M/S. Tata Chemicals Ltd vs Commnr. Of ... on 14 May, 2015

Equivalent citations: 2015 AIR SCW 3571, 2015 (11) SCC 628, AIR 2015 SC (SUPP) 1973, (2015) 5 MAD LJ 378, (2015) 6 SCALE 419, (2015) 4 KCCR 460, (2016) 1 GUJ LR 547, (2015) 4 RECCIVR 88

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Bench: R.F. Nariman, A.K. Sikri

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.7439-7440 OF 2004

M/S. TATA CHEMICALS LTD. …APPELLANT

VERSUS

COMMISSIONER OF CUSTOMS
(PREVENTIVE) JAMNAGAR ...RESPONDENT

WITH

CIVIL APPEAL NOS.7628-7629 OF 2004

J U D G M E N T

R.F. Nariman, J.

1. The appellants were engaged in the manufacture of soda ash and Coke. For the manufacture of Coke, they require coking coal which was imported by them. Notification No.35/90 exempted coking coal having an ash content below 12% from basic customs duty that was in excess of 5%. In addition, notifications 36/90 and 23/91 exempted coking coal with ash content of less than 12% from the whole of auxiliary duty and additional duty of customs.

2. On 4.2.1991, the appellants had entered into an agreement with Philbro Energy Company (situated in the USA) for supply of 30500 metric tons, CIF, Okha of Low Ash Metallurgical Coal produced by M/s Kembla Coal and Coke, Australia. The contract specifically provided that the ash content was not to exceed 10.3% and that the sampling and analysis was to be done by an independent inspection agency of international repute, namely, M/s Cargo Superintendents

Company (Asia) Pty. Limited (CASCO), at the loading port and that CASCO should give a certificate regarding analysis of the coking coal. In accordance with the aforesaid agreement, the appellants in Civil Appeal Nos.7439-7440 of 2004, namely, M/s. Tata Chemicals Limited imported 33462 metric tons and appellants in Civil Appeal Nos.7628-7629 of 2004, namely, M/s. B.L.A. Coke Private Limited imported 5000 metric tons of coking coal. Detailed sampling was done by CASCO while the coal was being loaded on to the ship and CASCO had meticulously followed British Standards equivalent to IS standards 436 and 1350. The two consignments were divided into samples of 3000 metric tons each and from each sample CASCO took samples weighing 470 kilograms each. The primary samples were passed through secondary sampling, crushing and tertiary treatment. 13 sample units were separately tested, their analysis report obtained and the average furnished in the form of a consolidated test report. This report stated that the moisture content was 7.2% and the ash content of the said coking coal was 9.8%.

3. When the aforesaid consignment arrived at Okha, the appellants in both the appeals filed bill of entry dated 15.3.1991 and claimed exemption under the aforesaid notifications. Along with the bill of entry, the appellants also submitted the certificate of CASCO. It is important to note that the Department at no stage stated that they have not accepted the CASCO report or that the CASCO report was defective in any manner. However, the Customs Inspector at Okha apparently drew samples of 20 kilograms each – one from the vessel and one from the shore on 18.3.2001 and beat them with stones to crush them. The samples were then made into powder form.

4. The samples were not drawn in the presence of any employee of the appellants. It was alleged by the Department that the Inspector had drawn the samples in the presence of Shri K.M. Jani who was allegedly an employee of Bhagwati and Company, clearing agents appointed by the appellants. It is common ground that the sample so drawn had not been drawn in accordance with IS 436.

5. The samples so drawn, however, were sent to the Central Fuel Research Institute, Dhanbad, to be analysed. On 13.1.1992, the appellants were informed by the Superintendent of Customs that the test agency stated that the ash content in the samples was more than 12%. A copy of the report was subsequently furnished to the appellants which indicated that the ash content of the coal belonging to Tata Chemicals was 13.8% and that belonging to M/s. B.L.A. Coke Private Limited was 12.6%. On objection being made to the said report, the Superintendent Okha sent two samples to the Chief Chemist, Central Revenue Control Laboratory (CRCL) on 15.2.1992. CRCL in turn submitted its report after another delay of 10 months and reported that Tata Chemicals coal had an ash content of 12.21% and that of B.L.A. 12.33%.

6. As a result of the ash content being more than 12%, show cause notices dated 4.1.1993 was issued to both the appellants and differential duty was demanded from both of them.

7. By an order dated 31.3.1995, the Assistant Collector demanded an amount of Rs.3,95,77,324/- from Tata Chemicals and an amount of Rs.59,136,771/- from M/s. B.L.A. Coke Private Limited.

8. On an appeal filed to the Commissioner (Appeals) Ahmedabad, the Commissioner by an order dated 30.12.1997, set aside the order of the Assistant Collector in the following terms:-

> "10. In view of the above discussion and after going through the comments of the Assistant Commissioner, Customs, Jamnagar as discussed in para 5.3 supra, wherein he was asked to give his comments on the submission made by the appellants during the course of personal hearing. It is seen that the Assistant Commissioner has accepted all the points raised by the appellants and he has not been able to controvert any of their submissions. I come to the conclusion that the appellants have substantial force in their arguments and therefore I held that nothing can be added into the notification and when notification does not prescribe the method of analysis for ascertaining the ash content in the coal, it should be ascertained on as received basis. I rely upon the ratio of the decisions cited by the appellants in this regard. The CFRI and CRCL have conducted analysis to ascertain the ash content on gross air dried basis, in spite of clear instruction of the Asttt. Commissioner, Customs, Jamnagar to give the report on as received basis, therefore, these reports should have been given on as received basis. I accept the plea of the appellants that these results can be converted into as received basis, which fact has also been accepted by the Assistant Commissioner as discussed in para 5.3 above, by applying the formula followed internationally. By applying the formula which is accepted all over the world and has been given by the appellants during the course of their submissions, the ash content on as received basis would be 11.8% and 11.6% in the case of M/s. BLA Industries and 13.9% and 11.4% in the case of M/s. Tata Chemicals Ltd. The formula for working out these results is as under:
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> 100 – Mar Mar: Moisture as received 100 – Mad Mad: Moisture as dried.

It is seen that in case of M/s BLA Industries results of both laboratories converted into as received basis gives ash content below 12% and in the case of M/s Tata Chemicals Ltd. Though the first result even after such conversion crossed 12% marginally, but the result of subsequent analysis conducted by CRCL after such conversion gives content of ash content below 12%. Therefore, after conversion on as received basis, which is the requirement of the law, the ash content in both the cases is below 12% and therefore both the appellants are entitled for partial concessional rate of Customs duty in excess of 5% as prescribed by Notification No.35/90"

9. Revenue appealed to CESTAT who by the impugned judgment and order dated 24.9.2004 allowed Revenue's appeal and set aside the order of the Commissioner (Appeals) basically on the ground that even though the samples drawn by the Inspector were contrary to IS 436, yet since a representative of the appellants was present, the appellants are estopped from turning around at a later stage inasmuch as they did not immediately object to the drawing of samples contrary to law.

10. Shri S.K. Bagaria, learned senior advocate on behalf of the appellants argued before us that the Australian Company from whose mines the coking coal was sent, generally mined coal with an ash content of less than 12%. He referred to and relied upon a great deal of material to establish this fact. Further, he went on to state that CASCO, the test agency, was internationally renowned and had given a test report/certificate of quality which described how meticulously they have taken samples in accordance with law and how ultimately the samples were found to contain ash at only

9.8% following the gross air dried method. He also referred us to Section 18 of the Customs Act and stated that since no fault had been found with CASCO's certificate, the entire sampling done by the customs authorities was invalid in law. He further went on to refer to the cross-examination of the Inspector who drew the samples and stated that the samples were drawn in the afternoon of 18.3.1991, the entire operation being completed by 1730 hours. No panchnama was drawn. 20 kilograms was taken from the shore and 20 kilograms from the vessel contrary to a minimum of 75 kilograms for six lots to be taken under IS 436. When cross- examined, the Inspector stated that he did not know about IS 436 and he further admitted that he put the samples in a plastic bucket which did not have any lid. He further went on to state that he had broken up the sampled lumps with stones and then put the resultant powder in containers. He further referred to the cross-examination of the Superintendent who had deputed the Inspector to carry out the samples who was equally in the dark about IS 436. Above all, he characterized as perverse the Tribunal's findings that the appellants were estopped because their representative was present when the sampling was done. He stated that no representative of either appellant was present. One K.M. Jani alone was present who admitted in his cross-examination that he did not work for the appellants Clearing Agent, namely, M/s Bhagwati & Company. Further the said Mr. Jani did not go together with the Inspector and no samples were actually drawn in his presence.

11. Shri Radhakrishnan, learned senior advocate appearing on behalf of the respondent countered the submissions of Shri Bagaria by reading copiously from the order of the Assistant Collector and the order of the Tribunal. According to him, the samples taken by the Inspector could be taken because statutory authority is given for the same by Section 18 of the Customs Act. He went on to further state that even though the samples may not have been taken strictly in accordance with IS 436 nonetheless as Shri Jani was present, the rule of estoppel would apply against the appellants.

12. Having heard learned counsel for the parties, it is important to first extract Section 18 of the Customs Act. Section 18 of the Customs reads as under:-

> "Section 18. Provisional assessment of duty (1) Notwithstanding anything contained in this Act but without prejudice to the provisions contained in section 46-
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> (a) where the proper officer is satisfied that an importer or exporter is unable to produce any document or furnish any information necessary for the assessment of duty on the imported goods or the export goods, as tie case may be; or
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> (b) where the proper officer deems it necessary to subject any imported goods or export goods to any chemical or other test for the purpose of assessment of duty thereon ; or
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> (c) where the importer or the exporter has produced all the necessary documents and furnished full information for the assessment of duty but the proper officer deems it necessary to make further enquiry for assessing the duty, the proper officer may direct that the duty leviable on such goods may, pending the production of such documents or furnishing of such information or completion of such test or enquiry,

> be assessed provisionally if the importer or the exporter, as the case may be, furnishes such security as the proper officer deems fit for the payment of the deficiency, if any, between the duty finally assessed and the duty provisionally assessed.
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> (2) When the duty leviable on such goods is assessed finally in accordance with the provisions of this Act, then-
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> (a) in the case of goods cleared for home consumption or exportation, the amount paid shall be adjusted against the duty finally assessed and if the amount so paid falls short of, or is in excess of 20[the duty finally assessed,] the importer or the exporter of the goods shall pay the deficiency or be entitled to a refund, as the case may be;
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> (b) in the case of warehoused goods, the proper officer may, where the duty finally assessed is in excess of the duty provisionally assessed, require the importer to execute a bond, binding himself in a sum equal to twice the amount of the excess duty."

13. The Revenue has grounded its case in Section 18(b) which provides that imported goods can be subjected to chemical or other tests for the purpose of assessment of duty thereon where the proper officer deems it necessary to so subject the imported goods.

14. In our opinion, the expression "deems it necessary" obviously means that the proper officer must have good reason to subject imported goods to a chemical or other tests. And, on the facts of the present case, it is clear that where the importer has furnished all the necessary documents to support the fact that the ash content in the coking coal imported is less than 12%, the proper officer must, when questioned, state that, at the very least, the documents produced do not inspire confidence for some good prima facie reason. In the present case, as has been noted above, the Revenue has never stated that CASCO's certificate of quality ought to be rejected or is defective in any manner. This being the case, it is clear that the entire chemical analysis of the imported goods done by the Department was ultra vires Section 18(b) of the Customs Act.

15. Statutes often use expressions such as "deems it necessary", "reason to believe" etc. Suffice it to say that these expressions have been held not to mean the subjective satisfaction of the officer concerned. Such power given to the concerned officer is not an arbitrary power and has to be exercised in accordance with the restraints imposed by law. That this is a well settled position of law is clear from the following judgments. See: Rohtas Industries Ltd. v. S.D. Agarwal, (1969) 3 S.C.R. 108 at 129. To similar effect is the judgment in Sheo Nath Singh v. Appellate Assistant Commissioner of Income Tax, Calcutta, (1972) 1 SCR 175 at 182. In that case it was held as under:

> "...There can be no manner of doubt that the words "reason to believe" suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and that the Income Tax Officer may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. The Income Tax Officer would be acting

> without jurisdiction if the reason for his belief that the conditions are satisfied does not exist or is not material or relevant to the belief required by the section. The Court can always examine this aspect though the declaration or sufficiency of the reasons for the belief cannot be investigated by the Court." See also Bar Council of Maharashtra v. M.V. Dabholkar, [1976] 2 S.C.R. 48 at 51. N. Nagendra Rao & Co. v. State of A.P. (1994) 6 SCC 205 at 216.

16. The admitted position on record is that the samples drawn were not drawn in accordance with law and were drawn with no regard whatsoever to IS

436. That IS 436 would apply to the facts of the present case is made clear by our judgment reported in Bombay Oil Industries (P) Ltd. v. Union of India, 1995 (77) E.L.T. 32 (S.C.), where this Court held following Union of India v. Delhi Cloth & General Mills Co. Ltd., 1963 Suppl. (1) SCR 586, that if the method of testing of any item of Central Excise tariff is not mentioned, then the Indian Standard Institution's method should be applied. That this would apply to the Customs Act as well. IS 436 lays down:-

> ""5. SAMPLING FROM SHIPS DURING LOADING OR UNLOADING 5.1 Sub-lots – For the purpose of sampling, the entire quantity of coal in a ship shall be divided into a suitable number of sub-lots of approximately equal weight as specified in Table 1.
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> 5.1.1 A gross sample shall be drawn from each of the sub-lots and shall be kept separately so that there will be as many gross samples as the number of sub-lots into which the lot has been divided.
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> 5.2. Sampling of coal from ships shall be carried out, as far as practicable, when coal is in motion. If it is taken on a conveyer, the gross sample shall be collected as per the procedure laid down in Table 3.

If not, the gross samples may be drawn during loading or unloading of the ship. For this purpose, the number of increments to be taken shall be governed by the weight of the gross sample and the weight of increment as specified in Table 3 for various size groups of coal." TABLE 1 NUMBER OF SUB-LOTS/GROSS SAMPLES (Clauses 0.3.4.1 and 3.1) Weight of the Lot No. of sub-Lots/Gross Samples (Metric Tonnes) Over 3000 6." Then the IS 436 goes on to describe the procedure to reduce a gross sample into a sample for a lab test etc. in great detail, and speaks about the minimum weight of a gross sample being 75 Kg so far as "Coal, small" is concerned.

17. Clearly the samples drawn by the Inspector in the present case, have been drawn contrary to the express provisions of IS 436. On this count also, the samples being drawn not in accordance with law, test reports based on the same cannot be looked at.

The Tribunal's judgment has proceeded on the basis that even though the samples were drawn contrary to law, the appellants would be estopped because their representative was present when the samples were drawn and they did not object immediately. This is a completely perverse finding both

on fact and law. On fact, it has been more than amply proved that no representative of the appellant was, in fact, present at the time the Customs Inspector took the samples. Shri K.M. Jani who was allegedly present not only stated that he did not represent the Clearing Agent of the appellants in that he was not their employee but also stated that he was not present when the samples were taken. In fact, therefore, there was no representative of the appellants when the samples were taken. In law equally the Tribunal ought to have realized that there can be no estoppel against law. If the law requires that something be done in a particular manner, it must be done in that manner, and if not done in that manner has no existence in the eye of law at all. The Customs Authorities are not absolved from following the law depending upon the acts of a particular assessee. Something that is illegal cannot convert itself into something legal by the act of a third person.

18. It is clear therefore that the Tribunal judgment has to be set aside on all these counts. The appeals are, therefore, allowed with no order as to costs.

.....J. (A.K. Sikri) .....J. (R.F. Nariman) New Delhi;

May 14, 2015