

(1960) 12 CAL CK 0002
In the Calcutta High Court
Case No : Suit No. 4334 of 1952

Hoare Miller and Co. Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 23-12-1960

Acts Referred:

Constitution of India, 1950 — Article 19(1), 226, 232, 266, 283
Evidence Act, 1872 — Section 45, 51, 57, 60

Citation : 65 CWN 1206

Hon'ble Judges : Datta, J

Bench : Single Bench

Advocate : B. Das and Amiya K. Basu, for the Appellant; G.P. Kar and D.K. Sen, for the Respondent

Final Decision : Dismissed

Judgement

Datta, J.—On the 24th day of November 1952 the plaintiff a shipper inter alia of jute carpet yarn filed this suit against the Union of India and its officers for a declaration that the orders and / or decisions and / or demands mentioned in paragraphs 5, 6, 8, 12 and 13 of the plaint are null and void and of no effect, if necessary for delivery up and cancellation of the said orders and / or decisions and / or demands, for a declaration that the plaintiff is not liable to pay the defendants Rs. 45,67,503/1/- or any portion thereof, for a decree for Rs. 45,67,503/1/-, altering for a decree for Rs. 32,50,782/4/0 alternatively for a decree for such other sum as the Court might find payable and/or due to the plaintiff by the defendants, interest and costs and for further and other reliefs. In view of the points involved in the suit, it is not necessary in my opinion to go into great details as to the circumstances leading to this case.

2. The more material paragraphs of the plaint give the circumstances under which the claim was made:

The said goods are assessable to export duty as sacking under the Indian Tariff Act 1934 and the Sea Customs Act. 1878 and it has always been so assessed in

the past since 1937.

Between June 1950 and January 1951 the plaintiff shipped from Calcutta within the said jurisdiction several consignments of the said carpet yarn, particulars whereof will appear from a schedule annexed hereto and marked "A."

3. The said goods were and are correctly assessable as sacking as aforesaid and the plaintiff made the necessary declaration on such basis. Such declarations were made at Calcutta within the jurisdiction aforesaid.

4. By his letter and / or order dated the 2nd / 5th February, 1951 the defendant No. 3 (hereinafter referred to as the said defendant) illegally and wrongfully assessed several consignments of the said goods referred to therein and shipped by the plaintiff as "hessian" and demanded payment of export duty thereon on the basis of the rate applying to "hessian" at Calcutta within the jurisdiction aforesaid. A copy of the said letter and / or order dated 2nd 15th February, 1951 is set out in a schedule annexed hereto and marked "B".

5. By his letters and / or orders respectively dated the 12th March, 15th March, 20th March, 21st March, 11th April. 12th April. 17th April, 20th April and 27th July 1951 the said defendant further wrongfully and illegally assessed the several consignments of jute carpet yarn mentioned in the said several letters as "hessian" and demanded payment of export duty on the basis of the rate applying to "hessian" at Calcutta within the jurisdiction aforesaid. The said defendant further wrongfully threatened action against the plaintiff for the alleged misdeclaration. Copies of the said letters and / or orders are included in the said Schedule "B" annexed hereto.

6. The plaintiff preferred an appeal before the defendant No. 2 but the said defendant wrongfully purported to uphold at Calcutta within the said jurisdiction the aforesaid ultra vires and illegal findings and / or orders of the defendant No. 3.

7. While the said appeal before the defendant No. 2 was pending, the plaintiff shipped several other consignments of jute carpet yarn from Calcutta within the jurisdiction aforesaid as per particulars set out in a schedule annexed hereto and marked "C". The plaintiff was obliged by reason of the act and / or conduct and / or directions of the Customs Authorities to declare the goods in the said consignment as "hessians" and did pay and /or deposit and / or submit to its Gunny Deposit Account with the Customs Authorities being debited with duty at the rate ruling for "hessions" to the extent of an extra sum of Rs. 32,50,782/4/- under orders and / or directions of the said defendant. The plaintiff did so under coercion and without prejudice to its rights, and its contentions that the said goods were sacking and not hessian. Particulars of the said sum of Rs. 32,50,782/4/ - will appear from the said Schedule "C".

8. Under the Indian Tariff Act "hessian" as ordinarily understood in the trade in manufactured jute goods means a jute fabric of plain weave woven from single

yarn i.e., a woven fabric. The goods shipped by the plaintiff as aforesaid were not "hession" and in purporting to assess the said goods to export duty at the "hessian" rate the said defendant acted wrongfully, capriciously and without jurisdiction.

9. The said defendant and defendant No. 2 are officers holding public offices having duties under the Sea Customs Act and / or Indian Tariff Act to act judicially or quasi-judicially. The pretended decisions and / or orders hereinbefore mentioned were made by the said defendants without giving the plaintiff any or any reasonable opportunity of being heard and in violation of the fundamental principles of natural justice and rules of judicial procedure The said defendant's demands for payment of export duty at the "hessian" rate were made without prior adjudication within the meaning of the Sea Customs Act. The said pretended orders and /or demands were dehors the Indian Tariff Act and / or the Sea Customs Act and were or are void.

10. The plaintiff repeatedly protested against the aforesaid purported decisions and / or orders of the said defendant and challenged his jurisdiction to assess and / or demand export duty at the higher rate ruling for "hessians" in respect of the said goods by describing the same as of "hessian quality."

11. The plaintiff was obliged at Calcutta within the jurisdiction aforesaid to pay and /or deposit and / or submit to its Gunny Deposit Account being debited with a total sum of Rs, 45,67,503/1/- representing the aggregate amount of the illegal claim as aforesaid, which the plaintiff did under protest and involuntarily under pressure of urgent and immediate necessity and without prejudice to its rights to recover the same. The said sum was obtained by the said defendant through illegal impositions or extortion. The plaintiff claims the said sum for money had and received by the defendants to the use of the plaintiff. Particulars of the said sum of Rs. 45,67,503/1/-will appear from the said Schedules "A" and "C". Out of the said total sum of Rs. 45,67,503/1/- a sum of Rs. 12,70,233/13/- was deposited by the plaintiff under protest pending appeal against the relative orders or decisions filed before the defendant No. 2.

12. In any event, the plaintiff states and contends that the pretended orders and / or demands for payment of the alleged deficiency in respect of a number of the aforesaid consignments were made at Calcutta within the said jurisdiction more than three months after the dates of the first assessment made thereon and as such are without jurisdiction, void and of no effect. A statement containing particulars of the said several consignments is set out in a Schedule annexed hereto and marked "D".

13. The said pretended orders and / or decisions if left outstanding will cause the plaintiff serious injury. The said orders should be set aside and cancelled and the defendants should be directed to pay and / or to refund the said sum of Rs. 45.67,503/1/- to the plaintiff.

14. The defendants have not refunded and/or paid the said sum of Rs.

45,67,503/ 1/- or any portion thereof in spite of demands."

15. The defendants filed a written statement that the jute yarn are assessable to export duty under items 2(i) and 2(h) of the second schedule of the Indian Customs Tariff either as sacking or as hessian depending on the quality of the yarn sought to be exported. The defendants further stated that the jute goods covered by the said consignment were of hessian quality and as such correctly assessable as hessian under item 2(ii) of the second schedule. Consequently the declarations of the plaintiff were made on a wrong basis and were as such misdeclarations. Accordingly the orders were not wrongful or illegal. Hence they were justified in calling for explanation from the plaintiff for such misdeclaration and taking action under the Sea Customs Act.

16. The defendants further denied that hessian means only jute fabric of plain weave woven from single yarn or a woven fabric under the Indian Tariff Act as alleged or that it is understood as such in the trade in manufacturing jute goods ordinarily or otherwise or at all. The word "hessian" in the jute trade referred also to yarn, twist, twines or ropes of hessian quality.

17. The defendants further said that the appeal was duly considered by the defendant No. 2 and upon due consideration he did not find any ground to alter the decision of the defendant No. 3 and accordingly rejected the appeal.

18. The defendants further stated that in making an assessment of the amount of duty leviable on any goods under the Indian Tariff Act the defendants act and / or acted in the exercise of purely executive functions. The defendant in answer to the alternative case of the plaintiff stated that for the purpose of the Sea Customs Act the real assessment is made not when it is provisionally assessed but when the duty is levied on examination of the mill specification and the samples. In this case the demand for the short levy was made within three months from the date of the first assessment as understood by them. The defendants also submitted that the plaintiff is not entitled to leave under Clause 12 of the Letters Patent, that the defendants No. 2 and 3 cannot be sued in the manner described in the cause title. The defendants further contended that the suit was 1 ad for non-joinder of Mr. Santosh Kumar Chatterjee who made the orders of assessment.

19. The defendants further raised the plea that this Court has no jurisdiction and / or the suit is not maintainable in so far as the Sea Customs Act is a self-contained Code and the method of redress of any alleged injury by actions taken under the said Act is indicated by the said Act. In view of the pleadings the following issues were settled:

1. Does the word "hessian" as ordinarily understood in the trade mean as alleged in paragraph 9 of the plaint?
2. Does the word "hessian" in jute trade refer also to yarn, twists or ropes of hessian quality?

3. Are jute carpet yarn in suit assessable to export duty as sacking under the Indian Tariff Act?

4. Were the orders and / or demands for payment of the deficiency, if any, in respect of the consignments marked D in the schedule annexed to the plaint made more than three months after the date of the assessment, thereof?

5. Was there any export cover system as mentioned in paragraph 12 of the written statement? If so, should three months be counted after the assessment made on examination of samples and mill's specifications?

6. Can defendant No. 2 or defendant No. 3 be sued in the manner they have been described in the cause title?

7. Is the suit bad for nonjoinder of Santosh Kumar Chatterjee?

8. Is the suit maintainable in view of the provisions of Sea Customs Act?

9. Was the plaintiff entitled to leave under clause 12 of the Letters Patent as alleged in paragraph 17 of the plaint?

10. To what relief, if any, is the plaintiff entitled?

20. The plaintiff called several witnesses to prove the meaning of the words hessian, sacking, yarn and twine as understood in the trade. The plaintiff also called one of its employees to support the meaning given by the trade according to them.

21. The defendants called Mr. Santosh Kumar Chatterjee, the officer who was responsible for the assessments or the consignments in question or most of them.

22. The parties also relied on a fairly large number of documents before me.

(His Lordship then discussed and analysed the evidence adduced by the parties).

23. Mr. Kar, learned Counsel appearing for the defendant submitted that as soon as the letters were admitted the contents stood proved. In this connection he relied on a case reported in Mobarik Ali Ahmed Vs. The State of Bombay, (1). There the question was whether a document was a genuine or not and not as to whether the statements in the letter were correct or not. In that case their Lordships held, inter alia, that the "proof of a genuineness of a document is proof of the authorship and is proof of fact like that of any other fact. The evidence relating thereto may be direct or circumstantial. The circumstantial evidence.....it may also be proof by internal evidence afforded by the contents of the document." This case lays down the principles which are applicable to determine whether a disputed letter was genuine or not.

24. In this case there is no question of genuineness of the letter. In this case the parties have admitted that the letters passed between them. In this case the question is whether the contents of the letters are correct. The correctness of the contents of the letters cannot and does not in my opinion stand proved as soon

as it is admitted that the letter had passed between the parties. Hence I am unable to accede to this contention pressed before me on behalf of the defendant.

25. Mr. Kar further submitted that the correctness of these statements have been proved under sec. 3 read with Part II and Item 20 of Part II of the Commercial Documents Act.

26. In order to attract Item 20 it must be firstly a certificate or survey of award; secondly, it must be issued by a recognised Chamber of Commerce; thirdly, certificate or survey award must relate to the quality, size, weight or valuation of any goods, count of yarn or percentage of moisture in yarn and other goods. There is no evidence before me to show that it is a recognised chamber of commerce. I will assume that it is so. It is again doubtful whether a body or association dealing only with a particular commodity can be called a chamber of commerce. I will assume that it is so. There are more fundamental objections. These letters do not purport to be certificates. What is more, these letters do not relate to the quality, size, weight or valuation of any goods, count of yarn or percentage of moisture in yarn or other goods. They give the opinion as to whether the yarn examined by them should be classified under one item or another of "Jute" in the Second Schedule relating to Exports. The classification involves appraisement of the quality. The classification however is more than determining the quality or more than certifying the quality of the yarn examined. Therefore, again I am unable to accept this contention advanced on behalf of the defendant.

27. Mr. Kar further submitted that these documents, particularly those contained in the letter dated 27th February, 1951 addressed by Mr. Sutherland to Mr. Nivan, Assistant U. K. Jute Controller and the letter dated 1st March, 1951 written by the plaintiff to the Secretary, Central Board of Revenue, Government of India, New Delhi, contained admissions.

28. Firstly these are not admissions by the defendant or its agents that the yarn examined were Hessians.

29. Be that as it may, let us examine the letters. In the letter dated 1st March 1951 from the plaintiff to the Secretary, Central Board of Revenue, the letters dated 27th February, 1951 from Mr. Sutherland to Mr. Nivan is annexed.

30. In the letter dated 27th February, 1951 Mr. Sutherland stated, inter alia, as follows: "The Committee's view on their examination of the samples of yarn returned along with this letter are that they are of fine quality toss jute and the texture suitable for hessian construction." In the letter dated 1st March, 1951 attention is also drawn to the Board of Revenue to the first sentence of the second paragraph of the letter dated 27th February, 1951 which embodies the contrary opinion of Mr. J. R. Walker, Indian Jute Controller and Chairman of the Indian Jute Mills" Association.

31. Therefore the letter dated 1st March of which the letter dated 27th February

1951 is an annexure contain no unequivocal admission. Hence, the statements in the letters cannot determine the question.

32. Mr. Kar further submitted that in any event the letter dated the 27th February, 1951 is admissible under sec. 32, sub-clause (2) of the Evidence Act, for, it has been proved before the court that Mr. Sutherland is dead,. It seems to me that this letter comes within the ambit of the words "ordinary course of business" mentioned in clause 2 of sec. 32.

33. This however does not advance the case of the defendant. There is no evidence as to the competency of Mr. Sutherland to give an opinion on the matter. There is no evidence as to whether he examined the yarn himself or that the statement represented his opinion. He, as a Secretary, may have been only communicating the opinion of the members of the Committee. Moreover the opinion on the question of classification is irrelevant for reasons given hereinafter.

34. Again the expressions of opinion or views were not in all cases with reference of the Carpet Yarn in suit. Moreover it has not been proved before me even in those cases where reference is made to the carpet yarn in suit that in fact samples taken from the disputed consignments were examined by the members of the Classification Committee of the Indian Jute Mills Association.

35. Mr. Kar, learned counsel appearing for the defendants urged that the members of a committee like this must have fluctuating members. Therefore, it is the Secretary who can express the opinion of the Committee under his signature.

36. In my opinion the committee is not a statutory body. The committee as such, divorced from the members constituting it, is not an expert on the subject. The opinion of the members who constitute the committee is the relevant opinion. Therefore, the Secretary cannot be substituted in the place of a member of the committee even if he was called. Therefore, on these grounds these opinions cannot be received in evidence.

37. Section 45 of the Evidence Act is as follows:

When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting or finger impressions, the opinions upon that point, of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions are relevant fact. Such persons are called experts.

38. Section 45 limits the ambit of the opinion. It must be "the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions". The opinions again must be expressed in court so that he may give the grounds or reasons and his grounds or reasons can be tested by cross-examination. An expert when in the box can refer to well-known works on the subject upon which he is deposing. Therefore, the opinion expressed in these letters cannot be a relevant fact u/s 45

of the Evidence Act.

39. Section 57 says inter alia that :-

The Court shall take judicial notice of the following facts:

***** In all these cases and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books of documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such books or document as it may consider necessary to enable it to do so.

40. Section 60 says, "Oral evidence must, in all cases whatever, be direct," Then it deals with what is direct evidence. Therefore, there is a proviso which is as follows:

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable.

41. These letters again do not satisfy the requirement of section 51 and 60 of the Evidence Act. Therefore, in my opinion, though these letters have been admitted by the parties, yet they are not evidence before the Court which the Court can take notice of and act upon.

42. There is another aspect of the matter.

43. It is understandable that an expert, can give his opinion as to the quality of jute.

44. It is, however, difficult to follow how an expert can give an opinion as to whether it should be classified under one item or another of Schedule 2 of the Sea Customs Act. It is a matter either for the Court or the Customs authorities or both.

45. Therefore, these evidences cannot be received as opinion at all.

46. Assuming that the statements are all admissible let us now consider what is the effect of the statements contained in the said documents.

47. In the letter dated 5th March 1946 the Secretary in effect states that one ply jute yarn should be classified as hessian for the purpose of assessment to export duty. In the letter dated 28th May 1946 the Secretary states that "the jute twine mentioned above should be classified as hessian quality and this class of jute twine.....will attract export duty payable for hessian". In the letter dated 21st December 1950 the Assistant Collector of Customs makes a query whether it is "sacking or hessian" for the purposes of assessment. In the letter dated 12th

January 1951 in reply the Deputy Secretary of the Indian Jute Mills" Association states, all the samples sent therewith are of hessian yarn. In the letter dated 20th February 1951 Mr. Raja Ram Rao, the then Collector, states, "I find that Hoare Miller declared construction as sacking which in consultation with responsible trade opinion has been found to be hessian yarn." In the letter dated 21st February 1951 addressed to Mr. Raja Ram Rao Mr. Nivan states that they were last classified in 1937 as sacking and that therefore in business which has been done since that date has been done in good faith, indicating no challenge on the classification. The letter of Sutherland has been already adverted to. It says that they are all of fine quality, toss jute and the texture is suitable for hessian construction. Again they have been described not as hessian but of hessian quality in the various letters. In this connection reference may be made to the letter dated 12th March 1951, 15th March 1951 and so on.

48. These statements, in my opinion, do not advance the case of the defendant for hessian quality is not the same thing as hessian. It only indicates that it is suitable for the fabrication of hessian. Again hessian yarn, in my opinion, is not the same thing as hessian. It only indicates in a short-cut manner that it is suitable for the manufacture of hessian.

49. Therefore so far as these statements are concerned in these letter it is not inconsistent with the oral evidence tendered before me. The witnesses who deposed on behalf of the plaintiff gave the trade meaning of hessian which is a fabric. They however admitted, at any rate most of them, that loosely terms such as hessian yarn or hessian quality are used in the market.

50. It is not in evidence as to what is the scope of the Tariff Classification Committee of the Indian Jute Mills Association. There is no evidence as to whether they were given any direction by the Customs authorities or not as to whether superior quality should be classified as hessians and inferior quality as sacking. There is no evidence as to the competency of the members of the committee: Therefore in this view of the matter this classification made by the Indian Jute Mills" Association cannot be acted upon.

51. In view of the fact that the oral evidence on behalf of the defendant is overwhelming on the meaning of hessian in the trade in the absence of more positive reliable evidence on behalf of the defendant it is difficult for me to reject the evidence tendered on behalf of the defendant in spite of the fact that they are open to criticisms.

52. Therefore on the evidence before me I hold that the word "hessian" as understood in the trade is a fabric woven in a particular manner, namely, plain weave single yarn and sacking is a fabric woven with double wrapped yarn.

53. In (1931) 2 KB. 297 (Newman Manufacturing Company v. Marrable, (2) it seems that the dictionary meaning of the word "button" was referred to in deciding whether it is unfinished button or rather packing or wrapping paper or not. In this case also reference was made to the dictionary meanings of the

words sacking and hessian. The dictionary meanings of sacking and hessian are as follows:

54. Hessian-A strong coarse cloth made of a mixture of hemp and jute, employed for packing of bales. (Vol. V of A New English Dictionary, Oxford).

55. Do.-A cloth made of Jute (Chambers Dictionary, 1959 Extn. page 495).

56. Sacking-A closely woven material of flax, jute, hemp or similar material used chiefly in the making of sacks, bags etc.

57. Hence the dictionary meanings of the words hessians also confirm the conclusion arrived at already. The matter however, does not rest here. The next question for consideration as a matter of abundant carpet yarn is whether as a matter of construction, of the several items relating to jute in the Second Schedule, assuming that in the trade "hessians" ordinarily includes yarn, twist, twine, cloth and bags made of superior quality of jute, falls within the category of hessians under the Indian Tariff Act.

58. The relevant heading in the Second Schedule which deals with export tariff is jute. In the Schedule in the first column the item number is given, in the second column the name of article is given, in the third column the unit of weight is given, in the fourth column rate of duty is given.

(The second schedule is set out-Ed.).

59. It is in the trade well known as it appears from the evidence that manufactured jute products may be sacking, hessians, twist, yarn, rope and twine. In other words, yarn, twist, twine, rope, cloth, and bags can be manufactured from jute fibre. Besides these items, jute fibre may be utilised for the manufacture of other kinds of goods as is clearly indicated from sub-clause (iii) of Item No. 2.

60. The parties before me proceeded on the basis that yarn in question must fall either under clause (I) that is "sacking" or clause II that is to say, Hessians of item No. 2.

61. It was urged before me that the very fact that hessians is used in the plural indicates that it includes cloth, bags, twist, yarn, rope and twine made of superior quality of jute.

62. The words "cloth, bags, twist, yarn, rope and twine" have been placed in bracket against the word "sacking". There are no such words against "hessians". It would have been much simpler for the Legislature either to put the very same words, namely, cloth, hags, twist, yarn, rope and twist against the word "hessians" or place the word Dittos or "Do" or " " " instead of using it in the plural, if it meant to expand the ordinary meaning of the Hessians by including twist, yarn, rope and twine made of superior quality of jute. Again the mere use of the word "hessians" in the plural cannot change the meaning of the word "hessian" which it bears in the singular. To put it differently, the word "Hessians"

in the singular cannot carry one meaning, namely, cloth and bags only and in the plural it cannot carry a different meaning in the sense that it is more comprehensive or wide so as to include not only cloth and bags but also twist, yarn, rope and twine.

63. Hence, the word "Hessians" cannot include twist, yarn, rope and twine made of superior quality of jute or made from Hessian quality of jute and it must accordingly fall under clause (I). There is another way of looking at these items on the assumption that Hessians in the plural include cloth, bags, twist, yarn, rope and twine. Let us have in view the three sub-items under item No. 2.

64. Then the question arises as the jab-items stand whether yarn, made of superior quality will fall within clause (I) Sacking of item No. 2 as expanded by the additional words in the bracket or it will fall in clause (ii) (Hessians) of clause (iii) (All other descriptions of jute manufactures not otherwise specified) of item No. 2.

65. Sacking is made of inferior quality of jute and woven in a manner different from Hessian. The word "sacking" does not ordinarily mean twist, yarn, rope and twine. Nonetheless, the word "sacking" has been given a more extensive meaning by adding the words cloth, bags, twist, yarn, rope and twine in the bracket. It suggests therefore, that the twist, yarn, rope and twine referred thereto must also be the product of inferior quality of jute similar to the quality which is used for sacking. There are no such words cloth, bags, twist yarn, rope and twine against the word "Hessians" as in the case of "sacking". Therefore, it would carry its ordinary meaning or import that is cloth or bags of superior quality of plain weave woven from single yarn. The twist, yarn, rope and twine manufactured from superior quality of jute are manufactured products of jute which does not fall under sacking or Hessian. Hence it will fall within the ambit of the residuary sub-item being item (iii) of item No. 2.

66. Therefore, in no view of the matter, the carpet yarn in question are "Hessians".

67. In *Powell Lane Manufacturing Company Ltd. v. Purnam* (3) reported in (1931) 2 K.B. 305 a case dealing with protective duty, the learned Judges of the Court of Appeal kept in view the factor whether a paper should be classified as packing or wrapping paper or otherwise should depend on the question whether the trade is sought to be protected or not. Therefore, in that case the question of fact whether it was suitable for the use of a wrapping paper or not was gone into or rather the user of the paper and that consideration was kept in view by the learned Lord Justice in *Newman Manufacturing Co. v. Marrable* (2), the question was whether a particular commodity was an unfinished button or buttons. There also their Lordships kept in view whether the classification would affect the trade which was sought to be protected.

Horridge, J. observed as follows:-

In my opinion some assistance is given to me by the case to which I have been referred, of *Powell Lane Manufacturing Co. v. Purnam* (3). In the light of the judgments in that case I think that I ought to look at the object of this section. I think it was intended to protect the English button trade. To protect that trade against the importation of completed buttons it would only be necessary for the definition and the sub-section to use the word "buttons". But in my view the statute was directed against those who imported goods which were not quite buttons, but upon which the bulk of the work had been done abroad, and very little remained to be done by the manufacturer in England. I think that was the reason why the words "buttons.... whether finished or unfinished" were used in this section.

In my judgment those articles were unfinished buttons, they were going to be buttons, and they were going to have a shank put into them. The insertion of that shank only involved one-seventh of the total cost of the finished button. This article with a hole ready to have a shank put into it was an unfinished button within the meaning of section 9 of the Finance Act, 1928.

68. In the present case before me, the duty did not relate to imported goods and was not protected. Hence the above principle of construction is inapplicable.

69. In this case before me at one stage Mr. Kar urged that if the duty on superior quality of yarn suitable for hessians is taxed at the rate of sacking, then the result would be that superior quality of hessian yarn would be exported with a very low duty and then manufactured into hessians. This would mean that the manufacturers outside India would have a premium so to say and the export trade in hessian would be imperilled.

70. There is no evidence before me on this aspect of the matter. There is nothing in the Indian Tariff Act or the Sea Customs Act throwing any light on this aspect of the matter. In answer to my queries during the argument Mr. Kar referred to certain books which showed the number of spindles in use in the foreign country. That by itself does not throw much light on the subject. Moreover, it is no evidence. There is no evidence before me as to whether in fact the export trade would be imperilled, assuming the court should have that consideration in view. There is no evidence before me as to the value of jute yarn of superior quality and the value of hessians, that is cloth when manufactured from this superior quality of jute yarn. There is again no evidence before me as to the costs of the foreign manufacturers of Hessian if there be any. There is again no evidence before me as to what proportion the relative higher costs of yarn to the home manufacturers and the relative lower costs of yarn to the foreign manufacturers will react on the total costs of the home manufacturers and the foreign manufacturers. Therefore, I cannot have regard for this consideration in construing these items of export even if the principle analogous to protective duty was applied in the case of export.

71. There is another point of view.

72. It is again to be noticed that the duty on sacking including yarn was originally Rs. 50/- per ton and duty on hessian was Rs. 350/- per ton, and the duty on all other descriptions of jute manufactures not otherwise specified was Rs. 80/- per ton. This was charged subsequently in 1950. Duty on sacking was raised to Rs. 350/-, the duty on Hessians was raised to Rs. 1500/- and the duty on all other descriptions of jute manufactures not otherwise specified was raised to Rs. 90/-. Therefore, the rate of duty has not followed any single policy or principle and consequently it is difficult to apply the principle applicable to protective duty or any analogous principle of construction.

73. There is another way of looking at the same problem.

74. In the import schedule occasionally the name of the article is followed by suitability for a particular purpose as in item 27(5) of section V. Therefore, if suitability of the yarn for the manufacture of Hessians was the determining factor, it would stand to reason that similar words have found place in the export items against the word, Hessians so as to embrace twist yarn, rope and twine.

75. Therefore again on a consideration of all these aspects of the matter it seems to me that on the materials before me it is difficult to hold that Hessians include twine, twist and rope made of superior quality of jute.

76. The matter, however, does not rest on this finding.

77. A more important question of far-reaching effect has been raised.

78. The question is whether the court is debarred from entering into this arena, namely, the question as to the meaning of the word, Hessians or sacking. If the Court is so prevented, then its finding can not affect the question or decision in this suit.

79. Mr. Kar at stages of his argument submitted that the Sea Customs Act was a self-contained Act and consequently the jurisdiction of the civil court is ousted. At stages Mr. Kar urged that it is the Customs authorities and Customs authorities alone who can determine the classification of the commodity in question. He, however, qualified his proposition with the rider that when the officer appraising the goods is not an officer of the customs or is a retired officer, there is no jurisdiction in the officer assessing the goods or article. He also said that where the assessment is mala fide, the civil court can step in. He also conceded that the court will entertain a suit provided it can be shown that there has been a violation of the principle of natural justice in coming to a decision or where the provision of the Act has not been complied with. In this case according to Mr. Kar the qualifications are not attracted. Therefore, it is for the customs officer to assess the rate, it is his exclusive jurisdiction and not that of the court. In assessing the duty the customs officer may make errors of facts or law, but that does not go to the question of jurisdiction.

80. Mr. Advocate General submitted on the question of jurisdiction to quote more or less his words in this way. Once it is found by the Court that hessian bears the

meaning as contended by his client, then it is clear that there is levy of duty at a higher rate on the yarn which is correctly assessable at a lower rate.

81. The Legislature has set the limit and defined the article and the rate of duty. The Customs authorities can not impose tax which is inconsistent with the Indian Tariff Act. Therefore, the Customs can not say that whatever the Legislature may have said and meant they will include yarn under the heading hessian. It is for the Legislature to give an extended meaning for the hessians, if they thought fit. The Customs authorities can not affect the legislation by giving an artificial definition to the word "hessians". Therefore, from this point of view having got the meaning of the word "hessian" and having got the meaning of the word "yarn" what do we get? What they have done is absolutely without jurisdiction. That is to say, they have usurped the jurisdiction regarding the matter which they can not do.

82. It seems to me that the question of the authority of the customs officer or jurisdiction of the customs officer can be raised at least on more than one ground.

83. The Indian Tariff Act read with the Sea Customs Act does not levy duty on any and every article. In any event there are exemptions under Sea Customs Act.

84. The question of jurisdiction may arise when the Customs authority levies duty on an article which is not taxable at all or which is exempted. The question would arise whether the Civil Court has jurisdiction in a suit to set it aright if the customs authority goes wrong.

85. The question of jurisdiction may arise from the nature of the items. The schedule relating to the import duty will more clearly illustrate the point. There are several sections in the first schedule and under each of these schedules there are in many cases more than one item. In other words, the articles are divided particularly first in the different sections and then sub-divided in different items under the same section.

86. The question of jurisdiction may arise if an article which really comes under an item in one section is taxed under an item in a different section without there being a dispute as to the meaning of the items. Again in such a case the further question will arise whether the Civil Court can set it aright if the Customs authority goes wrong.

87. The question of jurisdiction may again arise when a particular article or goods is taxed under one item instead of another in the same section or group of items without there being a dispute as to the meaning of the items. Again in such a case the further question will arise whether the Civil court can set it aright if the customs authority goes wrong.

88. The question of jurisdiction may arise as in this case. There may be dispute as to the meaning of the item or article or- as to the attributes of the item or articles named in the schedule Once a correct meaning is given to the competing items there is no difficulty in such a case to find the correct rate.

89. The question of jurisdiction may arise as it has arisen in the other two suits as to whether the Customs authorities can assess, disregarding the particular prescribed statutory methods or tests. The further question arises in such a case whether the Court can set it aright if the customs authorities go wrong.

90. Be that as it may, it is not necessary for me to consider and answer all these various aspects of the matter in this suit.

91. In this case one of the most important thing to notice is that there is no dispute as to the fact that the yarn is liable to duty.

92. In this case the question is to put it more shortly and directly whether the Customs authorities have exclusive jurisdiction to decide what are the meanings of the words "hessians" and "sacking" and thereby determine whether the yarn is liable to a higher or lower rate of duty. If it has, the expression of opinion by the Civil Court would be of no avail to an aggrieved exporter or importer.

93. In order to answer this question it is necessary to advert to the law on this subject and the scheme of this Act with its consequent implication. Section 9 of the CPC states, inter alia, as follows:—"The Court shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognisance is either expressly or impliedly barred. "In this case there is no express bar to a suit. There is express bar to a suit in the income tax Act, to wit, section 67 of the income tax Act which bars all suits relating to assessment. The Madras Sales Tax Act likewise bars all suits in respect of or relating to assessment. The Arbitration Act also bars suit expressly.

94. There is no express bar in the Sea Customs Act read with Indian Tariff Act.

95. Hence the question for consideration is whether the relative Acts impliedly bar a suit in a Civil Court. In order to find out whether the Acts impliedly bar a suit, it is necessary to advert to the Indian Tariff Act and the scheme of the Sea Customs Act.

96. Section 2 of the Indian Tariff Act, 1934 upon which great reliance was placed on behalf of the plaintiff is as follows:-

2(i) There shall be levied and collected in every port to which this Act applies the duties specified in the first and second schedules.

97. The duties specified in the first and second schedules have to be read along with the name of the article.

98. In other words, the rate of duties means nothing. It must be correlated or connected with the relevant item.

99. Section 2 by itself does not give the true picture. The schedule have to be kept in mind. The first schedule deals with the export tariff. In the first schedule there are several columns. The first column relates to Item number., the second column the name of the article, the third column nature of duty, the fourth

column standard rate of duty, the fifth column deals with preferential rate of duty if the article is the produce or manufacture of the U.K. or British Colony and the last column deals with duration of protected rates of duty. There are several sections in the first schedule where the goods are classified broadly. To illustrate this, it may be noted that section I deals with live animal and products of the animal kingdom; section 2 deals with the products of vegetable kingdom, section 3 with fatty substance, creases, oils and products of their decomposition; prepared elementary fats, waxes of animal or vegetable origin and so on. In each section more often there are more than one item with numbers. Sometimes there are sub-items with the same numbers. Item 3 of section I will make the fact clear.

100. Item 3 relates to fish not otherwise specified. Item 3(i) relates to fish, salted, wet; Item 3(iii) related to fish, salted, dry; Item 3(iii) relates to fish unsalted, dry. Likewise in the second schedule which is a much shorter one there are a number of columns. The first column deals with Item number, the second column deals with the name of the article, the third column deals with the rate of duty. There are no sections in the second schedule. There are, however, more than 21 items Though in the second schedule there are no sections but a group of commodities having common element is classed together as in the case of jute.

101. It is clear that if this Indian Tariff Act stood by itself, the court would have had undoubted jurisdiction to determine whether the levy of duty has been made in accordance with the schedule which is a part of the Act itself.

Section 2 or for that matter the Indian Tariff Act does not indicate how the duty should be levied and collected and what should be the machinery for the levying of the duty and the collection thereof. It is content in saying, "There shall be levied and collected in every port....."

102. The answer to the above queries is given by section 20 of the Sea Customs Act. This is one of the sections in Chapter V dealing with levy of, and exemption from, customs duties.

103. Section 20 as amended is as follows :-

20. (1) Except as hereinafter provided, customs duties shall be levied at such rates as may be prescribed by or under any law for the time being in force, or-

(a) goods imported by sea into or from any customs-port from or to any foreign port;

(b) opium, salt or salted fish imported by sea from any customsport into any other customs-port;

(c) goods brought from any foreign port to any customs-port, and without payment of duty, are transhipped for, or thence carried to, and imported at, any other customs-port; and

(d) goods brought in bond from one customs-port to another.

* * * * *

(2) The provisions of subsection (1) shall apply in respect of all goods belonging to the Government of a State and used for the purposes of a trade or business of any kind carried on by, or on behalf of, that Government or of any operations connected with such trade or business as they apply in respect of goods not belonging to any Government.

(Explanation- In this sub-section, "State" does not include a Union territory).

104. Therefore, it is necessary to consider the scheme of the Sea Customs Act.

105. Chapter I inter alia defines or gives the interpretation of certain words of phrases. Chapter II deals - with the appointment and powers of officer. Chapter III deals with appointment of ports, wharfs, customs houses, warehouses and boarding and landing stations. Chapter IV deals with prohibitions and restriction of importation and exportation. Chapter V deals with levy of and exemption from customs duty. Chapter VII deals with draw-back. Chapter VI (a) deals with prohibition of entry of vessels constructed etc., for concealing goods. Chapter VII deals with arrival and departure of ships, Chapter VIII deals with general provisions affecting vessels in port. Chapter IX deals with discharge of cargo and entry inwards of goods. Chapter X deals with clearance of goods for home consumption. Chapter XI deals with warehousing. Chapter XII deals with transshipment. Chapter XIII deals with exportation or shipment and re-landing. Chapter XIV deals with spirit. Chapter XV deals with posting trade. Chapter XVI deals with offences and penalties created by this Statute. Chapter XVII" deals with procedure relating to offences, appeals etc, arising out of the provision of the Act.

106. These chapters include specific provisions for coasting trade. There are likewise specific provisions for offences and penalties.

107. In other words the Sea Customs Act makes elaborate arrangements and provisions so that each and every commodity which passes through the sea or ports or wharfs must be brought to the notice of the Sea Customs authorities whether they are exempted or not. provisions for assessment on the basis of declaration given by the traders or amended declaration, if the declaration of the trader is questioned by the customs officers, provisions for remedies by way of appeal or revisions in case the trader is dissatisfied with the order given and provisions for collection of the tax ordinarily before it leaves the control of the Customs authorities and in special cases when the traders have accounts with the Customs authorities sufficient to meet the increased demands, if goods are allowed to be cleared or exported before assessment.

108. Therefore, the scheme of the Act suggests that it is a self-contained Act.

109. The only question is whether there is any outlet or door in this Act through which the hands of the Civil and Criminal Courts can reach.

110. There is express provision in section 198. This relates to a suit "against any person for anything purporting to be done in pursuance of this Act." There is also express provision as to the jurisdiction of the ordinary criminal courts in section 187 of the Act.

111. Therefore, on a consideration of the whole scheme of the Sea Customs Act, it seems that the ordinary or Civil Courts have no entrance except in cases governed by section 198 and 187 of the Act.

112. Consequently, the question of finding out the meaning or scope of an item or classification is placed by the Legislature beyond the reach of the civil courts.

113. These considerations may not clinch the matter, for the provisions relating to assessment may contain impliedly room for stretching the hands of the Court in the field of assessment which seems impregnable. Therefore, it is necessary to consider in greater detail the provisions relating to assessment.

114. Section 29 imposes a duty upon importer or exporter or the owner of the goods to declare in the bill of entry or shipping bill as the case may be, the real value, quantity and description of such goods to the best of his knowledge and belief and shall subscribe a declaration of the truth of such statement at the foot of such bill. Sections 87 and 137 of the Act impose a further duty to deliver the Bill of Entry or the shipping bill as the case may be to the Customs Collector or other customs officer. This is the starting point of assessment or the basis of assessment. It may be noticed that in this part the customs authorities do figure directly. The customs authorities figure after the Bill of Entry or shipping bill is placed before him when his duty to assess arise. He simply calculates the figure when he accepts the declaration and if doubt is entertained by him as to the correctness of the declaration then the Customs Collector can call for invoice, broker's note, policy of insurance or other document which would help the Customs Collector to find out the real value, quantity or description of the good-- and the importer or exporter \\ makes the declaration is bound to produce them. Sections 30 and 31 then give the principles on which the real value shall be calculated where the taxes are imposed on advalorem basis. The power of the Customs authorities is not limited to the power of calling for the documents in order to arrive at the correct duty payable by the importer or exporter. The Customs Officer can inspect the goods or have the goods tested or examined in order to make certain as to whether the description of the goods and the relative item declared by the trader are correct or not. When the Customs Officer resolves his doubt and forms his own conclusion about the valuation or the appropriate item applicable to the goods in question, which may or may not be in accord with the declaration, it is his duty to assess the duties on the goods and collect the same. The owner or trader may then remove the goods for home consumption or warehouse them, subject to the provisions of the Act or export them.

115. Section 167 along with its schedule creates offence which arise from the

breach of the provisions of this Act. This section also lays down the punishments or penalties for such offences. The punishment may be made by way of increased rates of duty or confiscation of the goods or a penalty not exceeding the prescribed amounts.

116. Section 182 gives a relief to the aggrieved importer or exporter, by enabling him to take up his grievances in respect of confiscation or increased rate of duty or penalty to an officer higher in rank than the assessing officer who had imposed the punishment, except in cases mentioned in items Nos. 26, 72, 74-76 both inclusive of section 167.

117. Section 182 is not directed to give relief to an exporter or importer aggrieved by the order of assessment simpliciter though it arises out of or founded on the assessments made.

118. Section 188 gives a right of appeal to the Chief Customs Authority or such other officer as may be directed by the Central Government to hear appeals from any decision or order passed by an officer of the Customs under this Act. In other words, there is a general remedy for any person aggrieved by any decision or order whatsoever of the Customs Officer to appeal to a higher officer. Therefore, the remedy u/s 188 is wide enough to cover the decision or order of the assessing officer or assessment.

119. In the last paragraph of section 188 it is said that every order passed in appeal under this section shall subject to the power of revision conferred by section 191 be final.

120. Section 191 empowers the Central Government by its appropriate officers to revise any decision or order passed under this Act by any officer of Customs or Chief Customs authority. It also says that a, revision may lie, though no appeal would lie against the order to decision sought to be challenged.

121. Therefore, an importer or exporter aggrieved by the decision or order of the officer assessing the goods is given the right to appeal to the Chief Customs Authority or any other officer empowered by the Central Government. He may obtain relief at this stage. If he does not, the matter does not end here. The aggrieved importer or exporter is given the right to take up the matter to the Central Government. He may obtain relief at this last stage.

122. It is significant to note that the right to appeal and revision is given only to the aggrieved assessee and not to the Customs Department.

123. These remedies prima facie bars the Civil Court for it is difficult to imagine that the Legislature meant to give two parallel sets of forum to the aggrieved assessee, one in the civil courts and another before the executive hierarchy or that the Legislature meant to give alternative sets of forums to the aggrieved assessee.

124. Hence the Act impliedly bars the jurisdiction of the Civil Court in the field of

assessment. The Customs officer is ordinarily faced with these considerations whenever the question of assessment arises.

125. He has to form his own idea of the goods in question. He has to appreciate the distinguishing characteristics of the several items where there are competing items.

126. He has then to examine the relative papers and examine the commodity, make up his mind and put the commodity under one item or category unless it is an exported goods. In other words, he has to classify the goods or categorize it.

127. Once the item is determined or fixed, then it falls upon him to calculate the duty having regard to the rate specified against the item in the schedule, the quantity of the goods or the value of the goods subject to his right to correct the value.

128. If the Customs officer is not allowed to make the categorization, then he is reduced to a calculating machine whenever there is a difference between the importer or exporter on the one hand and the Customs authorities on the other hand. It is difficult to imagine that the Legislature meant to relegate the Customs authorities or the Central Government to such position as calculating machine, the Customs officer is reduced to a calculating machine in every case of dispute, if the matter will have to be adjudicated by the Court. The adjudication by the Court may take years and involve the parties in enormous costs. The goods may be destroyed or its value may depreciate. It will hamper trade and commerce. This would be a cumbrous and expensive process of collection of tax when the State needs the money in the "present".

129. This is again a consideration which strengthens the conclusion already arrived at.

130. Then considerations however weighty may not be decisive if there is express or implied right under the Sea Customs Act to approach the courts in case of misconstruction of an item. Hence it is now necessary to consider whether the Act has provided remedy to the aggrieved assessee in case there is a misconstruction of an item.

131. Sections 39 and 40 of the Act which are as follows:

39(1). When customs-duties or charges have not been levied or have been short-levied through inadvertence, error, collusion or misconstruction on the part of the officers of Customs, or through mis-statement as to real value, quantity or description on the part of the owner, or when any such duty or charge, after having been levied, has been- owing to any such causes erroneously refunded, the person chargeable with the duty or charge which has not been levied or which has been so short-levied, or to whom such refund has erroneously been made, shall pay the duty or charge or the deficiency or repay the amount paid to him in excess, on a notice of demand being issued to him within three months from the relevant date as defined in sub-section (2) ;

and the Customs-collector may refuse to pass any goods belonging to such person until the said duties or charges or the deficiency or excess be paid or repaid.

40. No customs-duties or charges which have been paid, and of which repayment, wholly or in part, is claimed in consequence of the same having been paid through inadvertence, error or misconstruction, shall be returned, unless such claim is made within" three months from the date of such payment.

132. The words "misconstruction, error and mis-statement" as to description on the part of the owner are significant. The misconstruction or misstatement as to the description of the goods when related to customs duties or charges must include if not exclusively refer, to the misconstruction of an item or error as to the items in the schedule. The word "mis-statement" as to description also refers to a wrong classification by the owner which again must relate to the items.

133. Section 39 makes the Customs Officer, the authority, in the matter, that is to say, he adjudicates whether the Customs is entitled to refund on the grounds mentioned therein.

134. Section 40 only mentions that a claim can be made to the Customs Department. It does not expressly say who will give the decision in case the claim is disputed by the Customs Officer. The claim will in the context be necessarily scrutinised by the officer, and thereafter an order will be made.

135. In either case, an order has to be made by a customs officer. Once there is an order, the order will attract sections 188 and 191. Consequently, the jurisdiction of the Civil Courts are barred when questions of misconstruction or misstatements are raised and decided by the Customs authorities.

136. Hence on the above considerations, it is clear that it is within the exclusive province of the Customs authorities, when the goods are undisputably taxable, to find the meanings or attributes of the competing items and therefore categorise or classify as between the competing items.

137. It is now necessary to advert to the more important decisions cited before me.

138. In 67 IA 222 (Secretary of State for India v. Maste & Company) (4) at p. 236. Their Lordships of the Privy Council observed that "it is a settled law that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred but that such exclusion, either to be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure." Their Lordships also observed: "By ss. 188 and 191 a precise and self-contained appeal is provided in regard to obligations which are created by the statute itself, and it enables the appeal to be carried to the Supreme head of the Executive Government. It is difficult to

conceive what further challenge of the orders was intended to be executed after than D challenge in the Civil Courts."

139. The Privy Council however kept open the question as to the rights of an aggrieved exporter or importer as the case may be to file a suit when only an order of assessment had been made but it had not been taken to the Appellate Officer u/s 188 of the Sea Customs Act.

140. Therefore, one of the points for decision is as to whether the right of the aggrieved importers or exporters to proceed by way of a suit subsists when an appeal is not filed by him under the Act. In my opinion if a suit is barred by reason of an order or decision u/s 188, it seems to me to be no valid ground for holding that such a suit would be open to the aggrieved party if no appeal is made u/s 188 of the Sea Customs Act. These remedies have been provided for by the self-contained Act. If the aggrieved person does not take recourse to the remedies given under the Act, he cannot be in a better position. He refrains at his peril. Therefore, in my opinion the jurisdiction of the civil Court is barred by the provisions of the Sea Customs Act, whether an appeal is filed or not.

141. It may be contended that the Privy Council left the question, for it may be that the Sea Customs Act contemplated alternative remedies, that is to say, remedy provided by the Act and the ordinary remedy in a civil court.

142. Their Lordships again observed when dealing with the question of jurisdiction under the Sea Customs Act as follows:

Where a liability not existat common law is created by a statute which at the time gives a special and particular remedy for enforcing it. (6 C.V. (N.S.) 356). With respect to that class it has always been held that the party must adopt the form of remedy given by the Statute.

143. In my opinion, this is a complete answer to the possible contention.

144. In this connection Mr. Kar, learned Counsel appearing for the defendant, relied greatly upon the decision of Gulabdas and Co. and another v. The Assistant Collector of Customs, (5) reported in 1958 SCA. 164.

145. This is not a decision given in suit filed by the aggrieved importer or exporter but in an application under Article 32 of the Constitution.

146. There the dispute as between the importers and the Customs authorities was "whether the "Lyra" brand crayons should be assessed under item 45(a) as stationery not otherwise specified or item 45(4), as coloured pencils.

147. In the application under Article 32 by the Customs four points were raised:

(1) The first ground of attack was that the Collector passed his order without hearing the petitioners or in other words the orders were passed in violation of the principles of natural justice.

(2) The second ground was that the "Lyra" brand crayons were not crayons at all

but were coloured pencils.

(3) The third ground of attack was that the rights of the petitioner under clauses (f) and (g) of Article 19(1) of the Constitution were infringed.

(4) The last ground was that on similar goods the Customs authorities assessed the crayons as stationery not otherwise specified. Therefore, there were unequal treatment to the petitioners.

148. Their Lordships rejected the grounds mentioned in clauses (1), (3) & (4).

149. Their Lordships held that in an application under Art. 32 the matter was concluded by the decision of the Customs Authorities.

150. In this connection, the more material part of the judgment at p. 168 of 1958 Supreme Court Appeals may be quoted with advantage.

It is for the Customs authorities to determine under the provisions of the said Acts what duty is payable in respect of certain imported article. The Customs Authorities came to a decision, right or wrong, and the petitioners pursued their remedy by way of an appeal to the Central Board of Revenue. The Central Board of Revenue dismissed the appeal.

* * * *

If a particular decision is erroneous on facts or merits, the proper remedy is by way of an appeal. If the petitioners were aggrieved by the order of the Central Board of Revenue, they had a further remedy by way of an application for revision to the Central Government. The petitioners did not choose to do.....

151. Again their Lordships said at p. 171 inter alia as follows:

The contention that the impugned orders are manifestly erroneous, because "crayons" have been treated as "coloured pencils" is not a contention which can be gone into on an application under Art. 32 of the Constitution.

152. Secondly this decision cannot clinch the matter in a suit when their Lordships have expressly left this question open with this observation:

.....Nor can the question be decided without first determining what constitutes the distinction between a "coloured pencil" and a "crayon", a distinction which must require an investigation into disputed facts and materials. This was a matter for the Customs authorities to decide, and it is obvious that this Court cannot, on an application under Art 32 of the Constitution, embark on such an investigation.

153. In this connection Mr. Kar, learned Counsel appearing for the defendant, at stages laid great emphasis on the decision reported in Glaxo Laboratories (India) Private Ltd. Vs. A.V. Venkateswaran and Another, (6) a judgment of Chief Justice Chagla as he then was, and in consonance with that decision Mr. Kar urged that assessment is an administrative Act and, consequently, it has been removed

from the purview of the Civil Courts.

154. It may be noticed that the Bombay case arose out of an application under Article 226 and not from a suit. In this case I am not concerned with the rights of a party in an application under Article 226 or Article 232 of the Constitution. The Bombay case again related to the question of valuation. There was no question of jurisdiction raised in those petitions. The question before the court was whether the Courts could interfere by a writ of certiorari with assessments made on the basis of valuation by the Customs Officer.

155. The question before me is whether the jurisdiction of the Civil Court has been ousted by the particular act in respect of assessment. The question before the Bombay High Court resolved into a question as to whether it was administrative act or quasi-judicial act.

156. It does not answer the question whether even though an act may be administrative it is beyond the purview of the Civil Court by way of a suit.

157. Therefore, the case is entirely different from the present case.

158. The extreme contentions of Mr. Kar is again not supported by the decision though it supports him generally.

159. It may be noticed that section 87 is not the only section dealing with assessment but section 137 plays an equally great part.

160. It is clear from the judgment of Chief Justice Chagla, as he then was, that the matter of assessment is not entirely beyond the reach of the Civil Courts. Even if it be an administrative act, the Court can in a proper application compel the assessing authority by a writ of mandamus to act according to law.

161. In the case of a quasi-judicial act the Writ of Certiorari will lie when inter alia there has been violation of the principles of natural justice where the Officer or the Tribunal is enjoined to proceed in a quasi-judicial manner. It is settled law so far as the Sea Customs Act is concerned that in a case of adjudication u/s 182 the Customs Officer must conform to the principles of natural justice. If there is a deviation from such a course, the Courts can set at naught the adjudication of decision or order of the Customs Authority by a Writ of Certiorari. As I said, this case does not deal with the question before me.

162. In this connection it is necessary to refer to 1951 AC (7) which has been strongly relied upon by the plaintiff. This is the case of *Bennet & White (Calgary) Ltd. v. Municipal District of Sugar City* (7). This related to the assessment of Alberta (R.S.A. 1942, c 157). It was held in that case as has been correctly summarised in the head-note as follows:

Held, first, that the decision of the Alberta Assessment Commission was not res judicata so as to preclude the appellants from maintaining this action. The effect of the under-named authorities is that a taxpayer called on to pay a tax in respect of certain property has a right to submit to the ordinary courts the

question whether he is taxable in respect of that property unless his right to do so has been clearly and validly taken away by some enactment (which was not the case here under the relevant provincial legislation), and that the fact that the statute which authorizes the assessment allows an appeal or a series of appeals against assessment to other tribunals is not sufficient to deprive the taxpayer of that right.

163. A number of cases were reviewed in *Bennet & White v. Municipal District of Sugar City* (7). Their Lordships observed, *inter alia*, as follows:-

In their Lordships' judgment the effect of these authorities is that a taxpayer called on to pay a tax in respect of certain property has a right to submit to the ordinary courts the question whether he is taxable in respect of that property unless his right to do so has been clearly and validly taken away by some enactment, and that the fact that the statute which authorizes assessment allows an appeal for a series of appeal also against assessment to other tribunals is not sufficient to deprive the taxpayer of that right.

164. Therefore, from the mere fact that there are provisions like sections 188 and 191 of the Sea Customs Act in an Act it does not necessarily follow that a suit is barred. Therefore, it is necessary again to examine the scope of the Act itself.

165. In this Appeal Case section 32 and section 33 open with these words:

Where any person was at the time of the assessment taxable in respect of any property, business, trade or profession.....

166. Section 45 says that the order made on appeal would be valid and binding on all parties concerned.

167. Section 53 states, *inter alia*, as follows:

In determining all matters brought before the Commission it shall have jurisdiction to determine not only the amount of the assessment, but also all questions as to whether any things are or were assessable or persons were properly entered on the assessment roll or are or were legally assessed or exempted from assessment.

168. In these circumstances, having regard to the opening words of sections 32 and 33 of the Assessment Act, Alberta and the ambiguity in the wording of section 53, the Appeal Court held that the question whether any property is taxable or not has not been removed from the purview of this King's Court. Therefore, again this decision makes it clear that in an Act the jurisdiction of the Civil Court may be barred. Whether it will be barred or not is not determined by the presence of further remedies in the Act but is conditioned by the language of the sections. Again the question is that case was different from the one presented before me. In that case the question was whether the property was taxable or not at all. In this case, whatever view may be taken, the goods are

taxable but the question is at what rate. This aspect clearly distinguishes the present case from the Appeal Case.

169. Therefore, having regard to the primary duties of a Customs Officer there has been no question of exceeding the jurisdiction or acting outside the Act. The question whether the carpet yarn was "sacking" or "Hessians" is a question of fact. That is not a question relating to the jurisdiction. That it is not question of jurisdiction is apparent from the fact that the Customs Authority has a power to assess What is objected is that it should be assessed under one head instead of another. In other words, where there are two competing items, there is no lack of jurisdiction, but there is the question of determining on facts whether it falls under one category or another.

170. This gives another approach to the problem. In 1947 King's Bench Regina v. The Commissioners for Special Purposes of the income tax (8) reported in 21 Q.B.D. 313 at 319, Master of Rolls laid down a principle in respect of an inferior Court or tribunal or body which has to exercise the power of deciding facts. The principle was followed in Rex v. Ludlow Ex parte Barnsley Corporation (9) by Chief Justice Lord Goddard. The relevant quotation is as follows:

When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that if a certain state of facts exists and is shown to such tribunal or body to exist before, it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may entrust the tribunal or body with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of affairs exists, as well as the jurisdiction, on finding that it does exist to proceed further or do something more. When the legislature are establishing such a tribunal or body to exist with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends.

171. The question whether a particular commodity is the named article under an item is a question of fact. In other words what is hessian is primarily a question of fact. Upon the decision on such a question of fact, the rate has to be determined and assessment has to be made. Therefore it comes within the principle laid down in Rex v. Ludlow (9).

172. Therefore on a consideration of the provision of the Act and the authorities relating to this matter, I have no hesitation in holding that the question of ascertaining the meaning of the items, when the goods are admittedly tenable, lies within the exclusive province or jurisdiction of the Customs Authority. It is with some regret that I come to this finding as in my opinion the word "Hessians" on the materials before me do not include yarn or twist of superior quality or Hessian quality.

173. This finding as to the jurisdiction of the Court, however does not set at rest all the controversies relating to the recovery of the tax said to be paid in excess, there is a claim for refund of Rs. 32,50,782/4/0 on a different ground based on section 39 of the Act.

174. The plaintiff stated as follows:-

In any event, the plaintiff states and contends that the pretended orders and / or demands payment of the alleged deficiency in respect of a number of the aforesaid consignments were made at Calcutta within the said jurisdiction more than three months after the dates of the first assessment made thereon and as such are without jurisdiction, void and of no effect.

175. In the written statement the defendants pleaded in answer to this paragraph in paragraph 12 thereof as follows:

With regard to paragraph 13 of the plaint the defendants state that goods are sometimes allowed to be shipped under what is known as "Export Cover System" according to which the shippers' declaration is accepted provisionally without any appraisalment or even attempt at appraisalment of the said goods subject to confirmation on examination of samples and submission of Mill specifications. All shippers of jute goods are well aware of the implications of this system. It is only when the original declaration is confirmed or altered on examination of the mill specifications and the samples that the real assessment is made. The demand for payment of duties which have been short-levied can under the Sea Customs Act be made within 3 months from the date of the first assessment. For this purpose it is the said assessment made after examination of samples and mill specifications that is regarded as the point of time from which the 3 month time-limit is counted. This long standing practice of allowing shipment under the "Export Cover System" was introduced to facilitate quick shipments and has been allowed by the Chief Customs Officer by virtue of the power vested in him under the proviso to section 137 of the Sea Customs Act and notified in para 30. page 35 of the Bengal Supplement to the Indian Sea Customs Manual (First Edition). Without waiving any of the contentions urged above but strongly relying thereon the defendants submit that in any event since the said sum was lawfully payable by the plaintiff to the defendants and since the said sum has already been realised the alleged question of limitation cannot be legitimately raised at this stage.

176. Mr. Chatterjee who deposed on behalf of the Union of India described the

system under which the plaintiff was allowed to export the goods before the production of the necessary documents and the examination of the samples as follows:

To facilitate quick shipment of jute goods the shippers who are regularly shipping jute goods from this part are allowed by Collector of Customs to execute a guarantee, undertaking to produce Mills' specifications after the goods have been allowed to be shipped. The idea is that when the goods are being shipped, the Mills' specifications are not ready and if the Customs House would stop the shipment as the Mills' specifications are not available, that would hamper the export trade. So under the system whatever declaration is given by the shippers on the shipping bills is accepted and provisional assessment is made by the Appraiser and duty is ear-marked from the deposit account of the shippers. When the relative mills' specifications are produced after the goods have been allowed to be shipped and when the samples are put up, in cases where they are called for, final assessment is made and the exporter's deposit account is debited, with the correct amount of duty.

In Export cover system, a pencil note is kept that amount of duty shown in the shipping bill is so much, so that they will not be able to utilise that amount for other consignment till this is finally adjusted. When this shipping bill is finally classified, only then the deposit account will be debited.

177. In this connection s. 137 together with the Notification dated the 23rd April, 1925 under s. 137 of the Act, and s. 41 are relevant besides s. 39 which has been already set out hereinbefore. They are as follows:

137. No goods, except passengers' baggage, shall be shipped or water-borne to be shipped for exportation, until-

(a) the owner has delivered to the Customs-collector, or other proper officer, a shipping bill of such goods in duplicate, in such form and containing such particulars in addition to those specified in section 29 as may from time to time be prescribed by the Chief Customs Officer ;

(b) such owner has paid the duties (if any) payable on such goods; and

(c) such bill has been passed by the Customs-collector:

Provided that the Chief Customs-officer may, in the case of any customs-port or wharf, by notification in the Official Gaze and subject to such restrictions and conditions, if any, as he thinks fit, exempt goods or any specified goods or any specified person or class of persons, from all or any of the provisions of this section.

178. The Notification dated 23rd April, 1952-

Shipment of certain goods under guarantee to produce documentary evidence in support of declarations in the shipping bill. The Chief Customs Officers, hereby permits the shipment of jute manufactures, raw hides and skins and tea on

shipping bills presented under clause (a) of the said section but which, in the absence of documentary evidence to support the declaration, have not been finally passed under clause (c) of the said section, provided duty is provisionally paid before shipment and a guarantee in the prescribed form is or has already been executed on a 12 anna stamped paper.

179. Section 41 of the Act-

The Customs-Collector may, if he thinks fit, instead of requiring payment of customs-duties and charges due from any merchantile firm or public body, at the time such duties and charges are payable under this Act, keep with such firm or body an account current of such duties and charges. Such account shall be settled at intervals not exceeding one month, and such firm or body shall make a deposit or furnish sufficient in the opinion of the Customs-Collector to cover the amount which may at any time be due from them in respect of such duties and charges.

180. Mr. Advocate-General contended before me that the provision of assessment must be an assessment under the Act, for otherwise the Customs Officer could not allow the goods to be taken out under the Sea Customs Act. In other words, there is no power under the Act like this "1st the goods go on provisional assessment; all that they can do is to make the assessment-make an assessment and let the goods go. If they choose to make some arrangements and say, let the goods go and make the assessment afterwards, that has nothing to do with the statute. The only assessment in this case is the first assessment which fixes the period of limitation or payment."

181. Section 137 in the case of exports enjoins the Customs-Collector to pass the shipping bill when the exporter had delivered to him the requisite shipping bill and paid the duties, if any, payable on the goods.

182. The above is the ordinary statutory duty of the Customs Collector.

183. The proviso to the section (enacted in 1937) however enables the Chief Customs officers subject to some safeguards to exempt goods or any specified goods or class of goods or any specified person or class of persons, from all or any of the provisions or clauses of this section (meaning S. 137).

184. The Notification dated the 23rd April, 1952 exempted the shipment by jute manufacturers

185. The fact that exemption is given clearly indicates that the assessment is not made by the Customs Officer in a case where the goods are allowed to be shipped before the production of the documents and / or the examination of the samples and / or before payment of assessed duty.

186. To put it differently, there can be no assessment when the Customs officer does not accept the declaration u/s 29 of the Sea Customs Act and when he means to resolve his doubt by calling for documents and / or examination of the

consignments or rather the samples taken from the consignments. It is only when he resolves his doubt by calling for further documents and on examination thereof the Customs officer can assess under the Act. Those rights were not abandoned or given up when the goods were allowed to be exported pending assessment under the Act. The matters as to assessment were kept open. Therefore, in my opinion there was no assessment under the Act when the goods were allowed to be exported under the export cover system sanctioned by section 137 and the notification dated 23rd April, 1952 on payment of provisional duty so to say.

187. There was however payment of the duty provisionally before the production of the documents and the examination of the goods. The right to assess under the Act is preserved by the guarantee bond and the running account.

188. This is made clearer by the Notification dated the 23rd April, 1925 which does not speak of provisional assessment but states, *inter alia*, "provided duty is provisionally paid before shipment.

189. Section 39 also lays down this contention: "through inadvertence, error, collusion or misconstruction on the part of the officers of Customs or through misstatement as to real value, quantity or description on the part of the owner."

190. There is no question of inadvertence, error, etc. for the parties acted under the practice of the Customs department deliberately.

191. Therefore, in my opinion, section 39 is not attracted in such a case and the question of demand for payment of deficiency more than three months does not arise at all.

192. If this procedure of import covers system is not sanctioned by the statute, then the Court cannot take into account the provisional assessment as it has been termed or first assessment as it has been described on behalf of the plaintiff, for it is not under the Act and hence cannot affect the matter.

193. In this view of the matter I have no hesitation in rejecting the contention advanced on behalf of the plaintiff on the basis of provisional assessment and section 39 of the Sea Customs Act.

194. In this connection a case was cited before me on behalf of the Union of India reported in AIR 1958 AP 122 at 127 (*B. W. Von Bachazan v. Collector of Customs*) (10) where the question of provisional assessment before the amendment of the Act was discussed.

195. Mr. Kar, learned counsel for the defendant, has submitted that no suit can be filed against the Union of India when the revenue collected by the Customs Officer has found its place, whether rightly or wrongly, in the consolidated fund. In this connection he relied upon Art. 266, Art. 283 and and Art. 300 of the Constitution of India. He also cited cases which dealt with the question of jurisdiction as against the Union of India in application under Art. 226 of the

Constitution of India.

196. The Articles 266, 283 and 300 do not deal with the venue of a suit. Art. 266 defines the consolidated fund. Art 283 also refers to consolidated fund. Art. 300 refers to the form in which a suit should be brought against or by the Union of India. Therefore; these articles cannot determine the jurisdiction of the High Court.

197. The jurisdiction of this Court is determined by clause 12 of the Letters Patent. There is no article of the Constitution which annuls or repeals this provision. None was shown to me by Mr. Kar. Therefore, in this case the places or place where the cause of action had arisen would determine the jurisdiction of the court.

198. In this case undoubtedly the cause of action arose, if not wholly but greatly within the jurisdiction of this court. The moneys were demanded and collected within the jurisdiction of this Court. Therefore, if the plaintiff succeeded otherwise, there would have been no difficulty on the ground of jurisdiction.

199. Mr. Kar, learned counsel for the defendant, indicated in his opening that leave under clause 12 should be revoked. An issue was raised on this point. In his arguments, so far as I remember, this was not pressed before me, though it is clear from the answer that he wished that the Court should give to the issues, that he had not abandoned this point. In my opinion the plaint shows in paragraphs 3, 4, 5, 6, 7, 8, 12 and 13 that the cause of action arose practically wholly within the jurisdiction of the court. In these circumstances, I see no reason why leave should be revoked in this suit

200. There was controversy before me assuming that the collections made by the Customs Officer were not under the Act, whether the plaintiff could recover the amounts claimed or not.

201. Art. 266 refers to the collection of revenue. The collection of revenue must be under a due legal process. If collection is made in accordance with any provision of an Act, then there cannot be any question of recovery of the same. If collection is made illegally and contrary to the statute, then it cannot be said in my opinion to be a collection of revenue and thus a part of the revenue or the consolidated fund Hence in such a case of illegal collection Art. 266 cannot be a bar to the recovery of the money collected illegally.

202. In this connection reference may be made to the Illustration (b) of section 72 of the Contract Act which is as follows:-

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 illegally excessive.

203. It is clear that there was at one time doubt whether coercion in section 72

carried the same meaning and effect as in section 15 of the Contract Act. This controversy, however, has been set at rest by the Privy Council in *Seth Kanhaialal v. National Bank of India* (11) reported in 40 I.A. 56. There was also at one time doubt as to whether section 72 covered mistake of law. This again has been set at rest by a decision of the Supreme Court, *Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf*, . This view is in consonance with the views expressed in the English cases which were cited before me on behalf of the plaintiff:

204. In this case the essence of the matter would have been this, if I had held that the Court had jurisdiction. The goods were brought for shipment obviously under certain commitments entered into with parties abroad. If they did not accept the terms of the Customs Officer, then these goods were liable to be damaged or the commitments entered into by the exporter may have been imperilled. In other words, there was no alternative but to pay the moneys on the terms of the Customs officer. In such circumstances it would have been an act of great injustice if the party who pays in excess could not recover the same. To put it differently, though the taxing authorities had no right to tax but if they did in fact levy tax wrongfully and did collect more money than they were entitled, the State could take benefit of the illegal and wrongful exactions and retain the same. Therefore, in my opinion if I had held otherwise, there would have been no difficulty in directing the refund of the moneys.

205. It is now necessary to answer the issues.

Issue 1:

Does the word "Hessians" as ordinarily understood in the trade means as alleged in paragraph 9 of the plaint?

On the evidence before me I will answer the issue in the affirmative.

Issue 2:

Does the word "hessian" in jute trade refers also to yarns, twists or ropes of hessian quality?

On the materials before me I hold that the word "Hessians" does not in jute trade refer to yarns, twists or rope of hessian quality.

Issue 3:

Are jute carpet yarn in suit assessable to export duty as sacking under the Indian Tariff Act?

As I have indicated already that the Sea Customs Act read with the Indian Tariff Act is a self-contained Act ousting the jurisdiction of the court on the question of assessment. It is not for the Court to say whether the consignments of yarns are assessable to export duty as sacking or Hessians under the Indian Tariff Act.

Issue 4:

Were the orders and / or demands for payment of the deficiency, if any, in respect of the consignments marked D in the schedule annexed to the plaint made more than three months after the date of assessment thereof?

206. There is no question of orders and demands for payment of the deficiency in the facts of this case, for there was no assessment when tax was paid provisionally in respect of some of the consignments. So there was no question of application of section 39 of the Sea Customs Act. Hence the question of order and / or demands for payment of the deficiency within three months does not arise.

Issue 5:

Was there any export cover system as mentioned in paragraph 12 of the written statement? If so, should three months be counted after the assessment made on examination of samples and mill's specifications?

There was an export cover system. The three months should be counted from the date of assessment made on examination of samples and mill's specifications.

Issue 6:

Can the defendant No. 2 or defendant No. 3 be sued in the manner they have been described in the cause title?

This question again really does not arise for the suit is directed against the Union of India. If, however, the suit was only against these officers they should have been named, for, the officer is not a legal entity even under the Act.

Issue 7:

Is the suit bad for nonjoinder of Santosh Kumar Chatterjee?

207. This was not pressed before me and even if it was pressed, in my opinion, there was no merit in this point, for the suit is directed against the Union of India.

Issue 8:

Is the suit maintainable in view of the provisions of Sea Customs Act?

This suit is not maintainable in view of the provisions of the Sea Customs Act.

Issue 9:

Was the plaintiff entitled to leave under clause 12 of the Letters Patent as alleged in paragraph 17 of the plains- Yes, the plaintiff was so entitled.

Issue No. 10:

To what relief, if any, is the plaintiff entitled.

208. In the result it is not possible for me to give any relief to the plaintiff. I have

heard the parties on the question of costs. In view of the fact that I have found in favour of the plaintiff on several issues, particularly in respect of the meaning of hessian as ordinarily understood in trade which occupied a considerable time of the hearing, I think that in the ends of justice the suit should be dismissed with half the costs of this suit. Certified for two Counsel.