
(1985) 09 CAL CK 0006

In the Calcutta High Court

Case No : Appeal No. 101 of 1977 and Matter No. 376 of 1975

Collector of Customs and Others

APPELLANT

Vs

Union Carbide India Limited

RESPONDENT

Date of Decision : 27-09-1985

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : 90 CWN 599 : (1986) 10 ECC 51 : (1986) 9 ECR 740 : (1987) 27 ELT 241

Hon'ble Judges : R.N. Pyne, J;P.K. Majumdar, J

Bench : Division Bench

Advocate : N.C. Roy Chowdhury and Dipak Basu, for the Appellant; Biswarup Gupta and S.K. Roy Chowdhury, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Majumdar, J.—This appeal is by the Collector of Customs and is directed against the judgment and order passed by a learned single Judge of this court on 31st January, 1977.

2. The respondent, Union Carbide India Limited made an application under Article 226 of the Constitution, inter alia, for writs of mandamus directing the respondents (who are the appellants before us) to assess and collect customs duty on the manganese ore of the respondent under tariff item No. 26 and not under tariff item No. 28 as sought to be done by the appellants. The learned Judge of the court of first instance allowed the said application and made the rule absolute and the appellants were directed to assess and collect customs duty on the manganese ore under item No. 26 of the tariff classification. Being aggrieved by the said order of the learned Judge of the court of first instance the appellants have preferred this appeal.

3. The respondent is the manufacturer of diverse goods including dry cell batteries, torches and allied products. For its dry batteries, the respondent

requires high grade manganese ore (battery grade) which is imported from Gabon in Africa. Such high grade manganese ore is not available in India and is generally imported from other country, namely, West Africa for the manufacturing of such dry cell batteries. At the material time, June, 1975, manganese ore was a canalised item and the Minerals & Metals Trading Corporation of India Limited, a Government of India Undertaking was the canalising agency. For import of such manganese ore the procedure for importation of manganese ore since 1971 has been that the Chief Controller of Imports issues release orders on the basis of which indents are placed by the consumers with the, said Minerals & Metals Trading Corporation of India Limited (hereinafter referred to as M.M.T.C.). On the basis of such indents the M.M.T.C. floats tender and effects the imports which are sold to the ultimate consumers sometimes on high seas by transfer of shipping documents.

4. In the instant case the said M.M.T.C. had entered into a contract with the foreign seller for purchase of high grade manganese ore (battery grade) as per specifications mentioned in the contract No. M.M.T.C./Purcon/70-75-IR(18), being annexure "C" to the writ petition on or about 25th February, 1975. The contract between M.M.T.C. and the foreign seller is for a total quantity of 4230 tonnes of manganese ore of 83-85% MnO₂. On the same day the M.M.T.C. entered into an agreement with the petitioner being contract No. MMTC/SALCON/MO/75/75-IR(23), being annexure "D" to the writ petition, for sale of such ore for 1685 metric tonnes of 83-85% for MnO₂. The said 1685 metric tonnes of such ore was delivered to Calcutta. The goods were sold on the high seas as being carried by the vessel "Georgis Matheos" and the said goods were transferred to the respondent by M.M.T.C. along with letter of authority issued by the Chief Controller of Imports and Exports.

5. The said vessel arrived in the Port at Calcutta in or about June, 1975 and the respondent duly filed a bill of entry to the customs authorities for removal of the said consignment of 1685 metric tonnes to its bonded warehouse. The entire consignment was allowed to be so removed under a test bond. In the bill of entry the respondent classified the said ore for the purpose of levy and assessment of duty under tariff item No. 26. The relevant tariff items for the purpose of this appeal are as follows:

Item No.	Name of Article	Nature	Standard of Duty	Rate of Duty
26.	Metallic ores			
	all sorts except	Revenue	40% ad valorem	ochres and other pigment ores and antimony ores
28.	Chemicals, drugs, and medicines,	Preferential	60% all sorts	not otherwise specified.
		Revenue	ad valorem.	

It is the case of the respondent that the goods imported were metallic ore and properly classifiable under the said item No. 26. On the arrival of goods in or about June, 1975 the appellants allowed the clearance of a part of the goods being 395.08 metric tonnes on payment of duty as appraised under item No. 26 of the customs tariff as metallic ore.

6. Thereafter in the course of processing for release of further quantity of 392.60 metric tonnes of the said goods the Assistant Collector of Customs for Appraisalment, Group I on or about 11th September, 1975 assessed the said goods under customs tariff item No. 28 as chemicals which attracts higher rate of duty under the said item No. 28. The respondent protested for such reclassification as sought to be done by the said Assistant Collector of Customs. The respondent, however, paid under protest a higher duty as claimed and cleared the said quantity of 392.60 metric tonnes. It is alleged by the respondent that the said protest was communicated verbally and subsequently confirmed in writing. It is the allegation of the respondent that the respondent was coerced to pay an excess sum of Rs. 1,69,955.74p in respect of the said goods.

7. The respondent alleges that the customs authorities reclassified the said ore from item No. 26 to 28 of the said Customs Tariff solely on the basis of a chemical test report which is, inter alia, as follows:

"The sample is in the form of moist coarse grain and coarse powder. Percentage of Manganese dioxide is 83.1."

8. It is alleged by the respondent that on or about 18th September, 1975, the respondent has been served with a notice by the Assistant Collector of Customs for Appraisalment, Group II to show cause why the respondent should not pay a further sum of Rs. 1,71,040.92p being the differential duty in respect of the 395.08 metric tonnes of manganese ore already cleared by the respondent by paying the duty under tariff item 26 of the said customs tariff. The said notice to show cause, inter alia, is as follows:

"Whereas it appears that customs duty amounting to Rs. 1,71,040.92 (Rupees one lakh seventy one thousand forty and paise ninety two only) which was not levied/short levied/erroneously refunded in respect of the above consignment is due from you as indicated below: The goods are correctly assessable U/I 28 ICT fa 60% 15% instead U/I 26 ICT @ 40% 5% as originally taken for purpose of assessment resulting in a short levy of Rs. 1,71,040.92 is involved."

Being aggrieved by such reclassification the respondent filed the said application under Article 226 of the Constitution before the court of first instance challenging the said order of reclassification of the manganese ore imported by the respondent under tariff item No. 28 instead of item No. 26 and the assessment order dated September 11, 1975 as recorded in the bill of entry and the collection of duty on the basis of the said assessment as well as the said notice to show cause dated September 18, 1975, inter alia, on the ground that the customs authorities had no jurisdiction to levy duty on the manganese ore whether in lump form or in the form of coarse grain under item No. 28 instead of item No. 26 and the said assessment order and/or reclassification is perverse.

9. The learned Judge of the court of first instance disposing of the said application made the rule absolute by his judgment and order dated January 31, 1975 against which the present appeal has been preferred. The learned Judge in

allowing the said application, inter alia, observed as follows:

(a) It is the common case that what has been imported in manganese ore. Such ore having been imported in the form of powder and/or coarse grains a dispute arose whether the same should be assessed as chemicals under item No. 28 of the Indian Tariff Act, 1934. The decision of the Supreme Court in the Wolfram case *Minerals and Metals Trading Corporation of India, Ltd. Vs. Union of India (UOI) and Others*, entirely covered the dispute.

(b) The application is not premature as the notice to show cause has been issued only in respect of a part of the consignment. On another part of the consignment the authorities have already assessed the duty under item No. 28 and have collected such duty. As such, the authorities have made up their mind and the question that it is premature is no longer open to them. On such finding the learned Judge held that the application was not premature; and,

(c) The existence of an alternative remedy by way of appeal was no bar to the writ petition as the remedy was not as efficacious as available under Article 226 of the Constitution specially when the jurisdiction of the authorities was challenged.

10. The learned counsel for appellants contends before us that the Customs House Laboratory Test Report disclosed that the sample is in the form of moist coarse grain and coarse powder having 83.01% of manganese dioxide.

11. It is also the contention of the learned counsel for the appellants that the Central Board of Revenue's order and/or direction is that battery grade manganese ore in the form of coarse grain or powder is correctly assessable under tariff item No. 28.

12. The learned counsel for the appellants further submits that since the consignment in question is in the form of moist coarse grains and coarse powder, it is correctly assessable under tariff item No. 28 in view of the said direction contained in the Central Board of Revenue dated December 29, 1955, appearing at page 352 of the Indian Customs Tariff Guide, 13th Edition, which inter alia, provided that the battery grade manganese ore in the form of coarse grain or powder was correctly assessable under item No. 28 of the Indian Customs Tariff. According to the appellants, since the consignment is in the form of moist coarse grain and coarse powder, it is correctly assessable under item No. 28 of the Indian customs tariff.

13. It is also the submission of the learned counsel for the appellants that the respondent's application under Article 226 of the Constitution was premature and the respondent only would have a right to come to this court after the matter was finally adjudicated upon by the concerned customs authorities in the pending proceedings as according to the appellants, the initial jurisdiction was that of the concerned customs authorities to decide under which item the materials imported would fall.

14. It is the further contention of the learned counsel for the appellants that if the said proceeding pending before the concerned customs authorities goes in favour of the respondent, the respondent has the remedy of claiming refund under the relevant statute or if aggrieved by the said proceeding the respondent may prefer an appeal before the relevant appellate authorities as provided under the relevant statute.

15. The learned counsel appearing for the appellants relied on a decision of the Supreme Court in the case of V.V. Iyer of Bombay Vs. Jasjit Singh, Collector of Customs and Another, in support of his contention that where the goods imported could be classified under more than one item and two equally tenable views were possible then customs authorities would have initial jurisdiction to decide under which item the material would fall. The Supreme Court further observed that such finding of the customs authorities could not be interfered with by the High Court under Article 226 even though another view contrary to one adopted was in favour of the subject. The facts in this case were that an import licence was issued for import of goods described as spare parts. It was contended by the customs authorities before the Supreme Court that whether the sprayers as imported were hand operated sprayers or power driven sprayers and decision on such question was entirely within the jurisdiction of the customs authorities, and it was to decide under which particular item the said goods would fall. The learned counsel also cited another decision of the Supreme Court in the case of A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhwani and Another, in which the question was whether the fountain pen in which certain of its essential parts, viz., nib, clip, and cap were plated with gold or silver falls within the category of "fountain pens complete" under item 45(3) or under item 61(8) as "articles plated with gold and silver". According to Supreme Court such question should be determined by the authorities concerned who were to decide the same and the importer if aggrieved could pursue the remedies available to him under the law and should not come to court under Article 226 of the Constitution.

16. The learned counsel for the appellants referring to other Supreme Court decisions cited before the learned trial Judge, namely, Delhi Cloth & General Mills Co. Ltd. v. R.R. Gupta and Ors., reported in 1976(3) SCC 444 and Chanan Singh Vs. Registrar, Co-op. Societies, Punjab and Others, , contended that where two equally tenable views were possible the matter should be finally resolved by the relevant authorities having the necessary expertise. Relying on the latter Supreme Court case as cited above, the learned counsel for the appellant also contended that when the relevant customs authorities had not taken any final decision pursuant to the impugned notice to show cause dated 18th September, 1975 no interference from this court at this stage was called for.

17. The learned counsel for the respondent reiterating the contention made by and on behalf of the petitioner, who is the respondent before us, also contended that it would appear that relying on the said decision contained in Central Board

of Revenue's order and/or direction dated December 29, 1955 and from the assessment order made on the bill of entry in respect of a part of the consignment, there was no doubt, that the relevant authorities had already made up their mind as to what should be the appropriate rate of duty and it would appear from the record that the relevant customs authorities had already levied duty on a part of the consignment holding it as chemical under item No. 28 of the said Indian Customs Tariff. Therefore, it is the contention of the learned counsel for the respondent that it would be an idle formality to pursue the procedure laid down under the Customs Act and to get the matter finally adjudicated by the customs authorities.

18. The learned counsel for the respondent also contended that the said notice to show cause if it be true did not show any basis that the imported manganese ore was classifiable under item No. 28 nor such notice to show cause mentioned the said test report which has been set out before alleged to be the basis of the levy of duty under item No. 28, the customs authorities had no jurisdiction to initiate proceedings pursuant to the said notice to show cause. Reliance was placed on the decision of the Supreme Court in the case of East India Commercial Co. Ltd., Calcutta and Another Vs. The Collector of Customs, Calcutta, .

19. The learned counsel for the respondent also contended that there was no scope at all for having two views or two constructions because the manganese ore in coarse grain clearly falls under item No. 26. Item No. 28 was meant for chemicals, drugs and medicines. According to the learned counsel, these two are completely different sets of items and there could not be any room for any confusion as between the two sets of items. It is the contention of the learned counsel for the respondent that there was no identifiable and definite test for such classification, further, neither the said purported notice to show cause nor the said test report indicated definitely that [there] was definite basis of holding that the said manganese ore was chemical and as such should fall under item No. 28 of the Indian Customs Tariff. It is also the contention of the learned counsel for the respondent that the earlier consignment was allowed to be cleared as the customs authorities were satisfied on examination that the said manganese ore was of coarse grain form and would clearly be classifiable under item No. 26. It is the submission of the learned counsel for the respondent that the appellants had failed to indicate any definite or reasonable prima facie basis for holding that the said goods were leviable under item No. 28 of the Indian Customs Tariff. Therefore, in the submission of the learned counsel for the respondent, the appellants had no jurisdiction to proceed with the impugned proceedings and as such the respondent's present writ application was not pre-nature.

20. The learned counsel for the respondent also contended that in reclassifying the manganese ore under item No. 28 instead of item No. 26 the customs authorities had adopted the construction which no reasonable person could adopt and this court had jurisdiction to interfere with, such construction and/or decision

sought to be given by the customs authorities holding the same as perverse.

21. The learned counsel for the respondent in this connection relied on an observation of the Supreme Court in *The Collector of Customs, Madras Vs. K. Ganga Setty*, of the report where the Supreme Court observed:

"This court proceeded on the basis that it is primarily for the Import Control authorities to determine the head or entry under which any particular commodity fell; but that if in doing so these authorities adopted a construction which no reasonable person could adopt, i.e., if the construction was perverse, then it was a case in which the court was competent to interfere. In other words, if there were two constructions which an entry could reasonably bear, and one of them which was in favour of the revenue was adopted, the court has no jurisdiction to interfere merely because the other interpretation favourable to the subject appeals to the court as the better one to adopt."

22. The learned counsel for the respondent also submitted that the said observation of Ayyangar, J. in the said case of *The Collector of Customs, Madras Vs. K. Ganga Setty*, was quoted with approval in the case of *V.V. Iyer v. Jasjit Singh* reported in (*supra*). Therefore in the submission of the learned counsel for the respondent the perversity vitiates the classification and such classification should be struck down by the court.

23. It is also contended by the learned counsel for the respondent that the said notice to show cause did not disclose any ground whatsoever as to why the manganese ore imported should be classified under tariff item No. 28 instead of item No. 26. He further contended that it would appear from the documents annexed to the writ petition, namely, the contract of M.M.T.C. with the foreign seller, the contract form of M.M.T.C. with the respondent, invoice, certificate of foreign seller, the test report of the customs authorities, and the notice to show cause issued by the customs authorities that there cannot be any dispute that what has been imported is manganese ore being the metallic ore in powder and coarse grain. The learned counsel for the respondent submits that the learned Judge also accepted this admitted position and was pleased to hold that it was common case that what has been imported is manganese ore. It was submitted by the learned counsel for the respondent that such finding of the learned Judge of the court of first instance has not been challenged in this appeal.

24. The learned counsel for the respondent also submits that it is not the case of the customs department that the consignment in question has been treated and/or roasted and/or processed by chemical resulting in any alteration in the chemical structure of the ore. It is not the case of the customs authorities that the said manganese ore in the form it has been imported is not commercially known or understood to be manganese ore.

25. The learned counsel for the respondent submits that the assessment is a judicial and/or a quasi-judicial process and no authority, however high, can direct the assessing officer as to how he should exercise his discretion and assess. The

learned counsel also submits that it was a specific case of the respondent that the consignment had not been subjected to any kind of processing after extraction from mine in the chemical sense such as roasting or treating with chemicals. The learned counsel had taken us through various averments contained in the affidavit filed by the appellants before the learned trial Judge, and it is his submission that such statement and/or assertion and/or assertion of the respondent that the said consignment had not been subjected to any kind of processing such as roasting or treating with chemicals has not been denied anywhere in the said affidavit filed by the customs authorities before the trial court. It is also the submission of the learned counsel for the respondent that the customs authorities had already finally decided by assessing a part of consignment on the basis of the said test report and also the direction of the Board as noted above and in that view of the matter, it is no use in respondent's appearing before the customs authorities and to participate in the adjudication proceedings before him.

26. We have heard the respective submissions of the learned counsel appearing for the parties. We see a great deal of force in the submission of the learned counsel for the respondent. The, learned trial Judge observed that the case before the learned Judge was fully covered by the decision of the Supreme Court in Wolfram case which is a case of Minerals and Metals Trading Corporation of India, Ltd. Vs. Union of India (UOI) and Others, . Strong reliance has been placed by the learned counsel for the respondent on the said case both before the trial court and before us.

27. In that case reported in Minerals and Metals Trading Corporation of India, Ltd. Vs. Union of India (UOI) and Others, the appellants before the Supreme Court had imported Wolfram ore under a valid licence. The customs authorities levied duty on this ore under residuary item No. 87 of Indian Customs Tariff instead of item No. 26. There the appellants paid the levy under protest and claimed refund on the ground that no duty was leviable as the goods fell under item No. 26. The Assistant Collector of Customs (Refund) found that the goods were imported in powder form and mainly composed of tungsten oxide with small portion of iron and manganese oxide. The Assistant Collector held that the term "ore" mentioned in the text of item No. 26 was confined to articles which were in the form or condition in which they were mined. Such ores in powder form could not qualify under item No. 26 as they ceased to be in the condition in which they were mined. The Assistant Collector also found in that test case that the imported goods were ore concentrates and not wolfram as mixed. According to the Assistant Collector the concentration of ores was considered a manufacturing process which excluded its assessment under item No. 26, Import Customs Tariff. In appeal the Appellate Collector of Customs held that the goods in question were of special specification by dressing and therefore not classifiable as ores. On a revision to the Government of India the Joint Secretary held that examination of a sample that (sic) the goods were in the form of fairly uniform granules. Further, the said authorities held that they had been separated not only

from the rock but also other impurities and had been subjected to such processing as would take them out of the category of metallic ore. It was also held that the goods were intermediary articles between ore and metal and had been correctly assessed under item No. 87. Finally, the matter went to the Supreme Court by special leave. On the facts noted above the Supreme Court held as follows:-

"Wolfram ore when mined contains only 5 to 2 percent WO₃ and in order to make it usable and merchantable ore with minimum 65% WO₃, concentration is necessary. If item 26 of the Import Tariff is to be restricted to wolfram being material containing 5 to 2 percent WO it would be mainly rock which can neither be imported in larger quantity and which will have no market. The separating of wolfram ore from the rock to make it usable ore is a process of selective mining. It is not a manufacturing process. The important test is that the/chemical structure of the ore should remain the same. Whether the ore imported is in powder or granule form is wholly immaterial. What has to be seen is what is meant in international trade and in the market by wolfram ore containing 60% or more WO₃. On that there is a preponderating weight of authority both of experts and books and of writings on the subject which show that wolfram ore when detached and taken out from the rock in which it is embedded either by crushing the rock and sorting out pieces of wolfram ore by washing or magnetic separation and other similar and necessary process it becomes a concentrate but does not cease to be ore. Unless the ore is roasted or treated with any chemical it cannot be classed as processed.

It is common ground that the wolfram ore which was imported by the appellants was never subject to any process of roasting or treatment with chemicals to remove the impurities. It thus remained wolfram ore concentrate containing 65% WO₃ which was of the merchantable quality and was known commercially as such and imported as ore. Apart from all this it must be remembered that in interpreting items in taxing statutes resort should be had not to the scientific or technical meaning but to the meaning attached to them by those dealing in them in their commercial sense. There can, therefore, be no manner of doubt that the goods imported by the appellants fell within item 62 of the Import Tariff and no duty was leviable on them. The appellants were entitled to the refund of the amounts which were paid by them by way of duty."

28. The learned trial Judge relying on the aforesaid observation of the Supreme Court held that what has been imported is manganese ore and such ore having been imported in the form of powder and/or coarse grains a dispute between the parties arose whether the same should be assessed as chemical. The similar controversy has been fully resolved by the decision of the Supreme Court in the said case reported in *Minerals and Metals Trading Corporation of India, Ltd. Vs. Union of India (UOI) and Others*. The learned trial Judge also observed that in the instant case the imported goods had been assessed as a chemical preparation only on the ground that the ore was imported in the form of moist

coarse grains and coarse powder and on no other ground. The import has been effected under a licence for manganese ore and has not been found to have taken by any chemical resulting in an alteration of the chemical structure of the ore. We entirely agree with the said views of the learned Judge and we do not see any reason to differ from the said observation and/or finding of the learned trial Judge.

29. In the present case there is nothing on record to show that the said ore of the respondent was roasted and/or treated, with any chemical and there was not at least a prima facie finding of the customs authorities to that effect. Therefore, it could not be held that the said ore was roasted and/or treated with any chemical. It would appear from the affidavit filed by the customs authorities before the trial court that such specific case of the respondent that the said ore was not roasted and/or treated with any chemical was not denied by the appellant. Further, no particulars had been advanced by the appellants to show at least prima facie that the said ore of the respondent was roasted and/or treated or by any process the said ore was converted into chemicals.

30. In our opinion, the said test report being annexure "H" of the writ petition only indicated that the sample is in the form of moist coarse grain and coarse powder. From that it is very difficult to conclude that the said ore was converted into a chemical within the meaning of item No. 28 of the Indian Customs Tariff. Further, in the notice to show cause there was no indication of any basis at least prima facie to hold that the said ore was not metallic ore but a chemical as mentioned under item No. 28 of the Indian Customs Tariff.

31. In our view, on such a vague allegation contained in the said notice to show cause which is the very foundation of the proceeding initiated against the respondent it is not proper for the court to direct the respondent to participate in the adjudication proceedings. We are of the view that when certain challenge has been thrown that the said metallic ore is not a chemical within the meaning of item No. 28 of the Indian Customs Tariff, it is for the appellants to come and satisfy the court with sufficient particulars that there is a reasonable basis for holding that the said ore is a chemical within the meaning of item No. 28 of the Indian Customs Tariff.

32. Further, our attention has been drawn to paragraph 3(b) of the affidavit of one Jagannath Prasad Pal, the Assistant Collector of Customs, Appraising Grade II affirmed on 19th January, 1976 filed before the trial court.

33. It would appear from the said paragraph 3(b) of the affidavit that it was the case of the appellants that there was a direction and/or ruling of the Central Board of Revenue dated 29th December, 1955 which, inter alia, mentioned that battery grade manganese ore in the form of coarse powder was correctly assessable under item No. 28 of the Indian Customs Tariff. It seems to us that the appellants issued the impugned notice to show cause on the basis of the said direction and/or ruling contained in the Central Board of Revenue's order dated

29th December, 1955. In our view the assessing authority while assessing the said goods as a chemical did not have any acceptable materials on the basis of which the said assessing authority could come to even a prima facie conclusion that the said ore was not a metallic ore but a chemical assessable under item No. 28 of the Indian Customs Tariff. Further, in our view, the said ruling and/or direction dated December 29, 1955 did not contain any basis to indicate as to why such battery grade manganese ore in the form of coarse grain and/or powder was correctly assessable under item No. 28 of the Indian Customs Tariff. It was also not indicated by the assessing authority in any of the documents on record or in the affidavit filed before the trial court that whether any battery grade manganese ore in the form of coarse grain or powder would be a chemical item and as such would be assessable under item No. 28 of the Indian Customs Tariff or as observed by the Supreme Court in *Minerals and Metals Trading Corporation of India, Ltd. Vs. Union of India (UOI) and Others*, that the said ore was "roasted or treated with any chemical",

34. It is well settled that the assessing authority acting as quasi-judicial authority cannot decide the issue before it on the basis of any surmise or on the basis of any ruling or direction issued by any authority, howsoever high it is. Such ruling or direction of the higher authority such as the Central Board of Excise and Customs may be binding on the officers subordinate to it, but not binding on any authority acting in the capacity of a quasi-judicial authority. Such direction or any interpretation given by any other administrative authority may be taken into consideration but should not form the basis of any decision arrived at by any quasi-judicial authority. In the present case, we do not find any materials on record or in the affidavits filed by the appellant from which one can come to a conclusion that there was a reasonable and an acceptable basis to support the decision of the authority concerned that the imported goods were chemicals and assessable under item No. 28 of Indian Customs Tariff. In respect of the part of the consignment, the assessing authority assessed the goods as chemicals without any reasonable basis. In making such assessment the assessing authority just mechanically followed the said direction of the said Central Board of Excise and Customs and/or the said test report. The said test report also did not indicate anywhere that the said imported ores were roasted or treated with any chemical. Therefore, in our opinion, there was no basis to hold that the said imported ores were chemicals.

35. We also agree with the learned trial judge that the application was not premature inasmuch as it would show that the said notice to show cause has been issued only in respect of the part of a consignment and in respect of another part of the consignment the authority already assessed it as chemical under item No. 28 and collected the duty in respect thereof. In that view of the matter, it can be concluded that the authorities had already made up their mind and it would be futile for the respondent to appear and participate in the said adjudication before the adjudicating authorities. Therefore, in our view, the said application was not premature. We also agree with His Lordship's finding that

the writ application of the respondent was not barred by any alternative remedy. In the present case the respondent has challenged the very jurisdiction of the authority and prayed for a writ of prohibition and therefore, in our opinion, the alternative remedy, if any, is not a bar to making an application by the respondent under Article 226 of the Constitution.

36. We hold that the learned judge of the court of first instance rightly made the rule absolute and gave direction to the respondent concerned to assess and collect the customs duty on the said manganese ore under item No. 26 and forbear from assessing and collecting the duty on the said manganese ore under any other item. The order of reclassification of the imported ore from item No. 26 to 28 and the assessment order dated 11th September, 1973 and the show cause notice dated 18th September, 1975 are set aside and the appellants are directed to refund to the respondent a sum of Rs. 1,69,955.74p. collected in excess. The judgment and the order of the learned trial Judge are hereby affirmed.

37. For the reasons stated above this appeal fails and is hereby dismissed. There will, however, be no order as to costs in the facts and circumstances of the case. All interim orders are vacated.