# Deep Exports vs Mmtc Ltd on 29 April, 2022

## Author: N.V.Anjaria

## Bench: N.V.Anjaria

C/FA/3200/2004 CAV JUDGMENT DATED: 29/04/2022

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/FIRST APPEAL NO. 3200 of 2004

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE N.V.ANJARIA

and
HONOURABLE MR. JUSTICE SANDEEP N. BHATT

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| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ? | Yes |
| 2 | To be referred to the Reporter or not ? | Yes |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ? | No |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ? | No |

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DEEP EXPORTS
Versus
MMTC LTD. & 1 other(s)

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Appearance:
MR AMAR N BHATT(160) for the Appellant(s) No. 1
MR. HJ KARATHIYA(7012) for the Defendant(s) No. 1
RULE SERVED BY DS for the Defendant(s) No. 2

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CORAM:HONOURABLE MR. JUSTICE N.V.ANJARIA
and

HONOURABLE MR. JUSTICE SANDEEP N. BHATT

Date :29/04/2022

CAV JUDGMENT

(PER : HONOURABLE MR. JUSTICE N.V.ANJARIA) The present First Appeal under Section 96 of the Code of C/FA/3200/2004 CAV JUDGMENT DATED: 29/04/2022 Civil Procedure, 1908, arises out of judgment and decree dated 31.8.2004 passed by learned Judge, City Civil Court, Ahmedabad dismissing the Summary Suit No.3536 of 1999 instituted by appellant herein which was for recovery of Rs.32,49,820/-.

2. The case of the appellant- original plaintiff pleaded in the plaint was inter alia that the plaintiff was a registered partnership firm engaged in carrying the business of importing gold and silver for its customers. The defendant was Government of India enterprise, the company incorporated under the provisions of Companies Act.

3. The plaintiff and the defendant entered into Memorandum of Understanding dated 24.3.1998, whereunder the gold and silver was agreed to be imported as per the terms and conditions of the memorandum of understanding. The plaintiff was to place an indent for import in writing together with the earnest money deposit of the 10% of the indent value calculated at international price. In case of advanced fixation of price of gold and silver, the earnest money deposit was to be 15% and the value at the international value was required to be paid. It was stipulated that the defendant No.1 would pay the custom duty clearing and handling charges etc. out of the earnest money deposit and the balance was to be adjusted in the final invoice.

3.1 It was made incumbent on the defendant No.1 to import the indented quantity of the said goods and complete the custom clearance etc. The material was to be dispatched within seven days of the arrival at the venue of defendant No.1. The default would entitle the defendant No.1 to dispose of the material. It was permissible for the defendant No.1 to collect the service charges from the plaintiff on the basis of the slabs mentioned in C/FA/3200/2004 CAV JUDGMENT DATED: 29/04/2022 the memorandum of understanding.

3.1.1 The memorandum of understanding was valid from 1.4.1998 to 31.3.1999. The plaintiff placed the indent on 4.1.1999 for importing of 1700 TT Bars of gold to be purchased from the defendant No.1. The plaintiff sent payment of Rs.85,00,000/- towards 10% sale value. Defendant No.1 acknowledged the same by its letter dated 5.1.1999 and fixed the base price as mentioned in the said letter. The plaintiff was to take immediate delivery against the indent. However, by letter dated 5.1.1999 defendant No.1 informed the plaintiff that on account of increase in the custom import duty, becoming effective from 5.1.1999 of Government of India, the decision was taken by defendant No.1 that it would charge the price by adding the import duty prevailing at the date of delivery.

3.1.2 Under the terms and conditions of the indent the plaintiff was liable to pay custom duty at the rate of 250 per 10% of gold. Under the increased rate, as intimated by defendant No.1 to the plaintiff, the rate of custom duty was hiked to Rs.400 per 10 grams of gold. The defendant also

conveyed to the plaintiff that since plaintiff had deposited the amount of earnest money on 1.4.1999, the stock would be offered for lifting after making full payment at the price including the custom duty revised at the increased rate.

3.1.3 The plaintiff responded by letter dated 6.1.1999 that the fixing of the price of the goods indented was made on 4.1.1999 and the rate of custom duty was also fixed with the customers. It was stated by plaintiff that since increase in the custom duty was with effect from 5.1.1999, the plaintiffs and its customers would be charged only on the basis of the custom C/FA/3200/2004 CAV JUDGMENT DATED: 29/04/2022 duty at the old rate. It was conveyed that there was no question of levying the increased customs duty from the plaintiff when it had come into effect from 5.1.1999 and it was a development subsequent to completion of contract of fixed price.

3.1.4 The plaintiff however had no option but to lift the material for its customers. It made it clear therefore that he was ready to lift 1700 TT Bars at the new custom duty rate under protest. The defendant was told that the issue should be referred to the custom office for consideration. The plaintiff also intimated to the defendant No.1 that the differential amount of custom duty which may arise because of the plaintiff paying additional custom duty of Rs.150 should be kept in the short term Fixed Deposit until the clearance is given by corporate office. The plaintiff accordingly was compelled to pay additional amount of Rs.29,74,320/- towards additional duty, which was paid under protest.

3.1.5 The defendant No.1 addressed letter dated 7.1.1999 to the plaintiff that its protest was referred to the corporate office at Delhi which will be taking final decision in the matter. Nothing was heard by plaintiff although ten days and more passed by, which led the plaintiff to address detailed letter dated 18.1.1999 requesting to review the policy and also to refund the excess amount paid. On 9.2.1999 the plaintiff issued communication from defendant No.1 that the custom duty would be liable to be charged as applicable to the date of delivery of the material. The plaintiff thereafter made futile representations dated 10.2.1999, 17.2.1999 and 22.2.1999. The response of the defendant No.1 remained negative.

3.1.6 It was the case of the plaintiff that price of the goods C/FA/3200/2004 CAV JUDGMENT DATED: 29/04/2022 was required to be fixed as per the rate prevalent on 4.1.1999. The goods were required to be delivered to the plaintiff from the vault of defendant No.1 and in that view the goods had already entered India before 5.1.1999 and had reached the vault of defendant No.1 after custom clearance, stated the plaintiff. It was further averred that plaintiff had accordingly settled the price from its own customers. It was contended that the defendant illegally charged amount of Rs.29,74,320/- by increasing the custom duty. The plaintiff referred to the Section 28B of the Customs Act to contend that the respondent No.1 was liable to refund forthwith the said large amount collected, the incidence of which was suffered by the plaintiff.

3.2 On the basis of above premise on the plaint, the plaintiff prayed for decree for total amount Rs.32,49,820/- with comprised of Rs.29,74,320/- being excess amount collected by defendant No.1, Rs.2,70,000/- being the amount of interest at 18% calculated till the date of the suit and Rs.5,500/- towards notice charges.

3.3 The defendant No.1 filed written statement (Exhibit 37) in which it was stated that though it was true that Memorandum of Understanding was dated 23.4.1998 (Exhibit 58) the same was not acted upon. According to the stand taken, defendant No.1 had sent the letter to the plaintiff intimating about substantial reduction in service charges from .80% of CIF value .25%. It was contended that Memorandum of Understanding was not required and the plaintiff had to agree for higher service charges if was desirous to continue with the Memorandum of Understanding. It was stated that the plaintiff did not continue with the Memorandum of Understanding and made first purchase of bullion from defendant on 14.11.1998 after C/FA/3200/2004 CAV JUDGMENT DATED: 29/04/2022 reduction of service charges which was communicated by the plaintiff by letter dated 23.11.1998. The plaintiff did not mention about his continuing under the Memorandum of Understanding, contended the defendant.

3.3.1 It was further contended that earnest money deposit of 10% of the indent was booking price only. It was the case of the defendant that it was incorrect that plaintiff approached the defendant on 4.1.1999 for delivery of the gold rather it approached on 5.1.1999 when the date of duty was 400 per 10 gram. It was stated that defendant No.1 addressed letter dated 5.1.1999 to the plaintiff and that reading of the said letter it was clear that defendant did not collect any additional duty of Rs.150 per 10 gram. The petitioner was offered right of 'first refusal' in respect of 1700 TT Bars of gold. It was denied that the defendant had charged any extra amount from the plaintiff.

3.3.2 It was denied that the defendant was entitled to receive only such amount as was paid by it towards custom duty. It was the case that the defendant was free to sell the goods imported in the open market at such price as may be fixed in light of the policies prevalent time to time. It was reiterated that since the material was delivered on 5.1.1999 custom duty as per the rate on that date was leviable in the price.

3.4 On the basis of the pleadings of the parties, the trial court framed the following issues - whether the plaintiff proves that he is entitled to the refund of amount of Rs.29,74,320/-; whether the defendant No.1 is entitled to collect from the plaintiff new custom duty on the old stock lying with the defendant and the custom duty paid by the defendant at the old rate; whether defendant had paid payment for custom duty at the new rate of C/FA/3200/2004 CAV JUDGMENT DATED: 29/04/2022 Rs.400 per 10 grams instead of Rs.250 per 10 grams and whether the plaintiff was entitled to recover the amount from the defendant.

3.4.1 The trial court recorded that it was clear that Memorandum of Understanding (Exhibit 58) was admittedly executed between the plaintiff and the defendant No.1. It was also recorded that in the cross examination, it was admitted by defendant No.1 that the excess custom duty was paid by the plaintiff under protest, and that 100% amount was paid on 5.1.1999, upon which the delivery of the gold bars was taken on 5.1.1999. According to the trial court letter dated 23.7.1998 (Exhibit 58) addressed by the defendant to the plaintiff was indicative that the plaintiff had accepted the reduction from .80% to .25% in what was described by the trial court to the 'duty facility', therefore the Memorandum of Understanding did not come in picture. The trial court recorded finding that in view of the above the Memorandum of Understanding could not be acted upon and was not acted upon.

3.4.2 A further view was taken by the trial court that the plaintiff failed to produce documentary evidence such as books of accounts to show that he had suffered loss of damages. It was reasoned that the customers had to pay the excess amount, they were the best persons to institute suits against the earring parties. It was thus on the basis of the premise of findings and accepting such contention on part of defendant No.1 that the Memorandum of Understanding did not come in picture. It was also the finding that the plaintiff did not suffer any loss by virtue of increase in the custom duty, and that if the loss was suffered by the customers the plaintiff could not have filed the suit. The suit of the plaintiff was accordingly dismissed.

C/FA/3200/2004 CAV JUDGMENT DATED: 29/04/2022 3.5 It was an argument advanced on behalf of the defendant- respondent and came to be accepted by the trial court that the principle of unjust enrichment would operate against the plaintiff seeking to recover the excess custom duty. The trial court observed while noting the argument that no damage was suffered by the plaintiff and that the customers were real sufferers.

3.6 In the later part of para 15 of the judgment, it was stated by the court, "...no damages or loss appear to have been suffered by the plaintiff hence, the plaintiff cannot claim any amount from the defendant No.

1. It is emphatically submitted that the real sufferers are the customers, therefore, how the plaintiff can file this suit hence, this suit is not. maintainable. Mr. Bhatt has also submitted that provisions of Sec.64(A) of Sales of Goods Act is also helping the defendant No.1. In support of his claim, Mr. Bhatt has relied upon judgments reported in (1985) 1 SCC 345 in the case of M/S. Amar Nath Om Prakash and others VS. State of Punjab and others and 1984(2) GLR 1111 in the case of Union of India Vs. Bharat Vijay Mills Co. Ltd. wherein, the ratio is laid down to the effect that with regard to the refund of excess taxation levied under an act is passed on by the dealers to the next purchaser, would disentitle the dealer to claim refund of the excess amount, meaning thereby that the Hon'ble Supreme Court laid down the principles of unjust enrichment while delivering its judgment."

4. Learned advocate Mr.Amar Bhatt took the court trough the journey of evidence on record and submitted that the memorandum of understanding existed between the parties. He submitted that custom duty was raised subsequent to the conclusion of the contract which was on 5.1.1999. It was submitted that the respondent No.1 could not have charged C/FA/3200/2004 CAV JUDGMENT DATED: 29/04/2022 additional customs duty of Rs.150 per 10 grams of gold. It was submitted that the gold was delivered to the appellant which was already in the vault of the respondent before 4.1.1999 and the respondent No.1 had paid the duty at the old rate of Rs.250 per 10 grams.

4.1 Learned advocate for the appellant further submitted that the reduction in service charges of gold intimated by letter dated 23.7.1999 was altogether was different aspect and that factor could not have the effect of annulling the Memorandum of Undertaking dated 23.4.1998. He submitted that the plaintiff had pay the additional duty, but it was paid under protest, which was a coercion exerted in law. He relied on Section 72 of the Indian Contract Act. It was his next submission that the submission of the other side before the court below on the count of principle of unjust enrichment did not hold good when the transaction between the parties was commercial

transaction, in respect of which this principle would not apply.

4.1.1 Decision of the Supreme Court in Hindustan Urban Infrastructure Limited Vs. Assistant Commissioner, Ernakulam and Others [(2015) 3 SCC 766] was relied on by learned advocate for the appellant. In that case, the official liquidator issued tender for sale of properties of company in liquidation and accepted the offer of the appellant. It was held that the contract stood concluded between official liquidator and the appellant upon the terms contained in the bid offer of the appellant. It was observed that since the appellant had specifically indicated that the offer made by it was inclusive of the statutory levies, the appellant was not liable to pay taxes. By further contending that in the instant contract, the price of the goods was agreed to be inclusive of custom duty and that the C/FA/3200/2004 CAV JUDGMENT DATED: 29/04/2022 goods were supplied from the stock on 4.1.1999 existing in the godown of respondent No.1, a Bombay High Court decision in The Pravara Sahakari Sakhar Karkhana Limited Vs. Express Industrial Corporation, Vinvat [AIR 2001 Bombay 185] was pressed into service.

4.2 On the other hand, learned advocate for the respondent Mr.Karathiya submitted that the Memorandum of Understanding dated 23.4.1998 was not acted upon. According to him, as contented in written statement by the respondent- defendant, the service charges were reduced from 0.80% to 0.25% which benefit was accepted by the plaintiff and the order was also placed. In his submission this amounted to giving up of the other terms and conditions of the Memorandum of Understanding. It was submitted that Clause 8 of the Memorandum of Understanding provided that it would automatically stand cancelled upon change of exim policy of the government and once the custom duty was reversed from Rs.250 to Rs.400 per 10 gram, it had effect of cancellation of Memorandum of Understanding.

4.2.1 It was the next submission on behalf of the respondent that the plaintiff had passed on the duty to the customers and therefore not entitled to refund. He relied on provisions of Section 27 of the Customs Act. He further submitted that it was immaterial whether the stock was lying with the respondent No.1 or not since the burden has been passed on the buyers and no loss was incurred by the appellant- plaintiff. He also submitted that no document was produced by the appellant to be entitled to seek the refund of the amount.

4.2.2 Learned advocate relied on the decision of the C/FA/3200/2004 CAV JUDGMENT DATED: 29/04/2022 Supreme Court in State of Rajasthan Vs. Novelty Store [AIR 1995 SC 1132] in which it was held that the respondent was not entitled to refund the amount which was also collected from the consumers. Learned advocate for the respondent also relied on the decisions for proposition that the plaintiff cannot rely upon the weakness of the defendant and has to prove his case on its own strength that the contentions beyond pleadings could not be raised and could not be entertained by the court.

5. Before discussing and analyzing the evidence on record and thereby considering the rival case on merits, the chronology of the facts may be recapitulated at the cost of repetition.

(i) On 23.04.1998, Memorandum of Understanding between the appellant and the respondent No. 1 was reached.

(ii) On 23.07.1998, letter came to be addressed by respondent No. 1 in respect of reduction of service charges on gold. The appellant objected to it.

(iii) On 04.01.1999, indent was placed by the appellant for 1700 TT Bar of gold. The appellant paid Rs. 85 lakhs as 10% Earnest Money Deposit. On that day, the Customs Duty was Rs.250/- per 10 gram of gold.

(iv) On 05.01.1999, letter was addressed by the respondent No. 1 acknowledging the receipt of indent and EMD, and that it was stated that the goods were to be purchased from the stock with the respondent. By this the respondent informed the appellant that the respondent No. 1 had taken a decision to charge the price after taking into account the import duty prevailing on the date of delivery which was at the rate of Rs. 400/- per 10 gram of Gold effective from 05.01.1999.



(v) On 06.01.1999, the appellant

addressed a letter to the respondent offering to lift 1700 TT Bar at the new custom duty rate under protest. The appellant requested to consider charging the custom duty at old rate.

stated by his letter that the issue was referred to the corporate office.

(vii) On 18.01.1999, the appellant again requested respondent no 1 to review its policy and refund the excess amount.

(viii) On 09.02.1999, the appellant was informed that the custom duty would be charged as per the rate prevalent on the date of delivery which was 6.1.1999.

(ix) The appellant made representations on 10.02.1999, 17.02.1999 and 22.02.1999 seeking refund of the amount.

(x) On 18.03.1999, the appellant issued legal notice for refund of Rs. 29,74,320/- , which was the excess amount of custom duty paid under protest by the appellant.

5.1 While proceeding to examine the acceptability, validity and correctness of the findings arrived at by the trial court, inconsistency in the pleadings by defendant No.1 in its written statement may be readily noticed. While the main plank of the defendant No.1 has been that Memorandum of Understanding did not come into force and was not acted upon, it was averred that the plaintiff had committed breach of the said Memorandum. But then in para 7 of the written statement, in light of the case put forth that the plaintiff had accepted the reduction in the service charges, the averment was found reflecting the stand of the defendant No.1 that the 'the plaintiff did not continue under the Memorandum of Understanding' and further that 'it is hereby submitted that Memorandum of C/FA/3200/2004 CAV JUDGMENT DATED: 29/04/2022 Understanding was/is not in force, not acted upon by the plaintiff.' As against this clear stand these averments are found in para 9 of the written statement, 'I say that Memorandum of Understanding was/is not in force. When the plaintiff had committed a breach of Memorandum of Understanding, defendant is entitled to take custom duty at the rate of Rs.400 per 10 grams.' These inconsistent averments could be viewed as amounting to a conflict in the stand of the defendants.

5.2 Dealing with the argument on behalf of the respondent No.1 based on principle of unjust enrichment at the outset, it was misplaced. This principle would not apply to the contractual obligation of state enterprise which was commercial transaction. The Patna High Court in Ms.Central Coldfields Limited Vs. Ms. S.J Coke Industries being Letters Patent Appeal No.1504 of 2012 and allied appeals decided on 14.12.2012 observed thus, "We are also not impressed by the argument that the claim of the writ petitioners requires to be rejected on the principles of unjust enrichment. The matter at hand is a purely commercial transaction between the appellant and the writ petitioners. The principle of unjust enrichment has been developed in respect of the statutory dues payable to the Government by way of a tax/a duty/a fee. The principle has not yet been extended to the commercial transactions of the Government which are governed by terms and conditions of the contract. We do not propose to expand the horizons. The contention is rejected."

5.3 The Apex Court, reversed the judgment of the Patna High Court in S.J Coke Industries Private Limited Vs. Central Coldfields Limited [(2015) 8 SCC 72], on other merits but without touching the observations of the High Court in respect of the unjust enrichment. In State of Gujarat [(2020) SCC C/FA/3200/2004 CAV JUDGMENT DATED: 29/04/2022 Online Guj 3214], it was observed in para 38 that the question of unjust enrichment for passing over the same to the buyer could not arise in case when the contract is of fixed price. In the present case in any view, the issue was also not framed on the question of unjust enrichment. The transaction in question since was commercial transaction, the principle of unjust enrichment will not be applicable and the submission of the respondent on the said count is liable to be rejected.

5.4 Adverting to the facts of the case and attendant evidence on record, Memorandum of Understanding dated 23.4.1998 (Exhibit 58) was entered into whereunder the plaintiff had placed the order for purchase of gold. The terms and condition of Memorandum of Understanding are mentioned herein above. The Memorandum of Understanding which evidenced the contract between the parties was proved from evidence of Exhibit 66 read with Exhibit 71 thereunder the plaintiff placed order for 1700 TT Bars of gold to the defendant No.1 which was on the basis of basic price prevalent on 4.1.1999. It was with reference to that price that the plaintiff paid 10% of the

earnest money together with the custom duty amount as applicable on that day.

5.5 The evidence of Vijay Vardhan Pratap Singh Rathod at Exhibit 71 who was senior Manager of respondent No.1 stated that the quantity of 1700 TT Bar gold was available in the vault. It was mentioned in the statement of stock. He admitted that whenever the goods are kept in vault, they are the goods cleared of custom duty. He stated that the custom duty of Rs.250 per 10 grams was already paid on the stock lying in the vault on 4.1.1999, from which the delivery was given to the plaintiff. Not only that this witness further admitted that the additional C/FA/3200/2004 CAV JUDGMENT DATED: 29/04/2022 custom duty of Rs.150 collected from the plaintiff was kept with respondent No.1 and was not paid to the government. He stated that he did not have any notification regarding increase in the custom duty. The evidence at Exhibit 71 thus proved that the delivery of the gold made on 4.1.1999 was from the vault and in respect of which the custom duty was already paid at the old rate.

5.6 Letter dated 5.1.1999 (Exhibit 15) which was addressed by the defendant No.1 in response to the letter of plaintiff dated 4.1.1999 whereby the earnest money was paid, mentioned that the quantity of gold was been purchased from respondent No.1 'out of our stocks'. It was further stated therein that respondent No.1 had fixed the base price. In para 2 it was admitted that EMD of Rs.85 lakhs at 10% of the sale value was deposited by the appellant on 4.1.1999. The delivery which was to be made to the plaintiff were of the goods already lying in the godown of the respondent on that day. There would be no gainsaying that the contract was concluded between the parties on 4.1.1999. The increase in the custom duty was conveyed on the next day on 5.1.1999. The terms and conditions prevalent on the day when the contract was concluded would operate between the parties.

5.7 The finding of the trial court that because of reduction in the service charges and on account of the plaintiff placing order once taking advantage of the reduced service charge, resulted into foregoing of the Memorandum of Understanding is without any basis in facts and without any evidence in foundation. Merely because the service charges were reduced and the plaintiff took advantage of it, it could not be said to have been resulted into rescinding of the contract. The service charges were altogether different aspect. Neither the factum of C/FA/3200/2004 CAV JUDGMENT DATED: 29/04/2022 reduction of service charges nor anything from the evidence suggested that the parties intended the rescind the Memorandum of Understanding and the conditions thereof. Reduction in service charges would have to be viewed and construed as an incentive.

5.8 The MOU used the word 'actuals'. He actual expense on account of payment of custom duty us at the rate of Rs.250 per 10 gms and not Rs.400 which was being claimed by the Respondent No.1 from the appellant. Clause 1 of MOU (Exhibit

58) stated, MMTC will pay custom duty, clearing / handling charges, insurance, and transportation charged etc. out of the earnest money deposit and the balance will be adjusted in the final sales invoice to the customer. Similarly, Clause 4 of MOU, provided that 'the customer shall be charged the actual CIF cost including CIF premium/ fixing commission, service charges as per cl.(3) clearing and handling charge, bank charges, transportation/ insurance, demurrage/ detention if any and other expenses incurred by MMTC at actual.' 5.9 The reasoning adopted by the trial court that the

change of policy would entitled respondent No.1 to charge the revised custom duty is erroneous. When the terms, conditions and obligations between the parties were reduced in form of written contract, they would bind the parties. Once the contract had reached the stage of conclusion when the goods were delivered as per the operative terms, the change of policy would not be a consideration to be applied to vary the binding conditions of the concluded contract.

6. In The Paravara Sahakari Karkhana Limited (supra) the facts were akin to the case on hand. The Bombay High Court C/FA/3200/2004 CAV JUDGMENT DATED: 29/04/2022 held, "...the quotation (Exhibit P-1) submitted by the defendant as well as the order (Exhibit P-2) placed by the Plaintiff uniformly stated that the prices included all duties except sales tax. Therefore, assuming for a moment that the Plaintiff was liable to pay excise duty, the same was already included in the price as is evident from the note made in Exhibit P-1 and Exhibit P-

2. The contract between the parties evidenced by these two documents does not at all give any indication that the prices agreed were liable to be changed on account of increase in tax or duty. On the contrary, the intention of the parties, as spelt out by the contract, is to be effect that the price was inclusive of all dues except the sales tax."

6.1 It was further stated, "The fact that the delivery of the brass tubes was made after the alleged increase in the excise duty on 1-8-1974 is of no consequence since the defendant, was not required to pay the increased excise duty. Firstly, it is not a manufacturer of the said brass tubes and secondly the brass tubes agreed to be sold and supplied to the Plaintiff were from the ready stock, that is, the stock already manufactured prior to the alleged increase in the excise duty. Thirdly, the alleged increase could not have retrospective application."

7. From the evidence on record, it is born out undisputed that the plaintiff paid the excess customs duty under protest. A payment made under protest amounts to payment under coercion, particularly when the recipient of the money is not entitled to receive. Section 72 of the Indian Contract Act deals with the liability of person to whom money is paid, or thing delivered, by mistake of coercion.

7.1 The said Section 72 reads as under, "72. Liability of person to whom money is paid, C/FA/3200/2004 CAV JUDGMENT DATED: 29/04/2022 or thing delivered, by mistake or under coercion.--A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it. --A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

> "(a) A and B jointly owe 100 rupees to C, A alone pays the amount to C, and B, not knowing this fact, pays 100 rupees over again to C. C is bound to repay the amount to B. (a) A and B jointly owe 100 rupees to C, A alone pays the amount to C, and B, not knowing this fact, pays 100 rupees over again to C. C is bound to repay the amount to B."

(b) A railway company refuses to deliver up certain goods to the consignee except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegal and excessive.

(b) A railway company refuses to deliver up certain goods to the consignee except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegal and excessive."

7.2 The Illustration (b) to Section 72 quoted above aptly apply to the facts of the case. The Illustration is viewed as part of the Section. In Muralidhar Chatterji Vs. International Film Company Limited [2 CAL. Privy Counsel 213]. It was observed in context of Section 64 and Section 64 of the Contract Act with reference to the Illustration (c) to the Section that the Illustration in the Section cannot be igorned or rest aside only because it is not body of the part of the Section. It was so held also in Mahomed Syedol Ariffin Vs. Yeoh Ooi Gark [(1916) L.R. 43 I.A.256].

C/FA/3200/2004 CAV JUDGMENT DATED: 29/04/2022 7.3 In Petlad Bulakhidas Mills Co. Ltd. and another Vs. Union of India and another [AIR 1970 Guj 59], the court noticed the definition of 'coercion' in Section 15 of the Contract Act which says that 'coercion' is committing, threatening to commit any act forbidden by the Penel Code, 1860 over the unlawfull detaining, or threatening to detain any property of any person, whatever with the intention of causing any person to enter into agreement.

7.4 The Court then quoted with approval from Kanhaya Lal Vs. National Bank of India Limited [(1913) ILR 40 Culcutta 598 (P.C.)] the following observations, "Section 72 of the Contract Act (IX of 1872) is not exhaustive. The meaning of the words "coercion" used in that section is not controlled by the definition in Section 15; but is used in its general and ordinary sense. The definition in Section 15 is expressly inserted for the special object of applying to Section 14, i.e., to define what is the criterion whether an agreement was made by means of a consent extorted by coercion, and does not control the interpretation of "coercion" when the word is used in other surroundings."

7.5 In T.G.M Asadi and Sons Vs. The Coffee Board [AIR 1969 Mys 230], the facts were that the plaintiffs firm had purchased coffee from the Coffee Board. The price was paid by the plaintiff, subsequently the Coffee Board demanded from the plaintiff firm a further sum towards sales tax by intimating the plaintiff unless the said additional amount is paid, the deposit would be forfeited. The plaintiff repudiated the claim, however paid the amount under protest. It subsequently filed the suit for recovery. It was held that if such were the circumstances in which the plaintiff firm was obliged to part with a sum of money C/FA/3200/2004 CAV JUDGMENT DATED: 29/04/2022 which could not be properly demanded as tax under the relevant law, demand would demand the money back from the State Government under Section 72 of the Contract Act which creates liability for return of money under mistake or coercion.

7.6 The High Court in T.G.M Asadi (supra) observed thus, "It seems to us that the case before us is fully within the provisions of this section and equally within illustration (b). It is clear that the word 'coercion' occurring in this section should not be understood in manner defined by Section 15 of the

Contract Act and that that word has to be understood in its ordinary sense. 'Coercion' to which that section refers includes every kind of compulsion even if it does not measure up to the 'coercion' defined by Section 15 of the Contract Act, which incorporates a special definition of that word occurring in the preceding section. That exclusive definition cannot assist the interpretation of Section 72 of that Act. That that is so was explained by Lord Moulton in Seth Kanhaya Lal v. National Bank of India (1913) 40 Ind App 56 (PC). Discussing the meaning of the word 'coercion' occurring in section 72of the Indian Contract Act, Lord Moulton said this:

> "It is impossible to contend that the coercion referred to in this section or in the above illustration is 'with the intention of causing any person to enter into an agreement. The word 'coercion' must therefore be used in its general and ordinary sense as an English word, and its meaning is not controlled by the definition in Section 15.""

7.7 When on facts and in law the appellant- plaintiff could not have been asked to pay the excess custom duty, which was paid by the appellant and the payment was under protest, it tantamount to paying the amount under coercion. Such amount received by defendant No.1 is required to be paid back to the C/FA/3200/2004 CAV JUDGMENT DATED: 29/04/2022 appellant- plaintiff. The apellant- plaintiff is entitled in law to recover the same.

7.8 The reasoning of the trial court that the plaintiff had not suffered any loss and if loss is suffered it is by the customers is inapplicable. It is not the question of suffering loss but the respondent No.1 collecting the excess amount of custom duty from the plaintiff to entitle the plaintiff to recover the same. The transaction being commercial transaction between the appellant and respondent No.1, the question of appellant producing any document regarding passing of any duty to its customers will not arise. The reasoning on this count supplied by the trial court is erroneous. The plaintiff paid the excess duty to the respondent No.1 under protest. In eye of law, paying under protest, when one is not liable to pay, is paying under coercion.

8. As the amount was wrongfully collected by defendant No.1, while repaying the same, it will be just and proper that the same is paid in interest. Though in the suit prayer the plaintiff has prayed for 18% interest, we deem it fir to award 9% interest from the institution of the suit till realization on the amount directed to be recover.

8.1 In view of all the above, it has to be concluded that the Memorandum of Understanding was applied and operate between the parties and that the contract was concluded 4.1.1999 before the upwardly revised custom duty could be a consideration. Accordingly, the suit of the plaintiff deserves to be allowed declaring and holding that the plaintiff is entitled to and shall recover Rs.29,23,320/- with 9% interest as above, to be calculated from the institution of suit till actual payment.

C/FA/3200/2004 CAV JUDGMENT DATED: 29/04/2022

9. For the forgoing reasons and discussion, judgment and order dated 31.8.2004 impugned in the present First Appeal passed by learned Judge Court No.11, City Civil Court, Ahmedabad dismissing the Summary Suit No.3536 of 1999, impugned in this appeal is set aside. The suit is decreed in the aforesaid terms and to the aforesaid extent. The decree shall be drawn accordingly. This appeal stands allowed as above.

Further Order At this stage, learned advocate for the respondent No.1 requested for stay of the present judgment and order to enable the respondent to approach higher forum. He further requested that in view of the impending vacation more time may be granted.

Learned advocate Mr.Amar Bhatt for the appellant opposed the prayer. In the facts and circumstances of the case, the present judgment and order shall stand in abeyance for four weeks from the date of receipt of the certified copy of the judgment and order.

(N.V.ANJARIA, J) (SANDEEP N. BHATT,J) Manshi