

(1985) 04 CAL CK 0041

In the Calcutta High Court

Case No : Civil Order No. 3670 (W) of 1985

In Re: Purbachal International and Another

Date of Decision : 01-04-1985

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 111, 112, 125, 49
Essential Commodities Act, 1955 — Section 3
Imports and Exports (Control) Act, 1947 — Section 3(2)
Imports Control Order, 1947 — Section 3
Income Tax Act, 1922 — Section 34

Citation : 89 CWN 961 : (1986) 6 ECR 581 : (1985) 21 ELT 673

Hon'ble Judges : Bhagabati Prasad Banerjee, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Bhagabati Prasad Banerjee, J.—This writ petition was moved with notice to the respondents against the refusal of the Customs Authorities to clear the imported white cement in contemplation of an adjudication proceeding. The said refusal to clear the said goods was endorsed in the body of the original bill of entry which is Annexure "D" to the writ petition. In the instant case, the petitioner imported two consignments of white cement under O.G.L. and that the petitioner on arrival of the goods from Yugoslavia filed two separate bills of entry being No. 1665 and 1666 both dated 28, 1984 for home consumption for clearance of the said goods. The said bills of entry were duly processed by the Customs Authorities and assessed customs duty to the extent of Rs. 1,83,000/-which was duly paid by the petitioner. Thereafter on the Bill of Entry, the Customs Authorities passed an order on January 1, 1985 and made the following endorsement :

"Goods are allowed to warehoused u/s 49 C.A. 1962. No clearance to be allowed. Adjudication proceeding will follow."

At the time, the petitioner was verbally informed that the said white cement could not be released as the same was a canalised item under Item 8, Part B of Appendix 5 of the Export Import Policy for the year 1984-85. Thereafter the

adjudication proceeding was started and by the show cause notice dated January 28, 1985, the Assistant Collector of Customs directed the petitioner to show cause why the said imported goods should not be confiscated u/s 111 of the Customs Act, 1962 and why penalty should not be imposed upon the petitioner u/s 112 of the Customs Act, 1962. The said show cause notice was issued on the basis of a chemical test of the sample wherein it was found that the white powder have the characteristic of ordinary portland cement. At that stage, the petitioner moved this Court a writ application with notice to the respondents and after hearing the parties, by the order, dated January 25, 1985, I directed the writ application to appear as an application on February 6, 1985 and in the meantime the respondents were given liberty to initiate and/or complete any proceeding for adjudication, if any, in the matter in dispute upon notice to the petitioners. It appears that on February 6, 1985, the matter came up for orders when learned Advocates for both the parties agreed that the matter should be disposed of as specially fixed application on February 7, 1985. It appears that in the meantime Shri S. Mukhopadhyaya, the Collector of Customs passed an order on February 1, 1985 concluding the said adjudication proceeding in terms of the liberty given by this Court in which the said Collector of Customs held that white cement which was imported by the petitioner, was nothing but the ordinary portland cement and as according to Appendix 5, Part B, Sl. No. 8 of Import Trade Control Policy of 1984-85, cement including clinker is canalised item and that the import of the said goods was only allowed to be made by the State Trading Corporation of India under O.G.L. According to the Collector of Customs, the importation of white cement which was nothing but portland cement and that the said importation by the petitioner was wholly unauthorised. According to the Collector of Customs the said imported goods were liable for confiscation u/s 111(d) of the Customs Act, 1962 read with Section 3(2) of the Import and Export Control Act, 1947. The Collector of Customs instead of confiscation of the goods gave an option to the petitioner to redeem the goods u/s 125 of the Customs Act, 1962 on payment of fine of Rs. 6,50,000/- and a penalty of Rs. 1,10,000/-. 2- Mr. Bhaskar Prasad Gupta, learned Advocate appearing on behalf of the petitioner, contended that white cement is a commodity different from ordinary portland cement and in support of his contention, relied on the provision of paragraph 2(a) of the Imported Cement (Control) Order, 1978 which defines "cement" means any variety of cement imported into India but does not include oil-well cement and white cement and coloured cement other than grey portland cement. The said Import Cement (Control) Order, 1978 was issued by the Central Government in exercise of the powers conferred by Section 3 of the Essential Commodities Act, 1955. Mr. Gupta also relied on the Booklet issued by the Indian Standard Institution under the name and style "Indian Standard Specification for White Portland Cement". In the foreword of the said Booklet it was provided that

-

"White Portland Cement is generally meant for non-structural use. White Portland Cement is made from raw materials containing very little iron oxide and

manganese oxide. Limited quantities of certain chemicals, which will improve whiteness of cement without affecting the physical properties, may be added during manufacture...

Portland cement except that maximum iron oxide content is 1.0 per cent, and requirement for loss on ignition has been deleted. Further the strength requirements of white Portland Cement are specified as not less than ninety per cent of these or ordinary Portland Cement."

The said booklet contains various information regarding the terminology, manufacturing process, chemical requirements, physical requirements, etc., of white Portland cement. Mr. Gupta also relied on the booklet issued by the Indian Standard Institution under the name and style "Indian Standard Specification for Ordinary and Low Heat Portland Cement" which also provides the terminology, manufacturing process, chemical requirements, physical requirements etc. of ordinary portland cement. From the Booklets it is also made abundantly clear that the chemical requirements of white portland cement and ordinary and oil heat portland cement are quite distinct and separate. The chemical requirements for ordinary portland cement is enumerated in Table I of the said Booklet. From this it is abundantly clear that even on chemical analysis the said two commodities are quite distinct and separate. Mr. Gupta also relied on the Press Note issued by the Government of India, Ministry of Industries, dated February 27, 1982 in support of his contention that the white cement and ordinary portland cement are two different commodities. A copy of the said Press Note is Annexure "E" to the writ petition wherein the Government of India, Ministry of Industries, Department of Industries Development used the expression "ordinary portland cement" The said Press Note also provides that in order to meet the deficit of such type of cement, the State Trading Corporation shall be freely allowed to import cement on its own account or on the account of the actual users. The said Press Note was also relied upon by Mr. Gupta in support of his contention that the ordinary portland cement have only been made a canalised item and that the ordinary portland cement could only be imported by the State Trading Corporation and that the said Press Note made it abundantly clear that white portland cement were left outside the purview of such restriction of importation through the State Trading Corporation. Mr. Gupta further contended that when the Indian Standard Institution which is the highest authority in the matter treated ordinary portland cement and white cement are two different and distinct commodity and had in their publication set out the chemical analysis of the ordinary portland cement it was no longer open on the part of the Collector of Customs to rely on any other chemical test behind the back and without the knowledge of the petitioner for holding that the sample were found to be white powder having characteristic of portland cement. Such chemical analysis the particulars of which are not disclosed also do not support to the contention that the two commodities are same commodities particularly when the said booklet issued by the Indian Standard Institution analysed separately two chemical composition of two different commodities. It was further stated that the said

determination made by the Indian Standard Institution with regard to the chemical analysis and physical requirements of the two types of commodities were binding upon the Collector of Customs. Further the Collector of Customs at its sweet will, cannot ignore the definition of cement given in the Imported Cement (Control) Order, 1978 which made it abundantly clear that the Central Government treated for all practical purposes ordinary portland cement and white cement as two different commercial commodities even under the law. According to Mr. Gupta, the Collector of Customs had acted arbitrarily, unjustly and whimsically in not relying upon the definition of cement in the said control order which was binding all force upon the Collector of Customs. The Collector of Customs had no authority and/or jurisdiction to override the statutory definition given to a particular commodity at his whims and caprice.

3. Mr. Gupta further contended that the Collector of Customs in the matter proceeded from the very beginning with a closed and biased mind and that as the matter was pending before this Court and the Collector was a party to it and the Collector of Customs from the beginning was contending that the white cement and the ordinary cement was same commodity. The Collector of Customs could not bring an impartial mind to bear in the matter and that the fact that when the Collector was very much biased, was made abundantly clear by imposition of fine of Rs. 6,50,000/- and a penalty of Rs. 1,10,000/- without any rhyme and reason. Further the Collector of Customs did not take into account of a sum of Rs. 1,83,000/- realised by the Customs Authorities as Customs duty and it was contended by Mr. Gupta that the respondents are estopped from refusing to release the goods after they had realised Custom duty.

4. The respondents filed an affidavit-in-opposition in which it was stated that the Imported Cement (Control) Order, 1978 or the Cement Control Order, 1967 were issued to control the prices of certain varieties of cement and that the Import Trade Control Policy, 1984-85 had not been framed with reference to the said Cement Control Orders. The Press Note dated February 27, 1982 issued by the Central Government, it was stated, had not said that the white cement can be imported by all persons under O.G.L. It was further stated in the affidavit that the goods in question on chemical test was found to be white powder having characteristic of portland cement.

5. Mr. R. N. Das, learned Counsel, appearing on behalf of the respondents, took a preliminary point and contended that the writ petition was not maintainable inasmuch as the only remedy available to the petitioner was to file a statutory appeal against the adjudication order which was passed pursuant to the liberty granted by this Court in the matter. This contention of Mr. Das cannot be accepted in view of the submission made by Mr. Gupta that the petitioner moved this Court against the endorsement made in the Bill of Entry of 1st January, 1985 and that the adjudication proceeding took place pursuant to the liberty granted by this Court and relied on the decision of the Supreme Court of India in the case of Calcutta Discount Company Limited Vs. Income Tax Officer, Companies

District, I and Another, . In that case the petitioner moved against the notice u/s 34 of the Indian Income Tax Act, 1922 and that during the pendency of the writ petition in the High Court, High Court granted liberty to the Income Tax Authorities to proceed with the assessment proceeding to pass final order and the Supreme Court was pleased to hold that the assessment orders that have been made, did not affect the Company's right to obtain relief under Article 226 of the Constitution against the notice u/s 34 of the Income Tax Act and directed the Income Tax Officer not to take any action on the basis of the impugned notice and a further order was passed quashing the assessment that was passed in the matter. In view of the above decision of the Supreme Court, the preliminary objection of Mr. Das cannot be upheld, Mr. Das next contended that the Collector of Customs had considered the matter and had treated white cement and ordinary cement as one commercial commodity and that under such circumstances, it was not open to this Court to interfere with the finding made by the Collector of Customs in this behalf and relied on the decision of the Supreme Court of India in *The Collector of Customs, Madras Vs. K. Ganga Setty*, . In the said case, it was held that it is primarily for the Import Control Authority to determine the head or entry in Tariff Schedule under which any particular commodity falls; but in doing so, these authorities adopted a construction which no reasonable person could adopt it, that is, if the construction is perverse then it is a case in which the Court is competent to interfere. In other words, if there were two constructions which an entry could reasonably appear and one of them which was in favour of the Revenue was adopted, the Court has no jurisdiction to interfere merely because the other interpretation favourable to the subject appeals to the Court as the better one to adopt. Mr. Das also relied on another decision of Supreme Court in the case of *V.V. Iyer of Bombay Vs. Jasjit Singh, Collector of Customs and Another*, wherein it was held that correctness of conclusion reached by the Customs Authorities in adopting one reasonable view as against the other while interpreting an entry under Taxation Law cannot be disturbed. The ratio of the above two decisions are not applicable to the facts of the case as the interpretation given by the Collector is not only contrary to the statutory definition of a particular commodity and contrary to the authoritative determination made by the Indian Standards Institution which clearly established that the Collector of Customs had taken a view which is not only unreasonable but apparently perverse. In this connection, reference may also be made to the decision of Supreme Court of India in *Dunlop India Ltd. and Madras Rubber Factory Ltd. Vs. Union of India (UOI) and Others*, in which it was held by the Supreme Court that "in interpreting the meaning of word in a Taxing Statute, the acceptance of a particular word by the trade and its popular meaning should commend itself to be authority. So meanings given to articles in a fiscal statute must be as people in trade and commerce conversant with the subject generally treat and understand the same in the usual course and that technical and scientific tests offer guidance only within limits. Once the articles are in circulation and came to be described and known in common parlance, the Court should find as difficulty for statutory qualification under a particular entry. In the

instant case, in view of the definition of comment as provided in paragraph 2(a) of the Import Cement (Control) Order, 1978 read with a Press Note issued by the Central Government and the authoritative publication made in the Indian Standard Institution" treating white portland cement as a different commercial commodity to that of ordinary low heat portland cement, it must be held that in commercial parlance the two commodities are known as two different commercial commodities and that there is no scope for contending merely on the basis of some chemical test contrary to the chemical analysis published by the Indian Standard Institution to hold that white cement and ordinary cement are same commodity. The important test for determining whether white cement and ordinary cement is one commercial commodity or not, is that if a customer asks for cement from a cement dealer, whether, the cement dealer will give him or offer white cement or not, certainly, a cement dealer will not offer white cement in such a case. The value of the two commodities are different, its chemical composition and uses are quite different. In commercial world it is treated as two different commercial commodities. Even the Central Government treated the same as two different commodities. It is also well-established principle of law that in interpreting a particular commodity the dictionary meaning and technical meaning should not be adhered to and that in a Taxing Statute word of every day use must be construed not in their scientific or technical sense, but as understood in commercial parlance. Reference may be made in this connection to the decisions of Supreme Court of India in Ramavatar Budhaiprasad Etc. Vs. Assistant Sales Tax Officer, Akola, ; Motipur Zamindary Co. (P) Ltd. Vs. The State of Bihar, and State of West Bengal and Others Vs. Washi Ahmed and Others, and Porritts and Spencer (Asia) Ltd. Vs. State of Haryana, . In view of "the above decision of the Supreme Court and in view of the statutory definitions of cement under the Imported Cement (Control) Order, 1978 and the booklets issued by the Indian Standard Institution it is no longer open for the Collector of Customs to ignore such definition and to contend that the cement in the market parlance also includes white cement. Such a view taken by the Collector of Customs is without any basis or materials on record and such a finding on the face of it is perverse. A perverse view taken contrary to the view prevailing in the market parlance and commercial parlance in the facts and circumstances of the case cannot be accepted.

6. Considering the facts and circumstances of the case and the materials disclosed in the petition and the authorities produced before this Court, I hold that ordinary portland cement and white cement are two different and distinct commercial commodities and as such the importation of white cement was perfectly valid and cannot be said to have been imported in violation of the provision of Section 3 of the Imports Control Order, 1947 and/or any other law in this behalf. Since the petition succeeds on the sole ground that white cement and ordinary cement are two different commercial commodities and there is no bar on the importation of white cement, it is not necessary to decide other points raised by Mr. Gupta in this behalf. Accordingly I hold that the refusal on the part

of the Customs Authorities to clear the goods, the issue of show cause notice and the order dated February 1, 1985 being No. 548-Cr. 1 (P)- -154-84A/S 33-7-85 A-Gr. at SI. No. 1, dated February 1, 1985 were wholly illegal and without jurisdiction. The proceedings are quashed. Accordingly, the writ petition succeeds. The adjudication proceeding including the order passed by the Collector of Customs are quashed and I direct the respondents to forthwith allow the clearance of the said goods.

7. In the result the writ petition succeeds with costs assessed at 10 gms.

8. On the undertaking to apply for a certified copy of this order and depositing the necessary folios and stamps in the department within a week from date, let a plain copy of this order, duly countersigned by an Officer of this Court, be given to the learned Advocate for the parties.