.2015. This clearly indicates that there was no price variation in the assessable value of goods cleared by the party and sold to their buyer under the original excise invoices for which refund has been claimed.

19. Section-11B(5)(B)(eb) of CE Act dealing with the relevant date of filing of refund clearly specifies that in "in case where duty of excise is paid provisionally under this Act or the rules made therunder, the date of adjustment of duty after the final assessment thereof". It makes it amply clear that with regard to payment of excise duty on a provisional basis, the relevant date of adjustment of duty would be after the final assessment thereof. In this case the final assessment order was issued by AC CE Jhansi on 16.01.2015 and the differential duty was deposited by the party within time by issuing supplementary invoices and even the party at the time of final assessment of the value of their goods cleared and assessment of duty finally they did not come with any such request that they have paid excess duty as a result of exemption in excise duty on a specific product under a specific notification which they claimed at a later stage by filing refund claim. I observe that the party had paid the differential duty amounting to Rs. 2,91,72,189/- by issuing supplementary invoices on various dates, as aforesaid was taken note in the final assessment order dated 16.01.2015 also. It was also mentioned specifically that there was no amount which M/s BHEL, Jhansi needs to pay as duty on final settlement of prices, to the related invoices and work orders.

Therefore, I am of the view that in this case the period of limitation should be counted in terms of Section-11 B (1)

and Section-11 B (5) (B) (f) of CE Act, 1944 whereas the party had re-filed their claim on 06.07.2015.

20. I would also like to place reliance on the judgment passed by the Hon'ble Supreme Court in the case of M/s Priya Blu Industries Ltd. Vs. CC (Preventive). Relevant portion of the same reads as under :-

"Once an order of assessment is passed the duty would be payable as per that order. Unless that order of assessment has been reviewed under Section 28 and/or modified in an Appeal that order stands. So long as the order of Assessment stands the duty would be payable as per that order of Assessment. A refund claim is not an appeal proceeding. The Officer considering a refund claim can't sit in Appeal over an assessment made by a competent Officer. The Officer considering the refund claim cannot also review an assessment Order".

21. In an another order passed by Hon'ble CESTAT, Mumbai in the case of M/s Nicholas Piramal (1) Ltd Vs. Commissioner of Customs, Airport, Mumbai [2014.TIOL.1716.CESTAT(MUM)] it has been clearly held "that exemption not claimed at the time of assessment cannot be claimed by way of a refund claim without challenging the original assessment." (para 4.1)

Position is further clarified by the CBEC vide their Circular No. 24/2004-Cus. (F.No.438/18/2003-Cus. IV), dated 18.03.2004 stating interalia that refund claim is not maintainable when the assessee did not challenge the Assessment Order which became final. I find that in this case the assessment was finalized by the proper officer vide order dt.16.01.2015 without any objection from the party. The case laws cited by the party do not come to their rescue as the facts and circumstances of those cases were not similar to instant case."

4.2 This order was set aside by the Commissioner (Appeals) vide order dated 26.03.2019 observing as under:-

"4.1 I have carefully gone through the facts of the case, the averments made at the time of the personal hearing and all other material/ documents available on record. It is observed that:

(i) The refund claim of the appellant was rejected by the Adjudicating Authoirty on the grounds that (i) the refund claim was time barred, considering the relevant date in this case as the date of payment of duty (clause (B) (f) of Explanation in Section 11B of the Act and the date of filing the refund claim as 06.07.2015 and (ii) since the appellant did not challenge the Final Assessment Order dated 16.01.2015, they could not have, therefore, filed the refund claim, in terms of decisions of the Hon'ble Supreme Court in the case of Priya Blue Industries Ltd. vs. Commissioner of Customs (Preventive) 2004 (172) ELT 145 (BC) & CCE Kanpur vs. Flock (India Pvt. Ltd. 2000 (120) ELT 285 (SC) and

(ii) The Adjudicating Authority has, thus, taken contradictory stand for rejecting the refund claim inasmuch as the relevant date has been considered as the date of payment of duty (clause (B) (f) of the Explanation in Section 11B of the Act) and not the date of adjustment of duty after the final assessment {clause (B) (eb) of the Explanation in Section 11B of the Act) (i.e., the clearances pertaining to this refund claim have been considered as not part of the provisional assessment & final assessment thereof), whereas for the purpose of applying the aforesaid decisions of the Hon'ble Supreme Court, the clearances involved in this refund claim, have been considered part of the provisional assessment & final assessment thereof.

4.2 First of all, I take up the issue pertaining to the applicability of the aforesaid decisions the Hon ble Supreme Court. I find that Rule 7(1) of the Central Excise Rules, 2002 Pertaining to provisional assessment, provided, as under:

Rule 7(1): Where the assessee is unable to determine the value of excisable goods or determine the rate of duty applicable thereto, he may request the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, in writing giving reasons for payment of duty on provisional basis and the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, may order allowing payment of duty on provisional basis at such rate or on such value as may be specified by him.

4.2.1 Thus, I find that as per the aforesaid statutory provisions, provisional assessment could have been allowed on the basis of either non-determination of the value of excisable goods at the time of removal or non-determination of the rate of duty applicable to the excisable goods at the time of removal. Further, on going through the Provisional Assessment Order dated 10.01.2013, I find that the provisional assessment was allowed on the issue of valuation (on account of price variation clause in the contracts) and the issue of rate of duty fi.e., classification or admissibility of any exemption notification) was not the issue involved therein. Accordingly, in the Final Assessment Order dated 16.01.2015, the issue of rate of duty could not have been discussed and as such, this Order dealt with the issue of valuation only.

4.2.2 The decision in the case of Priya Blue Industries Ltd. vs. Commissioner of Customs (Preventive) 2004 (172) ELT. 145 (S.C.) was based on the decision in the case of CCE Kanpur vs. Flock (India) Pvt. Ltd. 2000 (120) ELT 285 (S.C.), wherein (i) the adjudicating authority had classified the goods manufactured as falling under Tariff Item No. 22B and the refund claim was filed on the basis that the goods were classifiable under T.1. 22A, (ii) thus, the issue before the Hon'ble Supreme Court was having accepted the classification under Tariff Item No. 22B as held in the

adjudication order, was it open to the assessce to claim refund by contending that the goods were classifiable under Tariff Item 22A and (ii) in this context, the Hon'ble Supreme Court held that without filing an appeal, it is not open to the party to question the correctness of the order of the adjudicating authority by filing a refund claim

4.2.3 I also find that the Hon'ble Supreme Court in the case of Punjab National Bank vs. R.L. Vaid 2004 (172) E.L.T. 24 (S.C.), has held at Para 5, as under:

5. We find that the High Court has merely referred to the decision in R.K. Jain's case (supra) without even indicating as to applicability of the said decision and as to how it has any relevance to the facts of the case. It would have been proper for the High Court to indicate the reasons and also to spell out clearly as to the applicability of the decision to the facts of the case. There is always peril in treating the words of a judgment as though they are words in a Legislative enactment and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a difference between conclusions in two cases.

4.2.4 Similarly, the Hon'ble Supreme Court in the case of CCE, Bangalore vs. Srikumar Agencies 2008 (232) E.L.T. 577 (S.C.), inter alia, held, as under:

Precedents - Court decision not statute - Reliance thereon without discussion of facts - Decisions not to be relied upon without discussing similarity of facts Judgments of courts not to be construed as statutes - Circumstantial flexibility, additional or different fact may make a world of difference between conclusions in two cases.

4.2.5 Thus, after taking into consideration the decisions of the Hon'ble Supreme Court discussed in Paras 4.2.3 & 4.2.4 above and the facts of this case, I find that the reliance placed by the Adjudicating Authority on the decisions of the

Hon'ble Supreme Court in the cases of Priya Blue Industries Ltd. vs. Commissioner of Customs (Preventive) 2004 (172) E.L.T. 145 (S.C.) & CCE Kanpur vs. Flock (India) Pvt. Ltd. 2000 (120) ELT 285 (S.C.) for rejecting the refund claim, is unjustified, as the issue of rate of duty (i.e., the admissibility of Sl. No. 336 of the Notification No. 12/2012-CE dated 17.03.2012) was not raised & discussed in the Final Assessment Order dated 16.01.2015 and as such, there was no assessment order on this issue of rate of duty. Even, it is on record that differential duty paid on final adjustment, did not take into consideration the invoices issued during 30.01.2014 to 29.03.2014, for the clearances of the products which were exempt under Sl.No.336 of the Notification No. 12/2012-CE dated 17.03.2012.

4.2.6 I also find that in the following judicial pronouncements, the decisions of the Hon'ble Supreme Court in the cases of Priya Blue Industries Ltd. vs. Commissioner of Customs (Preventive) 2004 (172) E.L.T. 145 (S.C.) & CCE Kanpur vs. Flock (India) Pvt. Ltd. 2000 (120) ELT 285 (S.C.), on similar basis, have been found inapplicable:

(i) Primo Pick N Pack Ltd. vs. Union of India 2001 (129) ELT 296 (M.P.)

(ii) Indian Dyestuff Industries Ltd. vs. Union of India 2003 (161) ELT 12 (Bom.)

(iii) Navinon Ltd. vs. U.O.I. 2004 (163) ELT A56 (S.C.)

(iv) Aman Medical Products Ltd. vs. CC, Delhi 2010 (250) ELT 30 (Del.)

(v) Micromax Informatics Ltd. vs. Union of India 2016 (335) ELT 446 (Del.)

(vi) Anupam Products Ltd. vs. CC, ICD, TKD, New Delhi 2012 (282) ELT 451 (Tri-Del.)

(vii) Ahswin Vanaspati Indus. Pvt. Ltd. vs. CC, Kandla 2012 (280) ELT 158 (tri-Ahmd.)

4.3 Now I take up the other issue regarding the relevant date. Since it has already been held that the rate of duty

(i.e., admissibility of exemption notification) was not an issue involved in the provisional assessment & final assessment thereof, 1, thus, find that for the purposes of the clearances pertaining to this refund claim, the relevant date cannot be date of adjustment of duty after the final assessment (clause (B)(eb) of the Explanation in Section 11B of the Act) and it has to the date of payment of duty (clause (B) (f) of the Explanation in Section 11B of the Act).

4.4 Regarding the date of filing the refund claim, I find that the Central Board of Excise & Customs, vide Para 2(g) of the Circular No.130/41/95-CX dated 30.05.1995 on the subject of Interest on delayed refunds (proposed Section 11BB)', instructed that where the refund application is found to be incomplete a letter shall be issued stating the deficiencies therein, the additional information/document required within 48 hours of the receipt. In such cases the letter shall be issued only with the approval of a Superintendent and the period of 3 months, for purpose of Section 11BB, shall count from the date of receipt of all the requisite information or documents.

4.4.1 I further find that in this case, the refund claim alongwith documents, was filed on 25.03.2015, submitting photocopy of statement for refund claim of Rs.1,53,36,799/-. photocopy of certificate of M/s Bharatiya Rail Bijlee Company Ltd., to substantiate that duty had not been reimbursed to them and photocopies of Mega Power Project Certificate issued by the Ministry of Power and the Project Authority Certificate. However, no deficiency was pointed out within two days of the receipt. Rather after lapse of nearly three months, the appellant was asked, vide letter dated 23.06.2015, to resubmit the refund claim alongwith documents, such as, invoices, certificate from the statutory auditor/ chartered accountant etc.. In response thereto, the appellant resubmitted the refund claim on 06.07.2015 alongwith copies of invoices etc..

4.4.2 Since, the appellant were asked to resubmit the refund claim, on 23.06.2015 (and as such, there was no appealable order vide which the refund claim was rejected earlier), whereas the appellant were asked to resubmit the refund claim, I, thus, find that the date of filing of refund claim taken by the Adjudicating Authority as 06.07.2015, is unjustified. It has to be considered as 24.03.2015, i.e., the date on which the appellant had filed the refund claim electronically.

4.5 Thus, I find that in this case, date of filing of refund claim is 24.03.2015, the relevant date (for the purposes of Section 11B(1) of the Act) is the date of payment of duty (clause (B)(f) of the Explanation in Section 11B of the Act) and the decisions of the Hon'ble Supreme Court in the cases of Priya Blue Industries Ltd. vs. Commissioner of Customs (Preventive) 2004 (172) E.L.T. 145 (S.C.) & CCE Kanpur vs. Flock (India) Pvt. Ltd. 2000 (120) ELT 285 (S.C.), are inapplicable to the facts of this case.

4.6 As regards to the submissions of the appellant that their earlier refund claim pertaining to the period April, 2013 to September, 2013 on the same contract, was sanctioned vide Order-in-Original No. 123-C.Ex/Refund/AC/JHS/2014 dated 13.10.2014; and that the Department in their case, had earlier taken stand that filing of refund claim when the assessment were yet to be finalized, was premature, are unjustified, as a wrong decision or order cannot entitle the appellant to claim the same benefit as held by the Hon'ble Supreme Court in the case of Fuljit Kaur v. State of Punjab 2010 (262) E.L.T. 40 (S.C.). This position has been lucidly explained by the Hon'ble Apex Court in the case of Chandigarh Administration v. Jagjit Singh [AIR 1995 SC 705 1995 SCC (1) 745], as under:

"Generally speaking, the mere fact that the respondent authority has passed a particular order in the case of another person similarly situated can never be the ground

for issuing a writ in favour of the petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent authority to repeat the illegality or to pass another unwarranted order. The extraordinary and discretionary power of the High Court cannot be exercised for such a purpose. Merely because the respondent authority has passed one illegal/unwarranted order, it does not entitle the High Court to compel the authority to repeat that illegality over again and again. The illegal/unwarranted action must be corrected, if it can be done according to law indeed, wherever it is possible, the Court should direct the appropriate authority to correct such wrong orders in accordance with law but even if it cannot be corrected, it is difficult to see how it can be made a basis for its repetition. By refusing to direct the respondent authority to repeat the illegality, the Court is not condoning the earlier illegal act/order nor can such illegal order constitute the basis for a legitimate complaint of discrimination. Giving effect to such pleas would be prejudicial to the interests of law and will do incalculable mischief to public interest. It will be a negation of law and the rule of law.

4.7 Regarding the submission of the appellant that in this case involving clearances against invoices issued during 30.01.2014 to 29.03.2014, they had paid duty finally on 5th April 2014 and they have filed the refund claim on 24.03.2015 which is within one year of the date of payment of Central Excise duty, it is observed that in terms of Rule 8(1) of the Central Excise Rules, 2002, the duty for the clearances effected during the month of January, 2014 was required to be paid by 05.02.2014/ 06.02.2014

(electronically), the duty for the clearances effected during the month of February, 2014 was required to be paid by 05.03.2014/ 06.03.2014 (electronically) and the duty for the month of March, 2014 was required to be paid by 31.03.2014. Thus, I find that this submission of the appellant requires verification at the end of the Adjudicating Authority.

4.8 Since this submission of the appellant that they had paid duty on 05.04.2014 requires verification by the appellant and also the Adjudicating Authority has not discussed the aspect of unjust enrichment in the impugned Order, I, therefore, direct the Adjudicating Authority to process & decide the refund claim of the appellant, in the light of discussions made & findings arrived at, in Paras 4.1 to 4.7 above, after verifying this submission of the appellant regarding payment of duty and after discussing/ verifying the aspect of unjust enrichment. I order accordingly."

4.3 **Neither the Appellant nor the Revenue filed any appeal before the CESTAT or any other Authority challenging any of the findings recorded in the order of the Commissioner (Appeals). Accordingly, the findings recorded both on the point of law and point of fact acquire finality for the purpose of these proceedings. The issues appellant have raised in this appeal for arguing against the denial of part refund claim are same as those mentioned in para 4.1 (ii) of the above order. The findings rejecting the said grounds have been recorded in para 4.3, 4.4, 4.4.1, 4.4.2 and 4.5.**

4.4 Commissioner (Appeals) has in Para 4.5 specifically decided that judgement would not be available to the Revenue for decision in this case for holding so he has referred to number of decision which are recorded in Para 4.2.6 of the order.

4.5 We note that the judgment which have been relied upon have been considered and specifically overruled by a Three

Member Bench of the Hon'ble Supreme Court in the case of ITC Ltd. V/s Commissioner of Central Excise, Kolkata-IV reported at 2019 (368) E.L.T. 216 (S.C.) holding as follows:-

> ***"42.*** *It was contended that no appeal lies against the order of self-assessment. The provisions of Section 128 deal with appeals to the Commissioner (Appeals). Any person aggrieved by any decision or order may appeal to the Commissioner (Appeals) within 60 days. There is a provision for condonation of delay for another 30 days. The provisions of Section 128 are extracted hereunder :*
>
> ***"128. Appeals to [Commissioner (Appeals)].*** *— (1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a [Principal Commissioner of Customs or Commissioner of Customs] may appeal to the [Commissioner (Appeals)] [within sixty days] from the date of the communication to him of such decision or order :*
>
> *[Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.]*
>
> *[(1A) The Commissioner (Appeals) may, if sufficient cause is shown, at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing :*
>
> *Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.]*
>
> *(2) Every appeal under this section shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf."*

43. *As the order of self-assessment is nonetheless an assessment order passed under the Act, obviously it would be appealable by any person aggrieved thereby. The expression 'Any person' is of wider amplitude. The revenue, as well as assessee, can also prefer an appeal aggrieved by an order of assessment. It is not only the order of re-assessment which is appealable but the provisions of Section 128 make appealable any decision or order under the Act including that of self-assessment. The order of self-assessment is an order of assessment as per Section 2(2), as such, it is appealable in case any person is aggrieved by it. There is a specific provision made in Section 17 to pass a reasoned/speaking order in the situation in case on verification, self-assessment is not found to be satisfactory, an order of re-assessment has to be passed under Section 17(4). Section 128 has not provided for an appeal against a speaking order but against "any order" which is of wide amplitude. The reasoning employed by the High Court is that since there is no lis, no speaking order is passed, as such an appeal would not lie, is not sustainable in law, is contrary to what has been held by this Court in Escorts (supra).*

44. *The provisions under Section 27 cannot be invoked in the absence of amendment or modification having been made in the bill of entry on the basis of which self-assessment has been made. In other words, the order of self-assessment is required to be followed unless modified before the claim for refund is entertained under Section 27. The refund proceedings are in the nature of execution for refunding amount. It is not assessment or re-assessment proceedings at all. Apart from that, there are other conditions which are to be satisfied for claiming exemption, as provided in the exemption notification. Existence of those exigencies is also to be proved which cannot be adjudicated within the scope of provisions as to refund. While processing*

a refund application, re-assessment is not permitted nor conditions of exemption can be adjudicated. Re-assessment is permitted only under Section 17(3)(4) and (5) of the amended provisions. Similar was the position prior to the amendment. It will virtually amount to an order of assessment or re-assessment in case the Assistant Commissioner or Deputy Commissioner of Customs while dealing with refund application is permitted to adjudicate upon the entire issue which cannot be done in the ken of the refund provisions under Section 27. In Hero Cycles Ltd. v. Union of India - 2009 (240) E.L.T. 490 (Bom.) though the High Court interfered to direct the entertainment of refund application of the duty paid under the mistake of law. However, it was observed that amendment to the original order of assessment is necessary as the relief for a refund of claim is not available as held by this Court in Priya Blue Industries Ltd. (supra).

45. *Reliance was also placed on a decision of Rajasthan High Court with respect to service tax in Central Office Mewar Palace Org. v. Union of India - 2008 (12) S.T.R. 545 (Raj.). In view of the aforesaid discussion, we are not inclined to accept the reasoning adopted by the High Court, that too is also not under the provisions of the Customs Act."*

4.6 In view of the decisions made in the case of Priya Blue Industries Ltd. vs. Commissioner of Customs (Preventive) 2004 (172) E.L.T. 145 (S.C.) & CCE Kanpur vs. Flock (India) Pvt. Ltd. 2000 (120) ELT 285 (S.C.) Appellant should not have challenged the self assessment made at the time of clearance of the goods.

4.7 However, as we have observed no appeal have been filed by the Revenue challenging this order of the Commissioner (Appeals) in view of any challenge we are of the view that this ground cannot be taken up in this proceeding now.

4.8 Similarly we find that issue of limitation have also been decided by the Commissioner (Appeals) and he have given a finding with regards to the relevant date after consideration of the fact and law in the present case in Para 4.5. There has been no challenge to these findings by the Appellant in any proceedings before this Tribunal or any other Authority. Accordingly, raising any ground contrary to the above finding would be against the principle of judicial and legal proprietary. Such ground would barred by principle of *res judicata.* In the remand proceedings Order-In-Original specifically refers to this Order-In-Appeal dated 26.03.2019 and examines the refund claim on the basis of the directions and findings given in this Order-In-Appeal.

4.9 The relevant findings recorded in the Order-In-Original are reproduced below:-

> *"Having regard to the circumstances, complexities & technicalities in the pattern of sale as opted by M/s BHEL Jhansi and caused inadvertent litigation in the matter, so to do away with, I don't want to discuss the issues viz, the challenging of the final assessment order dated 16.01.2015, the period of limitation and applicability of the case Priya Blue Industries Ltd, any more; as these issues already had been discussed in length and negated by the Appellate authority in OIA dated 26.03.2019. Further, as per available record, no appeal has been filed against the OIA dated 26.03.2019 so far and appeal period also seems to be over. Now I confine my findings to the direction given by the appellate authority in its OIA dated 26.03.2019.*
>
> *Following are the moot points as envisaged, to be discussed in light of OIA dated 26.03.2019:-*
>
> *1. Whether the refund claim is time barred for the month of Jan-14 & Feb-14, as the claimant had filed refund claim on 24.03.2015?*

2. Whether the duty was reimbursed to the party during the sale for the period of under consideration and whether the clause of unjust enrichment is invokable?

On the first count, I find that ER-1 for the month of Jan-14 was filed on 08.02.2014.

On examination, it was found that the refund portion pertains to Jan-14 is Rs 56,85,511/-. The ER-1 for the month of Feb-14 was filed on 08.03.2014 & refund portion involved is Rs 58,27,036/-. The last date for filing of refund claim pertaining to the month of Jan-14 & Feb-14 is 07.02.2015 & 07.03.2015 respectively in terms of section 11 B of Central Excise Act, 1944. Whereas the total refund claim for the period Jan-14 to Mar-14 was filed on 24.03.2015, consolidated. Therefore, it is evident that the refund for the month Jan-14 & Feb-14 became time barred. The refund portion filed for the month of Mar-14 was well within the time limit. The details are appended in Table -1 as under:-

C. Excise ER-1 Return for the following months	Refund portion involved in ER-1 return	ER-1 Electronically filed date	The last date for filing the refund	Actual date of filing of the refund claim	Remark
Jan-14	5685511	08.02.2014	07.02.2015	24.03.2015	time barred
Feb-14	5827036	08.03.2014	07.03.2015	24.03.2015	time barred
Mar-14	3824252	09.04.2014	08.04.2015	24.03.2015	within time

So, during scrutiny the refund pertaining to the clearances made against invoices issued in the month of Mar-14 is found to the tune of Rs 38,24,252/-. The claimant had paid central excise duty on the 5th April 2014 and they had filed the refund claim on 24.03.2015, which is within one year of the date of payment of C. Excise duty. So this portion of refund amount may be sanctioned to the claimant."

4.10 We have reproduced in Para 1 the findings recorded in the impugned order.

4.11 We find in absence of any challenge by the appellant to the earlier order of the Commissioner (Appeals) the findings recorded have attained finality. Commissioner (Appeals) have specifically stated in the order as the manner for determining the relevant date for computation of period of limitation. Order-In-Original goes by the same and have partly rejected the refund claim paid by the Appellant. The Commissioner (Appeals) also recorded the same in Para 4.2 to 4.4 of the impugned order. Commissioner (Appeals) is also bound by the findings recorded in his own order dated 26.03.2019.

4.12 By application of principles of *Res judicata* in our view the Appellant is barred from arguing anything which have acquired finality in earlier round in this proceedings. Submissions made by the Appellant thus lack merit to the extent they go against the Order-In-Appeal dated 26.03.2019.

4.13 In the case of Food Specialities [1998 (97) E.L.T. 402 (S.C)] Hon'ble Supreme Court has observed as follows:

> *Shri Vellapally, learned senior Counsel for the respondent assessee states that this appeal arises out of a consequential order made pursuant to the decision reported in Dalmia Industries Ltd. v. Collector of Central Excise - 1992 (61) E.L.T. 295 pertaining to classification in respect of the same assessee. He submits that the question of classification was decided by the Tribunal in the assessee's favour and even though a caveat was filed in this Court by the assessee, there is no intimation of any appeal being filed by the Department against the Tribunal's decision pertaining to classification. He submits that irrespective of the merits of the Tribunal's decision on the question of classification, if the decision in the assessee's favour has become final, the question of the consequential order about quantum made by the Tribunal in favour of the assessee, cannot alone be challenged by the Department. He submits that this appeal must fail for this reason alone*

because the question of correctness of the view taken by the Tribunal on the question of classification is no longer open in respect of the product known as `New Sapan Dairy Special'.

2. In view of the above statement made by the learned Counsel for the assessee-respondent, and it not having been shown to us that the Department has challenged the Tribunal's decision on the question of classification reported in Dalmia Industries case (supra), this appeal must fail for this reason alone.

3. The appeal is dismissed.

4.14 In case of MIL India [2008 (222) E.L.T. 497 (All.)] Hon'ble Allahabad High Court held as follows:

17.*The principle laid down by the Apex Court in the case of Hindustan Lever Ltd. (supra) is not applicable to the facts of the present case inasmuch as in the present case we find that pursuant to the order of remand passed by the Commissioner (Appeals), the respondent had not reagitated the issue regarding dutiability of bought out items before the original authority, i.e., the Assistant Collector, Central Excise. It would be treated that the respondent had accepted the order passed by the Commissioner (Appeals) in so far as it has held that bought out items brought directly to site was liable to excise duty. That order having become final, as held by the Apex Court in the case of Food Specialities Ltd. (supra), it was not open for the respondent to reopen it in the appeal preferred before the Tribunal. Further, a specific plea regarding the finality of the order passed by the Commissioner (Appeals) was taken by the appellant before the Tribunal and, therefore, the principle laid down by the Apex Court in the case of Hindustan Lever Ltd. (supra) would not be applicable.*

18.*In the case of Jasraj Inder Singh (supra) the Apex Court has held that the Supreme Court is not bound by what the High Court might have held in its remand order. It has held that a finding in an earlier order cannot bind a higher Court when it hears the matter in appeal. We are of the considered opinion that the same principle cannot be extended to a Tribunal which is not a Court. As held by the Apex Court in the case of Flock (India) Pvt. Ltd. (supra) if an order passed by an adjudicating authority is appealable under the statute and the party aggrieved did not choose to exercise the statutory right of filing an appeal, it is not open to the party to question the correctness of the order of the adjudicating authority subsequently by filing a claim for refund on the ground that the adjudicating authority had committed an error in passing his order. The provision of appeals in the Act and the Rules will loose their relevance and the entire exercise will be rendered redundant. The position will run counter to the scheme of the Act and will introduce an element of uncertainty in the entire process of levy and collection of excise duty and such a position cannot be countenanced. The principle laid down by the Apex Court in the case of Satyadhyan Ghosal and Preetam Singh (supra) is also not applicable in the present case. It is not a case of interlocutory order nor it is a case where the Tribunal has any suo motu power of revision of an order.*

19.*In view of the foregoing discussion, we are of the considered opinion that it was not open to the Tribunal to permit the respondent to reopen and reagitate the matter relating to dutiability of the bought out items brought at site once again when the order of the Commissioner (Appeals), dated 22-3-2000, holding it dutiable had attained the finality. In this view of the matter, we are not going into the question as to whether the bought out items on site can be subjected to duty under the law or not.*

4.15 In case of Terex Equipment Pvt. Ltd. [2019 (20) GSTL 94 (T-ALL)] this bench observed as follows:

> ***"5.*** *We find that Revenue is trying to raise an issue which is already settled by the earlier order of this Tribunal in the earlier round of litigation, as quoted hereinabove. Thus under the 'doctrine of merger,' Revenue cannot raise concluded issue in the remanded matter by Tribunal wherein directions were specific that the Adjudicating Authority is required only to examine whether debit notes in question contain all the particulars as required under Rule 4A of Service Tax Rules, 1994. In this view of the matter, we find that the appeal of Revenue is hit by 'doctrine of merger' as they have urged the ground which does not arise in terms of direction or findings of this Tribunal in the earlier round of litigation…."*

4.16 In the case of Bharat Sanchar Nigam Limited [2006 (2) STR 161 (SC)] Hon'ble Supreme Court held as follows:

> ***"20.*** *A decision can be set aside in the same lis on a prayer for review or an application for recall or Under Art. 32 in the peculiar circumstances mentioned in Hurra v. Hurra. As we have said overruling of a decision takes place in a subsequent lis where the precedential value of the decision is called in question. No one can dispute that in our judicial system it is open to a court of superior jurisdiction or strength before which a decision of a Bench of lower strength is cited as an authority, to overrule it.* ***This overruling would not operate to upset the binding nature of the decision on the parties to an earlier lis in that lis, for whom the principle of res judicata would continue to operate. ….."***

4.17 In case of M. Nagabhusana [2011 (271) ELT 481 (SC)] Hon'ble Supreme Court observed:

> ***"12.*** *We find that disregarding the aforesaid clear finding of this Court, the appellant, on identical issues, further filed a new writ petition out of which the present*

appeal arises. That writ petition, as noted above, was rejected both by the learned Single Judge and by the Division Bench in clear terms.

13.*It is obvious that such a litigative adventure by the present appellant is clearly against the principles of Res Judicata as well as principles of Constructive Res Judicata and principles analogous thereto.*

14.*The principles of Res Judicata are of universal application as it is based on two age old principles, namely, 'interest reipublicae ut sit finis litium' which means that it is in the interest of the State that there should be an end to litigation and the other principle is 'nemo debet his ve ari, si constet curiae quod sit pro un aet eademn cause' meaning thereby that no one ought to be vexed twice in a litigation if it appears to the Court that it is for one and the same cause. This doctrine of Res Judicata is common to all civilized system of jurisprudence to the extent that a judgment after a proper trial by a Court of competent jurisdiction should be regarded as final and conclusive determination of the questions litigated and should forever set the controversy at rest.*

15.*That principle of finality of litigation is based on high principle of public policy. In the absence of such a principle great oppression might result under the colour and pretence of law in as much as there will be no end of litigation and a rich and malicious litigant will succeed in infinitely vexing his opponent by repetitive suits and actions. This may compel the weaker party to relinquish his right. The doctrine of Res Judicata has been evolved to prevent such an anarchy. That is why it is perceived that the plea of Res Judicata is not a technical doctrine but a fundamental principle which sustains the Rule of Law in ensuring finality in litigation. This principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing Court for*

agitating on issues which have become final between the parties.

16. Justice Tek Chand delivering the unanimous Full Bench decision in the case of Mussanunat Lachhmi v. Mussammat Bhulli (ILR Lahore Vol. VIII 384) traced the history of this doctrine both in Hindu and Mohammedan jurisprudence as follows :-

> *"In the Mitakshra (Book II, Chap. I, Section V, verse 5) one of the four kinds of effective answers to a suit is "a plea by former judgment" and in verse 10, Katyayana is quoted as laying down that "one against whom a judgment had formerly been given, if he bring forward the matter again, must be answered by a plea of Purva Nyaya or former judgment" (Macnaughten and Colebrooke's translation, page 22). The doctrine, however, seems to have been recognized much earlier in Hindu Jurisprudence, judging from the fact that both the Smriti Chandrika (Mysore Edition, pages 97-98) and the Virmitrodaya (Vidya-Sagar Edition, page 77) base the defence of Prang Nyaya (former decision) on the following text of the ancient law-giver Harita, who is believed by some Orientalists to have flourished in the 9th Century B.C. and whose Smriti is now extant only in fragments :-*
>
> *"The plaintiff should be non--suited if the defendant avers : 'in this very affair, there was litigation between him and myself previously,' and it is found that the plaintiff had lost his case".*
>
> *There are texts of Prasara (Bengal Asiatic Society Edition, page 56) and of the Mayukha (Kane's Edition, page 15) to the same effect.*

Among Muhammadan law-givers similar effect was given to the plea of "Niza-i-munfasla" or "Amar Mania taqrir mukhalif." Under Roman Law, as administered by the Proetors' Courts, a defendant could repel the plaintiff's claim by means of 'exceptio rei judicatoe" or plea of former judgment. The subject received considerable attention at the hands of Roman jurists and as stated in Roby's Roman Private Law (Vol. II, page 338) the general principle recognised was that "one suit and one decision was enough for any single dispute" and that "a matter once brought to trial should not be tried except, of course, by way of appeal"

(Page 391-392 of the report)

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20. It may be noted in this context that while applying the principles of Res Judicata the Court should not be hampered by any technical rules of interpretation. It has been very categorically opined by Sir Lawrence Jenkins that "the application of the rule by Courts in India should be influenced by no technical considerations of form but by matter of substance within the limits allowed by law". [See Sheoparsan Singh v. Rammanandan Prasad Singh, (1916) 1 I.L.R. 43 Cal. 694 at page 706 (P.C.)].

21. Therefore, any proceeding which has been initiated in breach of the principle of Res Judicata is prima-facie a proceeding which has been initiated in abuse of the process of Court.

22. A Constitution Bench of this Court in Devilal Modi v. Sales Tax Officer, Ratlam & Ors. - AIR 1965 SC 1150, has explained this principle in very clear terms :

> *"But the question as to whether a citizen should be allowed to challenge the validity of the same order by successive petitions under Art. 226 cannot be answered merely in the light of the significance and importance of the citizens' fundamental rights. The general principle underlying the doctrine of res judicata is ultimately based on considerations of public policy. One important consideration of public policy is that the decisions pronounced by courts of competent jurisdiction should be final, unless they are modified or reversed by appellate authorities; and the other principle is that no one should be made to face the same kind of litigation twice over, because such a process would be contrary to considerations of fair play and justice, vide : Daryao v. State of U.P., 1962-1 SCR 575; (AIR 1961 SC 1457)."*

23. This Court in All India Manufacturers Organisation (supra) explained in clear terms that principle behind the doctrine of Res Judicata is to prevent an abuse of the process of Court.

24. In explaining the said principle the Bench in All India Manufacturers Organisation (supra) relied on the following formulation of Lord Justice Somervell in Greenhalgh v. Mallard - (1947) 2 All ER 255 (CA) :

> *"I think that on the authorities to which I will refer it would be accurate to say that res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."*

25. The Bench also noted that the judgment of the Court of Appeal in "Greenhalgh" was approved by this Court in State of U.P. v. Nawab Hussain - (1977) 2 SCC 806 at page 809, para 4.

26. Following all these principles a Constitution Bench of this Court in Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra - (1990) 2 SCC 715 laid down the following principle :

> *"……..an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with subject matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence. Thus, the principle of constructive res judicata underlying Explanation IV of Section 11 of the Code of Civil Procedure was applied to writ case. We, accordingly hold that the writ case is fit to be dismissed on the ground of res judicata."*

27. In view of such authoritative pronouncement of the Constitution Bench of this Court, there can be no doubt that the principles of Constructive Res Judicata, as explained in explanation IV to Section 11 of the CPC, are also applicable to writ petitions.

28. Thus, the attempt to re-argue the case which has been finally decided by the Court of last resort is a clear abuse of process of the Court, regardless of the principles of Res Judicata, as has been held by this Court in K.K. Modi v. K.N. Modi and Ors. - (1998) 3 SCC 573. In paragraph 44 of the report, this principle has been very

lucidly discussed by this Court and the relevant portions whereof are extracted below :

> *"One of the examples cited as an abuse of the process of the court is relitigation. It is an abuse of the process of the court and contrary to justice and public policy for a party to relitigate the same issue which has already been tried and decided earlier against him. The reagitation may or may not be barred as res judicata..."*

29. In coming to the aforementioned finding, this Court relied on the Supreme Court Practice 1995 published by Sweet & Maxwell. The relevant principles laid down in the aforesaid practice and which have been accepted by this Court are as follows :

> *"This term connotes that the process of the court must be used bona fide and properly and must not be abused. The court will prevent improper use of its machinery and will in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation. ... The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances. And for this purpose considerations of public policy and the interests of justice may be very material."*

30. In the premises aforesaid, it is clear that the attempt by the appellant to re-agitate the same issues which were considered by this Court and were rejected expressly in the previous judgment in All India Manufacturers Organisation (supra), is a clear instance of an abuse of process of this Court apart from the fact that such issues are barred by principles of Res Judicata or Constructive Res Judicata and principles analogous thereto."

4.18 In case of M J Exporters Pvt Ltd. [2015 (325) ELT 216 (SC)] following was observed:

> *"10. No doubt, if the question of law raised in the final Court is a pure question of law and there is no controversy on facts, which are already on record, and on the basis of those facts, the question of law can be determined in the interest of justice, such a question of law could be allowed to be raised even if it was not raised in the Court. However, in the present case, having regard to the manner in which the case proceeded in the Courts below, we feel that the appellant cannot be allowed to raise this question.*
>
> *11. Mr. K. Radhakrishnan, learned senior counsel appearing for the Department, has drawn our attention to the Order dated 2-8-2004 which was passed in Writ Petition No. 1278 of 2004. His submission was that in the earlier round of litigation before the High Court when the demand of interest was questioned, it was given up inasmuch as after arguments on this issue, the counsel for the appellant had withdrawn the writ petition. At that time, while allowing the appellant to withdraw the writ petition, the dispute was confined only to the calculation of interest as is clear form the order dated 2-8-2004 itself which specifically referred to the averments made in Paragraphs 6 and 7. These paragraphs have already been extracted above. In Paragraph 6 particularly, Respondent No. 1 made some remarks about the calculation of the interest and had stated that it needed re-calculation. Therefore, after the dismissal of the said writ petition as withdrawn, the only issue that remains for consideration was how much interest is payable and the correct calculations thereof. It is a matter of record which flows from the correspondence exchanged thereafter between the parties that insofar as Department is concerned, it only re-worked the amount of interest and demanded interest in the sum of Rs. 4,67,02,251/- after reducing the figure from*

8,43,62,504/- because of the reasons already stated above.

12. Consequently in the second writ petition, when the appellant as well as its counsel knew that the issue as to whether the interest is payable or not on other grounds had already been foreclosed in the earlier writ petition, the counsel for the appellant did not make any submission with regard to the aforesaid plea raising the issue in Show Cause Notice and limited his prayer from the date from which the interest was to be paid.

13. In these circumstances, we feel that when this issue was raised and abandoned in the first writ petition which was dismissed as withdrawn, the principles of constructive res judicata which is laid down under Order 23 Rule 1 of the Code of Civil Procedure, 1908, and which principles are extendable to writ proceedings as well as held by this Court in 'Sarguja Transport Service v. State Transport Appellate Tribunal, M.P., Gwalior and Others' [1987 (1) SCR 200] would squarely be applicable.

14. For these reasons, we are of the opinion that it is not permissible for the appellant to now raise such arguments. We, thus, do not find any error passed by the High Court which results in the dismissal of this appeal."

4.19 In the case of Saraswati Agro Chemicals Pvt. Ltd. [2023 (386) ELT 193 (SC)] Hon'ble Supreme Court held as follows:

"6. *….. This is not permissible in law for two reasons: firstly, there has to be finality in litigation and that is in the interest of State. Secondly, a person cannot be vexed twice. This is epitomized by the following maxims :*

(i) Nemo debet bis vexari pro una et eadem causa (No man should be vexed twice for the same cause);

(ii) Interest reipublicae ut sit finis litium (It is in the interest of the State that there should be an end to a litigation); and

(iii) Res judicata pro veritate occipitur (A judicial decision must be accepted as correct).

7. *These maxims would indicate that there must be an end to litigation otherwise the rights of persons would be in an endless confusion and fluid and justice would suffer.*

4.20 In view of the discussions as above, we do not find any merits in this appeal.

5.1 Appeal is dismissed.

(Pronounced in open court on 18.12.2025)

Sd/-
(P. DINESHA)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

Nihal