Commissioner Of Customs, Mumbai vs M/S. Bureau Veritas And Ors on 14 February, 2005

Equivalent citations: AIR 2005 SUPREME COURT 1292, 2005 AIR SCW 993, 2005 (5) SLT 115, (2005) 28 ALLINDCAS 450 (SC), (2005) 2 JT 348 (SC), 2005 (2) JT 348, 2005 (2) SCALE 158, 2005 (3) SCC 265, (2005) 120 ECR 143, (2005) 181 ELT 3, (2005) 2 SCJ 245, (2005) 2 SUPREME 82, (2005) 2 SCALE 158

Author: Arijit Pasayat

Bench: Ruma Pal, Arijit Pasayat, C.K. Thakker

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           CASE NO.:
Appeal (civil)  808-811 of 2004

PETITIONER:
Commissioner of Customs, Mumbai

RESPONDENT:
M/s. Bureau Veritas and Ors.

DATE OF JUDGMENT: 14/02/2005

BENCH:
Ruma Pal & Arijit Pasayat & C.K. Thakker

JUDGMENT:
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JUDGMENT ARIJIT PASAYAT, J.

These four appeals by the Revenue have a common matrix in the judgment of Customs Excise & Service Tax Appellate Tribunal, West Zonal Bench at Mumbai (in short `the Tribunal').

The factual background leading to the dispute as noted by the Tribunal in essence is as follows :

> Pride Foramer (the respondent no. 2 in Civil Appeal Nos. 808-810 of 2004 and sole respondent in Civil Appeal No. 811 of 2004) (hereinafter referred to as the "assessee") was the owner of oil well drilling rigs and drill ships which it leased out to parties engaged in oil exploration or exploitation. It entered into a contract with the Oil & Natural Gas Commission (in short `ONGC') in January 1999 for lease to the latter of a jack-up rig of 300 ft depth to be utilized for oil exploration and exploitation off the coast of India. The assessee was not originally owner of the rig, and in order to comply with the terms of the contract, purchased in March 1999 the rig Pride Pennsylvania from Pride Global Limited, a company registered in the British Virgina Islands at a price of US $ 17 millions. The rig was being deployed for off sea

exploration in accordance with the directions of the hirer, i.e. ONGC, and did not initially enter either Indian territorial waters or any areas of the exclusive economic zone designated under the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 to which the provisions of the Customs Act, 1962 (hereinafter referred to as `the Act') have been made applicable. In April 2000, the rig was required by the hirer to enter one of such designated areas. On the belief that such entry would constitute import under the Act, assessee filed a Bill of Entry in May 2000 for the rig, declaring the C.I.F. value of the rig to be Rs. 783,439,838. The Bill of Entry was accompanied by an invoice showing details of the value of fixed and loose equipment, spares and consumables on the rig for a total C.I.F. value of U.S. $ 17, 682, 690. The invoice was issued by the project office in Mumbai of the assessee and signed by Jean Paul Rabier, its manager in India (the respondent no. 3 in Civil Appeal Nos. 808-810 of 2004). The rig was permitted to be cleared on payment of duty at the declared value.

Subsequently investigation by the department led it to conclude that the value of price was under declared and that the true value of the rig ought to be Rs. 1966,950,295. The rig was placed under seizure in September 2001 and ordered to be released provisionally by the Bombay High Court after securing guarantees and deposits. Notice was issued proposing to enhance the value of the rig as stated above, proposing its confiscation under clause (m) of Section 111 of the Act on the ground that its value was misdeclared. Penalty was also proposed on the importer, Rabier and Bureau Veritas, a marine inspection agency, (respondent no. 1 in Civil Appeal Nos. 808-810 of 2004) whose Singapore office had issued two reports in 1999 and 2000 certifying the value of the rig. The show-cause notice alleged that the values certified by it were improper. After considering the cause shown and hearing the parties, the Commissioner of Customs (Import) Mumbai (in short the `Commission') passed the order which was impugned before the Tribunal. He held the value of the rig to be Rs. 1451,893,375 (equivalent to US $ 32.78 million) and demanded differential duty of about Rs. 29.45 crores. He ordered confiscation of the rig with an option to redeem it on payment of fine of Rs.5 crores, demanded interest on the differential duty, imposed penalties equal to the duty on the company, Rs. 2 lakhs on Jean Paul Rabier and Rs. 2 lakhs on Bureau Veritas.

After confirmation of duty he directed appropriation of Rs.10 crores against the same. Payment of interest @ 24% under Section 28 AB of the Act was demanded from July 2000. Penalty of Rs. 29,45,19,057 was imposed and separate penalties under section 112(a) of the Act were imposed on Bureau Veritas and Jean Paul Rabier.

The Commissioner found that the transaction value in terms of Rule 4 of the Customs Valuation Determination of Price of Imported Goods Rules, 1988 (in short the `Rules') of the rig was the price paid for its purchase in March 1999 by the importer of US $ 17 millions. The purchase was made by the assessee to bring the rig into India

so that it could fulfill the contract that it signed in January of the year with ONGC. He declined to accept the declared value on the ground that the buyer, Pride Former and seller, Pride Global Ltd. were related parties, each of them being a subsidiary company of Pride International Inc. He noted that the rig was purchased in 1997 by Pride International Inc from Cartier Shipping Co. at US $ 35.35 millions. He did not accept the report by Bureau Veritas issued in March 2000 valuing the rig at US $ 17 millions on the ground that it has been arrived at without taking into account the fact of the earlier sale at US $ 35.35 millions. He valued the rig by applying the rates of depreciation specified in the circular F 4951/16/93-Cus V of 26.5.1993 of the Board at US $ 35.35 millions, taking into account additional amounts which were subsequently spent on the rig. Accordingly, he arrived at the assessable value of Rs. 145,18,93,375 and confirmed the demand for differential duty which was worked out at Rs.29.45 crores. The Commissioner held the importer - assessee guilty of suppression of facts and misdeclaration of values. Bureau Veritas and Jean Paul Rabier were guilty of aiding and abetting assessee-importer. Accordingly, Commissioner directed confiscation under Section 113(m) of the Act.

Before the Tribunal stand of assessee was that the Rules provide that transaction value is not to be rejected solely on the ground of relationship and unless it is shown that the relationship between the parties has influenced the price, transaction value has to be accepted even when the party to the sale and purchase are related. Oil rigs are not traded frequently, and number of such rigs available at a given time is limited. Most of the companies which owned the rigs lease them out for oil exploration. As number of such owners is limited, oil well drilling is a specialized task. The value of rigs mostly depends upon the day-rates. Whenever oil prices go up due to any reason, there is increase in exploitation of existing oil reserve and exploration for new field. At the relevant point of time the prices of oil fell to very low level in 1999 from the high level in 1997. That explains the substantial difference between the price paid for the rig in 1997 and 1999. Reference was made to a certificate obtained from a reputed ship broker in Paris who had indicated price to be between US $ 15 to 17 millions. The fact that rig was insured for US $ 18 millions also shows that the transaction value was not influenced by the relationship. Further, even if the depreciated value has to be worked out as done by the Commissioner, original value was to be taken. The counsel for the valuer submitted that the certificate was given after due verification and mala fides are not involved.

Revenue's stand on the other hand was that it has not been established by the importer that the transaction value was not influenced by the relationship. The drop of the price cannot be explained merely by changes in oil price.

The appeals against the order of the Commissioner filed by these persons and by the Commissioner were disposed of by the impugned order.

The Revenue also preferred an appeal against that part of the Commissioner's order by which the proposed additions for alleged value additions were rejected.

The Tribunal noted that both Revenue and the assessee agreed that the declared price is the transaction value and they also agreed that the seller of the rig and the purchaser were related. Therefore, the only issue, to be adjudicated was whether the transaction value is to be accepted and, if not, by what method of assessment value of the rig has to be determined. After referring to various rules the Tribunal referred to data indicated in reputed publications indicating periodical change of value of rigs. After noticing various details the Tribunal came to the conclusion that there were noticeable fluctuations in prices and there were sometime violent fluctuations. With reference to day-rates, it came to hold that there was a relationship between day-rates and the price of the oil rigs. Particular reference was made to two publications i.e. the Bassoe Offshore Monthly, published by Bassoe Offshore Consultants, Edinburg, Scotland and Offshore Drilling Monthly published by Jeferies and Company Inc. with offices Worldwide. The Bassoe Offshore Monthly of March 1999 had published a table of changing values of rigs, which was referred to by the Tribunal. It was noted that the relevant data were produced before the Commissioner, but he did not accept them, by introducing the concept of "value in exchange" and "value in use". It was noted that the two aspects were difficult to understand and the Commissioner or the departmental representative did not cast any doubt on the accuracy or reliability of the publications and on the other hand relied upon them to discard the assessee's case. It was held that there was considerable substance in the assessee's stand. Reference was also made to the affidavits of one Mr. Gavin M.J. Strachan who was considered to be an expert on the valuation aspect. According to the Tribunal, the affidavit of Mr. Gavin M.J. Strachan showed that day-rates fluctuate depending on the supply of and demand for a particular type of rig and the value go up and down accordingly. Accordingly, it was held that the prices of rigs of different types dropped by 50% or more between 1997 and 1999. The explanation offered by the assessee for the 50% drop in prices merited acceptance. Accordingly it was held that there was enough evidence to justify the view that sale of rig in 1999 was uninfluenced by the relationship between buyer and the seller. The price, therefore, would be the transaction value in terms of Rule 4. With reference to various materials it was also noted that even if the depreciation method is adopted, the computation as done by the Commissioner was not correct one. Accordingly, the appeals were allowed and the duty and penalty imposed, interest charged were set aside.

In support of the appeal Mr. A.K. Ganguli, learned senior counsel submitted that the approach of the Tribunal is clearly erroneous. It proceeded on the basis as if the Revenue accepted that the price disclosed was the transaction value. It was really not so. The Commissioner indicated reasons as to why the price indicated was not transaction value. Further, merely relying on the data available from the journals and publications and the affidavit of Mr. Strachan, it could not have been held that the

value disclosed was the market value. The Commissioner had noted that at different point of time in the bid documents of higher values were shown and nothing has been indicated as to what was the need for sell by Pride Global Limited and if the assessee had indicated the price to be US $ 27 millions, how it became 17 millions US dollars within a period of 25 days. It has not been indicated what was the need for sale and purchase of rig between two related persons. Rule 4 has application only when the transaction leads to import. Therefore, it was not a case of transaction value and the Tribunal's view cannot be sustained.

In response, Mr. Dushyant A. Dave learned counsel for the assessee- respondent submitted that right from the show-cause notice stage stand of the Department was that the price indicated was the transaction value which was not to be accepted because the transactions were related. The assessee could not have benefited by showing a lesser figure when the customs duty was payable by ONGC. It was not the case of Revenue that ONGC and the assessee colluded to show a lesser figure. As a matter of fact, the various circumstances like the insurance coverage, agreement of ONGC to pay the duty as assessed by the authorities clearly rule out any collusion. Admittedly, this was not treated as a case of under-valuation. There were several bids invited by ONGC and finally on negotiations the rates were fixed. The view taken by the Tribunal has been arrived at after taking into consideration all relevant aspects, keeping in view the correct position in law. That being so, there is no scope for interference in these appeals.

Though there is amount of controversy as to whether the Department accepted the declared price as the transaction value, and fixed the higher price because of relationship, it is not necessary to go into that aspect in detail. Suffice it to say that right from the show-cause notice stage same was the stand the Revenue had adopted. In fact, the Tribunal recorded there was agreement on this issue. If there was no agreement as contended by the revenue in the present appeals and if there was wrong recording by the Tribunal, the procedure to be adopted is different.

After having agreed on some point as recorded, it is not open to the appellant to turn round or take a plea that the position is different. If really there was no agreement, the only course open to the appellant was to move the Tribunal in line with what has been said in State of Maharashtra v. Ramdas Shrinivas Nayak and Anr., [1982] 2 SCC 463. In a recent decision Bhavnagar University v. Palitana Sugar Mill Pvt. Ltd. and Ors., (2002) AIR SCW 4939 the view in the said case was reiterated by observing that statements of fact as to what transpired at the hearing, recorded in the judgment of the Court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in Court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. It is not

open to the appellant to contend before this Court to the contrary.

It appears that the Tribunal kept various requirements of Rules more particularly Rule 4 in view and proceeded to assess and examine the materials brought on record. It placed reliance on the evidence adduced by the assessee with reference to various journals the acceptability and the credibility of which was never questioned by the Revenue. It also referred to the affidavit of experts.

The ambit and method of Rule 4 was elaborately dealt with by this Court in Eicher Tractors Ltd. v. Commissioner of Customs, Mumbai, (2002) 122 ELT

321.

It is true that the Rules are framed under Section 14(1-A) and are subject to the conditions in Section 14(1). Rule 4 is in fact directly relatable to Section 14(1). Both Section 14(1) and Rule 4 provide that the price paid by an importer to the vendor in the ordinary course of commerce shall be taken to be the value in the absence of any of the special circumstances indicated in Section 14(1) and particularised in Rule 4(2).

Rule 4(1) speaks of the transaction value. Utilisation of the definite article indicates that what should be accepted as the value for the purpose of assessment to customs duty is the price actually paid for the particular transaction, unless of course the price is unacceptable for the reasons set out in Rule 4(2). "Payable" in the context of the language of Rule 4(1) must, therefore, be read as referring to `the particular transaction' and payability in respect of the transaction envisages a situation where payment of price may be deferred.

That Rule 4 is limited to the transaction in question is also supported by the provisions of the other rules each of which provide for alternate modes of valuation and allow evidence of value of goods other than those under assessment to be the basis of the assessable value. Thus, Rule 5 allows for the transaction value to be determined on the basis of identical goods imported into India at the same time; Rule 6 allows for the transaction value to be determined on the value of similar goods imported into India at the same time as the subject goods. Where there are no contemporaneous imports into India, the value is to be determined under Rule 7 by a process of deduction in the manner provided therein. If this is not possible the value is to be computed under Rule 7-A. When value of the imported goods cannot be determined under any of these provisions, the value is required to be determined under Rule 8 "using reasonable means consistent with the principles and general provisions of these Rules and sub-section (1) of Section 14 of the Customs Act, 1962 and on the basis of data available in India". If the phrase "the transaction value" used in Rule 4 were not limited to the particular transaction then the other rules which refer to other transactions and data would become redundant.

It is only when the transaction value under Rule 4 is rejected, that under Rule 3(ii) the value shall be determined by the proceeding sequentially through Rules 5 to 8 of the Rules. Conversely, if the transaction value can be determined under Rule 4(1) and does not fall under any of the exceptions in

Rule 4(2), there is no question of determining the value under the subsequent rules.

The scope for interference with findings recorded by the Tribunal if it has kept in view the correct legal position, has been dealt with by this Court in many cases. The position was illuminatingly stated by this Court in Collector of Customs, Bombay v. Swastic Woollens (P) Ltd. and Ors., [1988] Supp SCC 796 as follow :

> "9. The expression "wool wastes" is not defined in the relevant Act or in the notification. This expression is not an expression of art. It may be understood, as in most of financial measures where the expressions are not defined, not in a technical or preconceived basis but on the basis of trade understanding of those who deal with these goods as mentioned hereinbefore. The Tribunal proceeded on that basis. The Tribunal has not ignored the Technical Committee's observations. We have noted in brief the Tribunal's handling of that report. The Tribunal has neither ignored the observations of CCCN nor the Board's Tariff Advice. These observations have been examined in the light of the facts and circumstances of the case. One of the basis factual disputes was long length of sliver tops. Having regard to the long length, we find that the Tribunal was not in error. Whether a particular item and the particular goods in this case are wool wastes, should be so considered or not is primarily and essentially a question of fact. The decision of such a question of fact must be arrived at without ignoring the material and relevant facts and bearing in mind the correct legal principles. Judged by these yardsticks the finding of the Tribunal in this case is unassailable. We are, however, of the view that if a fact finding authority comes to a conclusion within the above parameters honestly and bona fide, the fact that another authority be it the Supreme Court or the High Court may have a different perspective of that question, in our opinion, is no ground to interfere with that finding in an appeal from such a finding. In the new scheme of things, the Tribunals have been entrusted with the authority and the jurisdiction to decide the questions involving determination of the rate of duty of excise or to the value of goods for purposes of assessment. An appeal has been provided to this Court to oversee that the subordinate tribunals act within the law. Merely because another view might be possible by a competent court of law is no ground for interference under Section 130-E of the Act though in relation to the rate of duty of customs or to the value of goods for purposes of assessment, the amplitude of appeal is unlimited. But because the jurisdiction is unlimited, there is inherent limitation imposed in such appeals. The Tribunal has not deviated from the path of correct principle and has considered all the relevant factors. If the Tribunal has acted bona fide with the natural justice by a speaking order, in our opinion, even if superior court feels that another view is possible, that is no ground for substitution of that view in exercise of power under clause (b) of Section 130-E of the Act."

The position was reiterated in West Bengal Electricity Regulatory Commission v. CESC Ltd., [2002] 8 SCC 715 and Commissioner of Customs, Chennai v. Adani Exports Ltd. and Anr., [2004] 4 SCC 367.

In the instant case Tribunal has referred to various materials which can by no stretch of imagination be termed irrelevant. The authenticity, credibility or reliability of the data has not been questioned. The inference to be drawn from these materials falls within the domain of factual determination. The conclusions of the Tribunal cannot be termed as perverse or irrational. The evaluation of material facts has been done in the background of applicable statutory provisions and legal principles.

The inevitable conclusion is that no interference is called for in these appeals and they deserve to be dismissed. We direct accordingly. Costs made easy.