

(1983) 09 CAL CK 0029
In the Calcutta High Court
Case No : Civil Rule No. 2769 (W) of 1972

Rungta Sons (P) Ltd. and Another

APPELLANT

Vs

Collector of Customs and Others

RESPONDENT

Date of Decision : 02-09-1983

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 21
Customs Act, 1962 — Section 142
Passports Act, 1967 — Section 10(3)
Revenue Recovery Act, 1890 — Section 3(1)
Sea Customs Act, 1878 — Section 131, 137, 139, 142, 167(7)

Citation : (1986) 23 ELT 14

Hon'ble Judges : M.N. Roy, J

Bench : Single Bench

Advocate : R.C. Deb, Hangsa Kumar Deb Burman and Sukumar Basu, for the Appellant; D.K. Sen and Samarendra Banerji for Respondent Nos. 2, 3 and 4 and Ramendra Nath Mukherjee, for the Respondent

Judgement

M.N. Roy, J.—The petitioner No. 1, M/s. Rungta Sons (P) Ltd. (hereinafter referred to as the said company), is an existing company within the meaning of the Companies Act, 1956, and has its registered office at P-16, Kalakar Street, Calcutta, and petitioner No. 2 is a shareholder and director of the same. The said company at all material times carried on and still carries on business inter alia of export of manganese ore and on or about 17th January, 1951, a contract of agency was entered by and between the said company and Hindusthan Mineral Corporation, whereunder the said company was constituted as an agent for the purpose of sale, export and shipment of manganese from the Port of Visakhapatnam to foreign buyers and then the said company has stated to have entered into several contracts with various foreign buyers, for the sale of diverse quantities of Indian manganese ore. Such contracts were for dispatching of the concerned ore from the Port of Visakhapatnam to the foreign buyers. It has been alleged that not only the said company but also the other petitioners, at all material times had and still have rights guaranteed under Articles 19(A)(g) and

14 of the Constitution of India in the matter of carrying on such business or avocation as mentioned above, without any restrictions which were either not in the interest of the general public or were unreasonable and in fact, they have also claimed to possess the fundamental right to be treated equally along with others, including all companies similarly situate without from being hostile, unequal discrimination or from being treated differentially or prejudicially and/or singled out from the other companies so placed like that of the said company for any hostile, unequal and unequal treatment.

2. It has been stated that in terms of the above the said company entered into several contracts with various foreign purchasers, for the sale of the commodities as mentioned above, after having the requisite licences from the Central Government for the purpose and from February, 1951 to June, 1952, the said company submitted to the customs authorities shipping bills and other documents including letters of credit opened by overseas buyers in favour of the said company, for the purpose of determining the duties payable under the Sea Customs Act, 1878 (hereinafter referred to as the said 1878 Act), on the said exporters. It was also the case of the petitioners that the Customs authorities levied and the said company paid duty on the basis of the prices as mentioned in the shipping bills and the said company also made or caused to be made 20 shipments of Indian manganese ore from the Port of Visakhapatnam. It has been stated that the customs authorities had collected duty on the basis of the prices mentioned in the shipping bills and the said company had paid the sum of Rs. 3,24,405.12 as and by way of duty in respect of the shipments. It was also the case of the petitioners that the concerned ores were duly exported to the respective purchasers out of this country.

3. By the Sea Customs (Amendment) Act, 1955, on or about 7th May, 1955, Sections 29A, 29B and 39 were introduced in the said 1878 Act and thereafter, on or about 29th November, 1959, by five separate orders, the Collector of Customs, Visakhapatnam, purported to demand various sums of rupees from the said company in respect of the first five shipments on the alleged ground of short levy, and by such order the said company was informed that an appeal against the decision would lie to the Collector of Customs, Madras, which could be taken, if so advised within three months from the date of the receipt of the concerned orders. Thereafter, on or about 2/4th August, 1960, a letter was sent by the Collector of Customs, Visakhapatnam, to the said company, requesting that the short levy amount should be paid at an early date and on or about 13th September, 1960, in reply, the said company informed the authorities concerned that (1) no extra duty was payable on the basis of analysis of shipments as adopted by the customs authorities and (2) a copy of the relevant rules or the notification under which such assessment of duty was sought to be made was not supplied and the same was asked for. It should be noted that in the concerned order by the Collector of Customs concerned it was stated that in accordance with the declaration of the said company on the shipping bills, the customs duty leviable in respect of different consignments had been assessed on

the basis of the value declared by the said company and shipment was allowed accordingly and such question of assessment, on being finalised, was found to have been made on entry on the basis of prices as prevailing at the time of delivery of the shipping bills or the basis as taken was more than the prices stated in the shipping bills, apart from the fact that the correct assessable value was arrived at on the basis of shipment analysis of the manganese content of the concerned ores as declared by the said company in two cases and as determined by M/s. R.V. Briddges and Company Ltd., Calcutta in three cases. It was the case of the petitioners that no copy of the analysis report as made by the customs authorities, was either disclosed or made known to them and everything was done behind their back and contrary to the principles of natural justice. It has also been stated that before the 13th September, 1960, letter as mentioned above, there were other representations made by the petitioners to the authorities concerned, but they were of no avail or assistance and in fact, they produced no fruitful results.

4. Then, a letter of 7th October, 1960, was addressed by the Collector of Customs, Visakhapatnam, to the said company, intimating that the contractual prices as declared in the shipping bills had not been accepted, as they were found to be lower than the value at which the goods of like kind and quality could be delivered at the time and place of exportation, quoted in the relevant Indian Trade Journal, and it was also mentioned that the value of the goods could not be determined according to the provisions of Section 30(a) of the Act of 1878 and as there was wholesale market for the goods in question at Visakhapatnam at the time of exportation and in that view of the matter, the amount of short levy as demanded was also directed to be paid at an early date. The petitioners by their letter of 13th October, 1960, denied that the prices in the relevant shipping bills were lower than the value at which goods of like kind and quality could be delivered at the material time. They also stated that there was no real market of manganese ores like other trading commodities nor was the price quoted in the Indian Trade Journal a correct index of the prices of manganese ores, and real value as declared in the shipping bills could be ascertained in terms of Section 30(a) of the Act of 1878 and the duties should be assessed thereon. On such basis, the petitioners requested the Collector of Customs concerned, to review his decision. It has been alleged that after this, several letters were sent by the said Collector to the said company, stating that the assessment had been finalised in accordance with the provisions of Section 30(b) of the Act of 1878, on the basis of prices quoted in the relevant Indian Trade Journal and thereby the decision as taken or made was refused to be reviewed. Since Sections 30(a) and (b) have been referred to by the parties and they would be of relevant consideration, the provisions of those sections are quoted hereunder :

"30. For the purposes of this Act the real value shall be deemed to be-

(a) the wholesale cash price, less trade discount, for which goods of the like kind and quality are sold, or are capable of being sold, at the time and place of

importation or exportation, as the case may be, without any abatement or deduction whatever, except (in the case of goods imported) of the amount of the duties payable on the importation thereof; or

(b) where such price is not ascertainable, the cost at which goods of the like kind and quality could be delivered at such place, without any abatement or deduction except as aforesaid."

5. The petitioners have also stated that in between the period of 16th November to 23rd November, 1960, they had preferred five appeals against the five orders dated 24th November, 1959, but thereafter on or about 17th December, 1960 fifteen other orders were passed by the Collector, respondent No. 1, in respect of the fifteen other shipments of manganese ores from the Port of Visakhapatnam by the said company and by those orders, the said Collector demanded various amounts by way of short levy in respect of the concerned shipments. Against those orders, different and respective appeals were preferred.

6. It has been stated that in spite of the above and the pendency of the appeals, on 19th June, 1961, the Collector of Customs, Madras, wrote 20 separate letters to the said company that no appeal would be heard unless they deposited total sums of extra duty payable into the Customs House, Treasury, Visakhapatnam, u/s 189 of the said Act of 1878 and necessary receipt as proof for payments were produced within 20 days from the receipt of the said letters. Section 189 deals with deposit, pending appeal, of duty demanded and lays down that where the decision or order appealed against relates to any duty or penalty leviable in respect of any goods, the owner of such goods, if desirous of appealing against such decision or order, shall pending the appeal, deposit in the hands of the Customs Collector at the port where the dispute arises, the amount demanded by the officer passing such decision or order. The said section further postulates that when delivery of such goods to the owner thereof is withheld merely by reason of such amount not being paid, the Customs Collector shall, upon such deposit being made, cause such goods to be delivered to such owner. Apart from the fact that if upon any such appeal it is decided that the whole or any portion of such amount was not leviable in respect of such goods, the Customs Collector shall return such amount or portion (as the case may be) to the owner of such goods on demand by such owner. In reply to the letters as mentioned above, the petitioners have also addressed similar replies to the Collector concerned denying their liabilities to pay the extra duty as demanded and stating that they were not in a position to deposit the duty as claimed or levied and requesting for the disposal of the appeal without any deposit.

7. During the pendency of the above proceedings, the Customs Act, 1962 (hereinafter referred to as the said Act) came into force with effect from 13th December, 1962, and thereafter on 28th January, 1967, the Deputy Collector of Customs, Visakhapatnam, sent a letter to the said company informing that they had not deposited the extra duty as demanded by the Collector of Customs in terms of Section 189 of the said Act of 1878 and as such, the appeals to the

Collector concerned were treated as closed and it was also notified that if the duty was not paid within 15 days from the date of receipt of concerned letter, actions would be taken to detain and sell any goods belonging to the said company u/s 142 read with Section 167(7) of the said 1878 Act. Section 142 deals with recovery of sums due to Government and Section 167(7) lays down or prescribes the punishment for offences.

8. The petitioners have claimed that from the trend of the letter as mentioned above, it would be proved *ex facie* that the appellate authority had apparently rejected their appeals, without considering their prayers and without giving them due opportunities to be heard and those appeals were admittedly treated as closed, only on the ground that the petitioners had failed to make the deposit. It has been alleged that in doing so or acting in that manner, the appellate authority did not exercise the discretion vested in him and the said authority had not really formed necessary opinion appropriately, which in law, they were obliged and bound to form. It has further been stated that the copy of the order was never served on the petitioners and the fact that the petitioners' appeals were dismissed due to non-payment of duty as demanded, was not also duly notified, which again was incumbent on the Deputy Collector of Customs concerned. The petitioners have further stated that taking into consideration, the relevant dates and even if the order as made can be treated to be a correct and proper one, the last date for treating the appeal as closed, should have been 18th July, 1961, but as the appeal was informed to have been closed earlier, there was not only irregular and illegal exercise of power, but power was also not exercised *bona fide* and duly. The petitioners have further claimed that the said Act of 1878 as amended by the Customs (Amendment) Act, 1955, would not be applicable in this case, but fully relying on the same, it was contended that Section 39(1), which was introduced in the said Act of 1878, would not be applicable in cases where Customs duties or charges have been short levied, the persons chargeable with the duty being informed about short levy, shall pay the duty on a notice of demand being issued to him, within three months from the date of first assessment. As steps in the instant case were not taken within the period of limitation, it was contended by the petitioners that the claim of the respondents, if any, was barred by limitation. Such submission was made, as the case of the petitioners was admittedly prior to 24th November, 1959, and 17th December, 1970.

9. Above being the position, the petitioners have further claimed the orders or proceedings as are in issue in these proceedings, to be illegal, null and void and of no effect whatsoever, apart from being without jurisdiction and contrary to law. The petitioners have stated that after representations were made in the above light, they had not done anything till 7th December, 1970, when a notice issued by the Certificate Officer, 24-Parganas, Alipore, informed them that a certificate for recovery of Rs. 58,151.03, aligned to have been due from the said company on account of export duty had been received from the Assistant Collector of Customs, Visakhapatnam, u/s 3(1) of the Revenue Recovery Act,

1890 (hereinafter referred to as the said 1890 Act), and thereby, they were asked to pay the said amount together with interest within 15 days from the date of receipt of the notice, otherwise they were informed that the certificate would be executed. Admittedly, thereafter, the said company filed an objection before the Certificate Officer, 24-Parganas, and on 7th November, 1971, notice was issued by the Tax Recovery Officer, 24-Parganas, in the concerned certificate case, informing thereby the said company that unless payment was made by the 2nd February, 1971, the amount claimed would be realised in one of the modes as mentioned in the said notice. On such notice, the petitioners, after making representations moved and obtained this rule on 16th May, 1972, along with the corresponding interim order on terms and it appeared from the order sheet that compliance having been made, the said company is enjoying the interim order, although the rule has been discharged against the Collector of Customs, Visakhapatnam, respondent No. 1, for default of Court's Order dated 25th March, 1972. In the rule, the notices dated 28th February, 1967, certificate dated 7th December, 1970, and the notice dated 7th January, 1971, some particulars whereof have been mentioned hereinbefore, have been sought to be impeached, by claiming them to be mala fide, arbitrary perverse, contrary to law,- apart from claiming them to be issued in colourable exercise of power and against violation of principles of natural justice. In addition to the submissions which were put forward by and on behalf of the petitioners, it was also claimed that the Assistant Collector of Customs concerned in the instant case, had no jurisdiction whatsoever to forward the certificate to the Certificate Officer nor had the Certificate Officer any jurisdiction to act on the basis of the certificate in the instant case. Entire proceedings, starting from the initiation to the issue of the certificate and initiation of the recovery proceedings, have been claimed to be improper, illegal, wholly without jurisdiction and void. It was also claimed that the Assistant Collector concerned had no authority or jurisdiction to sign or send the certificate u/s 3(1) or under any other section of the said 1890 Act, to the Certificate Officer, 24-Parganas.

10. There were series of affidavits filed in the proceedings from time to time. The first of such affidavits was in opposition dated 23rd July, 1973, filed on behalf of respondents Nos. 1 to 4, through Shri H. Narayan Rao, an employee in the office of the Deputy Collector of Customs, Customs House, Visakhapatnam. He has stated that the petition at the instance of the said company would not be maintainable and they would not also be entitled to claim either any benefits of Article 19(1)(g) or there was any violation of Article 14 of the Constitution and the demand as issued or made was claimed on account of short-levy of duty inasmuch as the value declared in the concerned shipping bills were not the real value of the ores despatched by the said company. It has also been stated that the value as declared, did not represent the wholesale cash price or that the ores in question could be sold or were capable of being sold from Visakhapatnam Port. It was the categorical case of the deponent that the value of the cargo as shown in the petition did not represent the real value.

11. It was also stated by the deponent that by the final assessment, the actual duty payable by the said company on the 20 exports was determined and in all such cases, the final duty was found to be more than the initial duty as paid by them provisionally, and as such, they were asked to pay the duty as short-levied. The deponent has stated that the petitioner was thus given necessary facilities of appeal but such facilities were not availed of. It has also been stated that though the said company filed an appeal to the Collector of Customs, Madras, the said appeal could not be continued as there was non-compliance with the provisions of Section 189 of the said 1878 Act, as the duty as short-levied was net paid before the appeal was filed. He has further stated that it was well within the knowledge of the petitioners or any one in the business of manganese ore, that manganese ore has to be tested in order to determine its grade or manganese contents and the actual value of the substance is dependent on such content. He has stated that in this case, samples of manganese ore were drawn as per the practice and in presence of the said company's agent, viz., M/s. International Shipping Corporation Ltd. He has further stated that the manganese content which was adopted as the basis for final assessment in respect of each export was disclosed to the petitioners in the concerned notices for the payment of duty as short-levied and as such the payments which were neither contested nor appealed against and were duly and properly made, were not illegal or irregular. It was also the case of the deponent that as the short-levied amount of duty was not paid, the said company was reminded by several letters for necessary payment and such reminder was issued for the purpose of fulfilling the requirements of the principles of natural justice.

12. The deponent has stated that the City Civil Court at Bombay, in the judgment in Suit No. 2575 of 1959 has not observed that the Indian Trade Journal is not a correct guide for the purpose of ascertaining the real value. It has further been stated by the deponent that the assessments as made were not arbitrary and in determining the real value of the goods, the documents as were produced by the petitioners were ignored. He has also stated that the method and the basis of making the final assessment was communicated to the petitioners and they were also given appropriate opportunities to put in their case. It was further claimed by the deponent that as the appeal was not preferred in accordance with law, so the question of consideration of the claims as sought to be made now, would not arise and really out of 20 shipping bills under consideration five were finalised, as mentioned above in the year 1959 and the rest of the 15 shipping bills were finalised in the year 1960 and demand of short-levy was made immediately thereafter. He has also reiterated that the samples were drawn from manganese ore as exported in the presence of the agents of the petitioners as mentioned above and the analysis reports were not kept secret. It was the case, that the contents of such reports were disclosed to the petitioners duly. He has also stated that the determination of the City Civil Court at Bombay has nowhere held that the Indian Trade Journal prices are not at all correct guide in ascertaining the real value of the concerned goods. He has of course mentioned that an

appeal is pending in the High Court at Bombay against such judgment and as such, no reliance can be placed on the said judgment at this stage. The deponent has further relied upon the judgment of the Andhra Pradesh High Court in Writ Petition Nos. 1210 and 1211 of 1958 and also the judgment of the Division Bench of that High Court, upholding the decision of a learned Single Judge, which according to him has bearing to the facts of this case.

13. It was also stated by the deponent that the appellate authority, viz., the Collector of Customs, Madras, respondent No. 4, had the discretion either to dismiss the appeal for non-payment of the amount of demanded duty or to waive such payment and to decide the appeal on merits. He has stated that in the present case the said authority duly decided, not to exercise the discretion in favour of the petitioners and as such there was nothing illegal in their decision, which was communicated to the petitioners administratively. In fact by that reference was made to the letter of 19th June, 1961, whereby the appellate authority asked the petitioners to deposit the amount for enabling them to consider the appeals. It was also the case of the petitioners that the exact date on which the appeal was to be treated as closed by the appellate authority, due to non-compliance of Section 189 of the 1878 Act, would not be material and that would not affect the recovery of duties as short-levied, which were pending since 1959-1969 and according to him Section 160(7) of the Act of 1962 protect the proceedings in question, which had been started under the said Act of 1878.

14. It was further stated by the deponent that the shipping bills were assessed provisionally at the petitioners' request and the assessment in five cases as mentioned above, were finalised in November, 1959, and the short-levy amounts were demanded on 24th November, 1959, and the remaining 15 cases were finalised in November, 1960, and the amounts as short-levied were duly demanded on 17th December, 1960. He has stated that necessary actions were, therefore, taken within three months time-limit as prescribed u/s 131 of the Act of 1878. It was also his case that since demands issued for recovery of short-levied amount of duty were perfectly valid and within the scope of the Act of 1878, when the proceedings for their recovery were still pending, the said 1878 Act was repealed and the Act of 1962 came into force, so initiation and continuation of the proceedings in the instant case were neither illegal nor irregular and without jurisdiction as claimed. In such view of the change of law it has been stated that further proceedings as heard as part of the earlier proceedings could not be taken under Sections 193 and 198 of the Act of 1878 and the actions as taken were authorised u/s 142 of the Act of 1962. The deponent has stated that since the demand as short-levied was not paid by the said company, actions u/s 142 of the said Act were taken. It would appear that u/s 142(c) of the said Act, the Assistant Collector of Customs may prepare a certificate where any due demanded from any person or any penalty payable by him under the said Act is not paid, if the amount cannot be recovered from such person in the manner as provided in Clause (a) and Clause (b), the Assistant Collector of Customs may prepare a certificate signed by him specifying the

amount due from such person and send to the Collector of the District, in which such person owns any property or resides or carries on his business and the said Collector on receipt of such certificate shall proceed to recover from the said person the amount specified thereunder, as if they were arrears of land revenue. The certificate as issued in this case has been stated to be one in terms of Section 142(c) of the said Act and the same was sent to the Collector of 24-Parganas, Alipore, Calcutta, for recovery of short-levied amount of Rs. 58,251.06, with a request to remit such amount to Customs House, Visakhapatnam. It was stated by the deponent that since the actions, in the instant case, were taken in terms of the requirements of law, so there was no wrong committed and initiation by the authorities concerned, were not made u/s 3(1) of the Revenue Recovery Act.

15. The certificate as issued, was further claimed to be issued with due jurisdiction and in accordance with law and the allegations of vagueness or devoid of any opportunities, in so far as the said certificate is concerned, have been denied. In fact, it has been stated that no certificate has been issued u/s 3(1) of the Revenue Recovery Act, 1890. The proceedings as initiated were also claimed to be within jurisdiction, legal, valid and proper. It has also been claimed that the attempt to recover the legal dues as in this case, was made bonafide and there was no illegality in the same. The deponent has further stated that the Assistant Collector of Customs concerned has not signed or sent any certificate u/s 3(1) of the Revenue Recovery Act, 1890, but such certificate was issued u/s 142(c) of the said Act. The said certificate has been claimed to have been issued in due and proper exercise of power, competence, jurisdiction and the sending of the same to the authorities at Calcutta, was claimed to be appropriate.

16. It has further been stated by the deponent that the provisional assessment in the instant case was made at the request of the said company's agents and such request would appear from the endorsement at the reverse of the shipping bills. It has further been stated by the deponent that the petitioners have obtained the benefits of such order and as such would be estopped from raising any plea, which would be contrary to their acts or actions. He has further stated that even prior to the introduction of the Sea Customs (Amendment) Act, 1955, goods were assessed provisionally at the request of the importers/exporters or their agents and real value of manganese ore at all material times was dependent and still the same depends on the grade of the ore. He has also stated that as testing of the ore in the customs laboratory at Madras would take considerable time and as the detention of the export goods till such completion would cause much hardship to the said company, their agents, as mentioned hereinbefore, requested the authorities of the department to assess the shipping bills on provisional basis and as such provisional assessments were made in the manner as indicated hereinbefore. The shipments by the said company in the instant case have been stated and claimed to be covered by the provisions of the repealed Act, as it stood in 1951-52. It has also been stated by the deponent that three months limitation would not apply in case of goods, which are

provisionally assessed and in this case, since the goods were assessed provisionally, there has been no substance in the submissions of the petitioners in respect of the contentions as mentioned above.

17. It has also been stated by the deponent that five cases were finally assessed in November, 1959, and 15 cases in November, 1960, and short-levied amounts were asked to be paid within three months thereafter and as such, there was no substance in the submissions of the said company that the claim was barred by limitation or the same was wholly without jurisdiction or authority of law. It was positively stated that the claim was not barred by time and there has been no prescribed time-limit for finalisation. Even in spite of such facts, it has been stated that as a large number of similar cases were pending disposal and time was taken for general decision regarding the method of finalisation or the number of provisional assessment, which was pending for some years, some time had lapsed, but there was no wilful delay. The deponent has stated that the said company cannot refuse to pay short-levied amounts, which would be recoverable from them, on the plea that there was the gap of 8 years between the establishment and the finalisation of the assessment resulting thereto. It has also been stated by the deponent that the value of the consignments in question, were finally assessed in accordance with Section 30(b) of the Act of 1878, i.e. the repealed Act, and similar assessments made by Visakhapatnam Customs House, in identical cases, have been upheld by the Andhra Pradesh High Court as would appear from the judgment in Writ Petition Nos. 1210 and 1211 of 1958, which again have been affirmed by the Division Bench of that Court in Writ Appeals Nos. 41 and 42 of 1960.

18. The deponent has further stated that before finalisation of the assessment, the Customs House at Visakhapatnam, wrote to the said company requiring thereby to produce the related test reports of the analysis at the Port of the destination, the final invoices, contracts and any other documents in support of the value declared in the shipping bills and the documents which were submitted by the said company were taken into consideration at the finalisation of the assessment and as such, it has been stated that there was or has been no question of any violation of Section 29 and in fact, the proper procedure for determining the real value was followed. It has been stated that the values declared by the said company in the shipping bills were not acceptable to the authorities and accordingly the assessable values were finalised u/s 30(b) of the Act of 1878. It was also contended that having requested for provisional assessment in the manner and circumstances as mentioned hereinbefore and having taken advantage of the same, the said company would be bound to pay the short-levied amount after the final adjustment. It was also his case that the letters demanding payment of short-levied amounts contained full details and they include particulars of the grades and prices of the manganese ore shipped by the said company. The categorical case of the deponent was that there was no need or any necessity to file any suit for the short-levied amount and the provisions of the said Act afford complete code in themselves and provide for

recovery of the duties as short-levied. The initiation and the continuation of the proceedings were also claimed to be due and proper as the proceedings initiated under the said Act of 1878 were not competent, till the said Act came into force. It was also stated that steps in the instant case were taken duly and in proper exercise of power vested in the authorities concerned under the provisions of the said 1878 Act and the said Act. The notices issued under the provisions of the Acts as mentioned hereinbefore, it was claimed, were not liable to be withdrawn as they were wholly in accordance with law and jurisdiction. The deponent has further stated that the said company have not exhausted the remedies available to them under the said Act of 1878 at the proper time and having chosen in that fashion, this application is liable to be rejected. It was also the case of the deponent that the said company may even now pay the short-levied duties and file relevant claims by approaching the authorities concerned by way of appeal within the prescribed time and such avenue being still open and available there will be no prejudice or any injuries to the said company. It was further and categorically stated by the deponent that the offices of respondent Nos. 2 and 3 being at Andhra Pradesh and that of respondent No. 4 being at Tamil Nadu, this Court will have no jurisdiction, either to entertain the petition or to interfere in the matter. That apart, it has been stated that the cause of action in the instant case arises at Visakhapatnam which is beyond the jurisdiction of this Court.

19. The reply to the above affidavit-in-opposition was filed by Shri Dharendra Nath Bose and the same was dated 17th May, 1976. The said deponent is the Export in-charge of the said company and in the affidavit-in-reply, he has not only repeated and reiterated the statements in as contained in the petition of motion, but he has denied the material allegations as contained in the opposition. He has claimed that the said company would be entitled to ask for protection under Article 19(1)(g) of the Constitution of India. It was claimed that the basis of the demand of the short-levy, in the instant case, was invalid and improper and such being the fact, this Court should interfere, as there was thus an admitted exercise of a jurisdiction, which was illegal and irregular. It has been stated that the said company having duly taken exception to the demand at the material time, they would be entitled to maintain the petition as filed, and this Court would also be entitled to interfere. The deponent has further submitted that no due and proper opportunities was received by the said company, in the matter of making representation and thus there was violation of principles of natural justice. He has further denied that the samples as mentioned in the affidavit-in-opposition were drawn in the presence of the agents of the said company. It was also his case that discretion in the matter had not been exercised judicially or in any judicial spirit. He has further stated that the objections as raised by the said company had not been duly, appropriately and properly dealt with and considered. Apart from saying that the recovery proceedings in the instant case were neither legal nor within jurisdiction and due or proper, the deponent has further stated that the Deputy Collector of Customs, respondent No. 3 has not acted properly, fairly or honestly in exercising his

discretion in the instant case and he has also violated the principles of natural justice so far the said company was concerned. It was claimed that in the facts and circumstances of this case this High Court has jurisdiction to entertain the present petition.

20. There was, thereafter, a supplementary affidavit dated 27th August, 1978 filed on behalf of respondent Nos. 2, 3 and 4, by Shri J.N. Narasimha Rao the then Deputy Collector of Customs, Visakhapatnam. He has stated that the case under consideration arose for assessment of differential export duty of Customs, payable on account of several exports of manganese ores, made by the said company and they made a request to assess the duty provisionally as to the contents of the manganese ores declared in the shipping bills. It was stated by him that in accordance with such request, the export duty was calculated on provisional basis pending determination of value declared by the exporters. In the case under consideration, it has been stated that a point was raised by the said company that the assessment of duty should have been made u/s 30(a) of the said 1878 Act and accordingly, the final assessment as made under the said Act or by the Customs Authorities, was wrong. It was stated that the final assessment of duty was made on the basis of Section 30(b) of the said Act of 1878 and the same was made duly and lawfully. The deponent has further stated that the assessing authorities, relying on the analysis report of the various export analysis and finding that the contents of manganese ores as declared by the said company, do not represent the real state of affairs, but contained higher percentage of manganese ores and as the wholesale cash price was not ascertainable, what duties on the basis of the prices at which like kind and quality of goods could be delivered at Visakhapatnam, thus relied on the prices laid down in the Indian Trade Journal, an authoritative index of the price of such manganese ores.

21. It has been stated further that it was not shown or proved by the said company that the prices laid down in the Indian Trade Journal, were not the prices that could legitimately be taken to apply to Visakhapatnam Port. He has also stated that the prices given in the Indian Trade Journal, during the relevant period was the comparative price and it was further claimed that the said journal was the only reliable publication, which could be accepted as the source for obtaining accurate data, in respect of the value of the concerned ores. It was also his case that the price as laid down in the Indian Trade Journal has also been accepted all throughout the country as the proper criteria in coming to the conclusion as to the real value of the goods as required u/s 30(b) of the said 1878 Act.

22. This supplementary affidavit was filed on the basis of the liberty granted on 2nd August, 1976, and the deponent further clarified and stated that the real position in the instant case would be that u/s 142(c) of the said Act, arrears of duty recoverable, cannot be recovered in the manner provided in Clause (a) or (b) of the said section, and thus the Assistant Collector of Customs may prepare

a certificate signed by him, specifying the amount due from such person and send the same to the Collector of the district, in which such person owns any property or resides or carries on his business and the said Collector, on receipt of such certificate shall proceed to recover from the said person, the amount specified thereunder, as if it were an arrear of land revenue. It has been stated that in accordance with the same, the Assistant Collector of Customs, Visakhapatnam, signed and issued the certificate dated 6th April, 1968, to the District Collector, Calcutta, in terms of Section 142 of the said Act and on receipt of the said certificate, a notice was duly served on the said company and objections were raised by them as to the validity of the certificate, as the same was not signed by the District Collector. It has further been stated that on receipt of the objection as raised regarding the question of jurisdiction of the Assistant Collector concerned, the certificate was returned on 21st June, 1969, by the Collector, 24-Parganas, through the Certificate Officer, 24-Parganas, to the Assistant Collector of Customs, Visakhapatnam, and he requested to send a fresh certificate to the District Collector and thereafter, the said Assistant Collector sent a fresh certificate to the District Collector, Alipore, through the District Collector, Visakhapatnam, on 19th August, 1969, for forwarding the same to the District Collector, Alipore, and then the said District Collector, Visakhapatnam, by his memo dated 17th September, 1969, sent the certificate to the District Collector, Alipore, for recovery of the certificate dues.

23. It has been stated that on receipt of the certificate from the District Collector, Visakhapatnam, by the District Collector, 24-Parganas, a fresh certificate case was started and the Certificate Officer, 24-Parganas, by his memo dated 16th January, 1970, directed to furnish in his office fresh requisition under the signature of the District Collector, Visakhapatnam, for taking necessary action, on which the Assistant Collector of Customs, Visakhapatnam, again sent a fresh certificate dated 7th February, 1970, to the District Collector, Visakhapatnam, with a request to forward the same to the Collector, 24-Parganas, Alipore. It was the case of the deponent that on receipt of the same, the District Collector, Visakhapatnam sent to the Collector, 24-Parganas, on 13th September, 1970, clarifying the provisions of Section 142(c) of the said Act and explaining the real legal position and sent the fresh certificate dated 7th February, 1970, to the District Collector, 24-Parganas, Alipore. On receipt of such certificate and the letter of 17th September, 1970, the Certificate Officer concerned, started case No. 77/78 (O.P.A.)/70-71 and issued a notice on 7th December, 1970, u/s 3(1) of the Revenue Recovery Act, 1890. Against such notice, the said company inter alia raised an objection that as the certificate was not signed by the District Collector, Visakhapatnam, the same was without jurisdiction and thereafter, the Tax Recovery Officer by his memo of 7th January, 1971, issued a notice, that unless the duties are paid by 2nd February, 1971, he would proceed to realise the amount and at that stage, the present rule was obtained on 16th May, 1972. It was the categorical case of the deponent that even under the Revenue Recovery Act, 1890, there was or is no bar to recover the certificate dues as

signed by the Assistant Collector of Customs, Visakhapatnam, even though the certificate was signed not by the District Collector, Visakhapatnam, and so the plea sought to be raised, was without any merit.

24. Thereafter, the said company filed an affidavit-in-reply dated 16th September, 1976, against the said supplementary affidavit, through Shri Dharendra Nath Basu, their officer-in-charge of the export department. He has taken exception to the way and the manner in which the supplementary affidavit has been filed and has claimed the same to be an affidavit, only on behalf of respondent No. 3. It has been denied that the final assessment of duty in this case was made duly. It has been claimed that such assessment was in excess of power, competence and jurisdiction. It has also been denied that the price laid down in the Indian Trade Journal is an authoritative index of the price of the manganese ore as involved in this case. It was also claimed and reiterated that the sample of the manganese ore as drawn or examined, was not made in the presence of the petitioners or with notice to them and furthermore, sampling was not done on international basis or standard. It was also stated that there was no material difference in the price of manganese ore in the Ports of Calcutta and Visakhapatnam and as such, the criterion as applied by the respondents in this case, for fixing the real value, was improper, irregular and invalid. The said company has further claimed to have duly supplied the real value of the goods as exported and in the shipping bills in terms of Section 30 of the said 1878 Act. The said company has further stated to have challenged the validity of the prices as fixed on the basis of the prices as shown in the Indian Trade Journal, which, according to them, was not the appropriate guide for the purpose. It has further been claimed that the said Trade Journal is not and in fact has not been accepted as the authoritative criterion for the purpose of determining the real value u/s 30(b) of the said Act.

25. Thereafter, two affidavits-in-confirmation, one dated 4th December, 1978, by M. Cornelius and the other dated 13th December, 1978, by S.A.K. Geelani were filed. The deponent of the first affidavit-in-confirmation is a pensioner and in the past, he was attached to the Customs Circle, Visakhapatnam, as an Inspector of Central Excise and he has further stated to have looked after this case as such Customs Officer. It has been stated by him that in 1950, the Collector of Customs, Visakhapatnam, issued a circular to the shippers of manganese ore, that samples were to be drawn by the Customs Officers in the case of export of such ore to foreign countries in order to have the declared percentage of manganese ore content verified and thereby to determine the assessable value for the purpose of levy of export duty. Thus deponent has stated to have the approval and sanction of the Government of India.

26. The deponent has also stated that in terms of the above, the shippers/their agents, who filed the shipping bills for the shipment of the concerned ore, used to request the Collector of Visakhapatnam, to make provisional assessment of contents of the subject shipping bills, so as to enable the Customs Officers to

inspect the lots as produced/tendered for export, draw samples from them in their presence, and then to determine the assessable value. It has further been stated by the deponent that he, in his capacity as such Customs Officer of the concerned Circle, drew the samples after due inspection of the lot produced by the said company through their agents M/s. International Shipping Corporation, Visakhapatnam. He has also stated to have drawn the concerned lot, on notice and on the basis of the request for provisional assessment. The deponent has given the necessary particulars of the vessel and the shipping bill, for which he made enquiries and the assessment.

27. The deponent of the other affidavit-in-confirmation is also a pensioner. He has retired as the Superintendent of Central Excise, Visakhapatnam. He has stated to be acquainted with the relevant procedure to be followed by the officers of Central Excise and the discharge of the functions of the Customs Officers. He has also narrated the background about the issue of the Circular in 1950 to the shippers of manganese ores and their obligations in the master. He has given the particulars of the vessels and the shipping bills, in respect whereof he drew samples on the asking of the said company through their agents M/s. International Shipping Corporation, Visakhapatnam, for the purpose of making provisional assessment of the manganese ore meant for export.

28. The answers to the above affidavits-in-confirmation were initially given by the affidavit-in-opposition dated 6th February, 1979, filed by Shri Amulya Krishna Banerjee, the sole proprietor of M/s. International Shipping Corporation. He has denied the allegations in the affidavits-in-confirmation and has stated that samples were not drawn from the petitioners' lots as tendered by their agents or in their presence. It has been stated that no steps were taken to comply with the request for provisional assessment. It has also been claimed that tests were made or samples were drawn without any reference to M/s. International Shipping Corporation. It has further been alleged that three copies of shipping bills were sent to the customs authorities, with the necessary endorsement at the back after the said bills were scrutinised. It was also stated by the deponent that one of such shipping bills was left with the officer-in-charge at the customs gate and the other one was handed over to the steamer agent on board the vessel. He has further stated that after the physical verification and inspection of stocks was made by the Customs concerned, the stocks were loaded on board the vessel. The particulars of the vessels and the shipping bills have been mentioned in paragraph 4 of his affidavit.

29. It has further been stated by the deponent that chemical test reports of the authorities clearly demonstrate, manganese content declared in the shipping bills were higher and as such it was and still is incumbent on the department to refund the duty which had been obtained from the said company on the basis of wrong declaration.

30. Shri Dharendra Nath Bose, an Assistant in the mineral ore department of the said company has filed an affidavit-in-opposition to the affidavit-in-confirmation

dated 13th December, 1979. This affidavit was dated 22nd February, 1979. He has also dealt with the other affidavit-inconfirmation dated 4th December, 1978. It has been stated by him that such affidavit-inconfirmation should not be allowed to be used as no reasons have been disclosed as to why they were not made earlier, even though liberty was obtained for using supplementary affidavits from this Court. It has further been stated that on inspection of the records as taken, in terms of the leave granted by this Court, the deponent has found out that the impugned assessment orders as made by the Collector of Customs, respondent No. 1, were passed on the basis of a letter dated 11th November, 1969, so also one dated 6th July, 1957, and the other one dated 17th November, 1967. Those records according to the deponent categorically direct the respondent concerned to assess the said company in respect of the shipments on the highest content of manganese, irrespective of whether it was declared in the shipping bills or stated in the analysis reports or the customs test. He has annexed as Annexure X, a chart of shipments with the percentage of manganese contents as declared in the shipping bills, as Briddges analysis report and as mentioned in the chemical examination tests report of the Madras Customs. He has also disclosed copies of the report as mentioned above and has stated that from such chart as disclosed, it would be evident that the percentages declared by the said company were much higher than the tests report of the customs and so, it was incumbent on the respondents to refund the duty paid by the said company on the basis of the manganese contents as declared in the shipping bills. He has claimed that the duty has been assessed by the respondents on an extraneous consideration and assessment being made wholly without jurisdiction, would not be at all binding on the said company and they must be set aside, quashed and cancelled, holding them to be a nullity, void ab initio and bad, apart from being obtained on non-application of mind. The deponent has further stated, when the said company challenged the impugned order, they were unaware that the order had been passed on the dictates of the Board and as such was unable to take the points specifically in the petition and it was only after inspection, the said company have become aware of the facts as mentioned about and as such they must be allowed to contend in the manner as indicated hereinbefore.

31. In any event, it has been denied that the samples were drawn from the said company's lot as tendered by their agents or in their presence or for the purpose of complying with the request for provisional assessment for the purpose of tests. This deponent has also given the particulars of the shipping bills and the vessels at paragraph 9 of the affidavit and categorically denied that samples were drawn in the presence of the said company's agents.

32. There was another additional affidavit dated 24th April, 1979, filed on behalf of respondents through Bhagyarathi Nanda, the Deputy Collector of Customs, Visakhapatnam. He has stated that pursuant to the leave given by this Court on 29th March, 1979, the Customs Authorities were permitted to file a further affidavit and the affidavit which is being dealt with now was filed in terms of such

leave. He has stated that as the Deputy Collector of Customs, he has looked into all available files relating to the matter. It was his case, that although there were and are Collector's two notes, Board's letters, the documents and records available in the files revealed that the notices of demands/orders were passed by the then Collector of Customs, Visakhapatnam, and was presumably done on his own judgment. He has stated that the letter of 6th July, 1957, would disclose a general formula relating to the assessment of value and the same is not an order directing the then Collector of Customs, Visakhapatnam, to fix the percentage of ore manganese. In view of the above, he has stated that the orders as made, were due, legal and valid and it would be open to the Collector of Customs, Visakhapatnam, to accept any standard to find out the percentage of manganese in manganese ore and if he has accepted certain basis and rejected the other, which covered the field on the weight of evidence, this Court would be pleased not to allow the said company to raise such contentions.

33. On such facts and pleadings as above, it was contended on behalf of the petitioners that the notice as impeached was or being a nullity, no assessment or even ex parte assessment could be made in this case and as in fact, the assessment in question was made without due hearing and opportunity, so there was no valid order passed in the eyes of law or even if such order was passed, the same was hit by violation of principles of natural justice. Thus, it was claimed that the proceedings as initiated and all proceedings arising out of the same were bad, void, irregular, illegal and without jurisdiction, apart from being a nullity as mentioned above. It was claimed that assessment proceedings being quasi-judicial in nature and character, so it was also a must or mandatory, before any determination was made. As the samples in the instant case were drawn behind the back of the petitioners, such action was claimed to be contrary to the provisions of the said Act and it was contended that such fact and also the fact that a report, which was obtained and was looked into or considered, was not supplied to them, would also constitute violation of principles of natural justice. To establish the quasi-judicial nature and character of the concerned proceedings, reference was made to Sections 20, 38, 39, 182 and 139 of the said 1878 Act and it was further stated that the scheme of the Act would also be enough to suggest and establish such character of the proceedings as mentioned above. To establish the submissions as above, reference was made to the case of *Sovachand Mulchand v. Collector of Central Excise and Land Customs-* (1967) 71 CWN 700, where it has been observed that the Customs Authorities act in quasi-judicial capacity and as such they must observe principles of natural justice. Reference was also made on the determination in the case of *Assistant Collector of Customs v. Soorajmull Nagarmull* (1952) 56 CWN 452 where it has been laid down that the Customs Authorities in levying Additional duty and imposing fine for misdescription of goods under the provisions of the Sea Customs Act, 1878, act in a judicial and quasi-judicial capacity. The Customs Authorities are therefore required to follow the elementary rules of natural justice, namely, give an aggrieved person an opportunity of being heard and give a fair trial before

adjudging the person guilty of an offence and then to fine him.

34. Apart from the above, it was also contended that the order as made was against all canons of justice and fair play and since the initial order was a nullity, the same cannot be affirmed in appeal without stating the reasons duly. In fact, it was also claimed that the appellate order was also void, irregular and bad as the same contained no reasons or was not a speaking order. On a reference to the determinations in the case of *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, , it was contended and claimed that even though the proceedings in this case are held to be administrative in nature and the order as made is an administrative one, the principles of natural justice would apply and would be available to the petitioners. This was of course an argument made in the alternative. In that case, while dealing with the question of natural justice, it has been observed that although there are no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature. The principle of *audi alteram partem*, which mandates that no one shall be condemned unheard, is part of the rules of natural justice. Natural justice is a great humanising principle intended to invest law with fairness and to secure justice and over the years it has grown into a widely pervasive rule affecting large areas of administrative action. The inquiry must always be : does fairness in action demand that an opportunity to be heard should be given to the person affected ?

35. The law must now be taken to be well-settled that even in an administrative proceeding, which involves civil consequences, the doctrine of natural justice must be held to be applicable. The power conferred u/s 10(3)(c), Passports Act, on the passport authority to impound a passport is quasi-judicial power. The rules of natural justice would, in the circumstances, be applicable in the exercise of the power of impounding a passport. The same result would follow even if the power to impound a passport were regarded as administrative in character, because it seriously interferes with the constitutional right of the holder of the passport to go abroad and entails adverse civil consequences. It would not be right to conclude that the *audi alteram partem* rule is excluded merely because the power to impound a passport might be frustrated, if prior notice and hearing were to be given to the person concerned before impounding his passport. A fair opportunity of being heard following immediately upon the order impounding the passport would satisfy the mandate of natural justice and a provision requiring giving of such opportunity to the person concerned can and should be read by implication in the Passports Act, 1967. If such a provision were held to be incorporated in the Passports Act, 1967, by necessary implication, the procedure prescribed by the Act for impounding a passport would be right, fair and just and it would not suffer from the vice of arbitrariness or unreasonableness. It must therefore be held that the procedure, "established" by the Passports Act, 1967, for impounding a passport is in conformity with the requirement of Article 21 and does not fall foul of that article. It was also submitted on the basis of the determinations in the case of *Mohinder Singh Gill and Another Vs. The Chief*

Election Commissioner, New Delhi and Others, , the attempt of the answering respondents to validate the impugned order by subsequent reasonings given in this affidavit, would not be permitted and cannot be done. In that case, it has been observed that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out.

36. Section 39 of the said 1878 Act deals with payment of duties short-levied or erroneously refunded and lays down that when customs duties or charges have been short-levied 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, or when any such duty or charge, after having been levied, has been owing to any such cause, erroneously refunded, the person chargeable with the duty or charge so short-levied, or to whom such refund has erroneously been made, shall pay the deficiency or repay the amount paid to him in excess, on demand being made within three months from the date of the first assessment or making of the refund ; and the Customs-Collector may refuse to pass any goods belonging to such person until the said deficiency or excess be paid or repaid and on the basis thereof, the demand in the instant case was claimed to be barred by time. It was also the claim of the petitioners that there was non-compliance with the provisions of Section 30 (a) of the said 1878 Act and the provisions of Section 30 (b) would not be involved or apply unless those in Section 30(a) are resorted to. It was also and the categorical case of the petitioners that there was or has been no legal evidence in support of the assessment as made and materials, if any, were not disclosed. In fact, it was contended that in arriving at their conclusions, the authorities concerned took into consideration or relied upon extraneous factors and materials and really no attempt was made to ascertain the wholesale price, and as such, also, the assessment as made, was bad. Relying on Section 147 of the said Act, which deals with liability of principal and agent and to the effect that ;

(1) where this Act required anything to be done by the owner, importer or exporter of any goods, it may be done on his behalf by his agent.

(2) any such thing done by an agent of the owner, importer or exporter of any goods shall, unless the contrary is proved, be deemed to have been done with the knowledge and consent of such owner, importer or exporter, so that in any proceedings under this Act, the owner, importer or exporter of the goods shall also be liable as if the thing had been done by himself.

(3) When any person is expressly or impliedly authorised by the owner, importer or exporter of any goods to be his agent in respect of such goods for all or any of the purposes of this Act, such person shall, without prejudice to the liability of the owner, importer or exporter, be deemed to be the owner, importer or exporter of such goods for such purposes :

Provided that where any duty is not levied or is short-levied or erroneously refunded on account of any reason other than any wilful act, negligence or default of the agent, such duty shall not be recovered from the agent unless in the opinion of the Assistant Collector of Customs the same cannot be recovered from the owner, importer or exporter, it was claimed that steps or actions, if any must be initiated first against the owner or the demand to be made from them and not from the agents and since that was not done, so the actions as taken cannot be said to be legal and proper. The petitioners also claimed that for enforcement of payment of penalty, Section 193 of the Act of 1878, which lays down that when a penalty or increased rate of duty is adjudged against any person under this Act by any officer of Customs, such officer, if such penalty or increased rate be not paid, may levy the same by sale of any goods of the said person which may be in his charge or in the charge of any other officer of customs.

37. When an officer of customs who has adjudged a penalty or increased rate of duty against any person under this Act is unable to realise the unpaid amount thereof from such goods, such officer may notify in writing to any Magistrate within the local limits of whose jurisdiction such person or any goods belonging to him may be, the name and residence of the said person and the amount of penalty or increased rate of duty unrecovered; and such Magistrate shall thereupon process to enforce payment of the said amount in like manner as if such penalty or increased rate has been a fine inflicted by himself, was the remedy, if at all and in terms of the provisions of Sections 188 and 189 as quoted hereunder :

"188. Any person deeming himself aggrieved by any decision or order passed by an officer of customs under this Act may, within three months from the date of such decision or order, appeal therefrom to the chief customs authority, or, in such cases as (the Central Government) directs, to any officer of Customs not inferior in rank to a Customs-Collector and empowered in that behalf by name or in virtue of his office by (the Central Government).

Such authority or officer may thereupon make such further inquiry and pass such order as he thinks fit, confirming, altering or annulling the decision or order appealed against :

Provided that no such order in appeal shall have the effect of subjecting any person to any greater confiscation, penalty or rate of duty than has been adjudged against him in the original decision or order.

Every order passed in appeal under this section shall, subject to the power of revision conferred by Section 191, be final.

189. Where the decision or order appealed against relates to any duty or penalty leviable in respect of any goods, the owner of such goods, if desirous of appealing against such decision or order, shall, pending the appeal, deposit in the hands of the Customs-C Collector at the port where the dispute arises the amount

demand by the officer passing such decision or order.

When delivery of such goods to the owner thereof is withheld merely by reason of such amount not being paid, the Customs-Collector shall, upon such deposit being made, cause such goods to be delivered to such owner.

If upon any such appeal it is decided that the whole or any portion of such amount was not leviable in respect of such goods, the Customs-Collector shall return such amount or portion (as the case may be) to the owner of such goods on demand by such owner, the appeal in this case could not be dismissed for non-deposit or failure to make the necessary deposit of duty as levied."

38. On consideration of the provisions of the said 1878 Act, the scheme of the same and the cases as cited at the Bar and so also the other case of *PONKUNNAM TRADERS Vs. ADDITIONAL Income Tax OFFICER, KOTTAYAM, AND ANOTHER.*, , which was further cited by Mr. Deb, it can safely be deduced and held that the Customs Authorities are quasi-judicial authorities or at least they act in such capacities and thus they are to act fairly, and as such, principles of natural justice have to be followed and observed by them and furthermore, the appellate authority is required to pass a speaking and reasoned order, if the initial order, as claimed, was a nullity. The principles as above, would also apply and would be available, even if the proceedings are administrative in nature. It is also true that at the stage of hearing of a Court proceedings, by filing affidavits, defects or lacuna, if any, in the order or the proceedings cannot be cured and such opportunity must not also be permitted ordinarily.

39. u/s 39 of the said 1878 Act, there is nothing which would require the Customs Authorities, in terms of the decision of *Assistant Collector of Customs etc. v. Bilbon Paper Printed Ltd. and Anr* (1965) 69 CWN 972, to be objectively satisfied about the fulfilment of my or all the grounds mentioned therein, before a notice can be issued under that section. We shall have to see on the pleadings of the parties, if the demand in this case was barred by time. The notice at Annexure D of the petition, which was dated 24th November, 1959, was u/s 39 of the said 1878 Act. This notice was served on the said company at Calcutta and it has been alleged that no copy of the assessment order was either annexed with the same or was ever served thereafter, even though demand for early payment of the short-levied amount was asked for thereafter. Section 39 postulates a period of limitation of 3 months, i.e., the demand is to be made within such, period and that too from the date of the first assessment or making the refund. Section 39 relates to payment of duties short-levied or erroneously refunded. It does not apply where the amount claimed is not the amount of refund, but the actual amount of difference, and in terms of the *Andhra Pradesh* judgment as cited herein-after, there is no question of any error, inadvertence, collusion or misconstruction on the part of the officers of customs to invoke Section 39. Mis-statement of the real value on the part of the owner, may give rise to or occasion for a short-levy. The said company by the record in Annexure J dated 17th December, 1960, were informed about the finality of the assessment at Calcutta.

Such and above being the position, submissions on limitation, as advanced, appear to be of substance, but the jurisdiction of this Court to entertain this proceeding, as urged by the respondents, may not be of any avail or assistance.

40. Section 30(a) and (b) of the said 1878 Act, deal with real value and on the definition thereof, principles of natural justice, be it under Sub-section (a) or (b), would have application, and such fact would appear from the determinations in the case of Deputy Collector of Customs v. Ramchand Jagdishchand (1964) 68 CWN 794. That case also lays down the necessity of a personal hearing. It has been laid down that where the Assistant Collector of Customs gave a personal hearing to the respondent, but the Deputy Collector of Customs passed an order of confiscation of goods and imposition of penalty without giving any further hearing to the respondent, there was violation of natural justice. It has also been observed that if one person hears evidence and arguments and another person decides, then such a procedure is destructive of the concept of judicial hearing and defeats the object of personal hearing. Personal hearing enables the authority concerned to watch the demeanour of the witness and clear up his doubts during the course of the argument and the party appearing to persuade the authority by reasoned argument to accept his point of view. But, if one person hears and another decides, then personal hearing becomes an empty formality and such a procedure offends the basic principle of judicial procedure. The above determination will certainly have no direct bearing and application on the facts of the case. But the principles, on application of the rules of natural justice as enunciated, may be applied in this case. But, one thing is certain, in this jurisdiction, I shall not be entitled to review and reappraise the evidence and as such, it becomes difficult for me to agree or to accept, that while coming to their conclusions as they did, the authorities concerned, took into consideration, matters or factors, which were extraneous wholly. If of course, by reference, to the Indian Trade Journal such submissions were sought to be supplemented, it must be held, that there was no substance in such submissions. But, taking into consideration the analysis report, should have been with due opportunities to the petitioners, such deficiency may also go to support the submissions of initial nullity of the order in this case, as relying on such information, which were not supplied to the said company, determination was made and such fact, amongst others, have been overlooked in the proceedings upto the appellate stage. There cannot also be any doubt, that if the initial order is defective or a nullity, such defect and null and void character would follow and continue upto the end of the appeal, as in this case, if such nullity is not cured duly in subsequent proceedings, including the proceedings in appeal. It should also be noted that while on Sub-section (a) of Section 30 of the Act of 1878, Mr. Deb made a further reference to the case of Ramchand Jagdishchand Vs. The Deputy Collector of Customs, Calcutta and Others, . Mr. Deb in fact made specific reference to paragraphs 17 and 18 of the determination, which lays down the in determining the real value of the imported goods, Clause (b) of Section 30 does not apply until and unless the wholesale cash price, etc., as contemplated in

Clause (a) of that section is not ascertained. It is not sufficient to prove that the Customs Officer in fact applied Section 30(b) of the Act or that the importer sought to have the real value determined u/s 30(b) of the Act. It is incumbent to prove that the conditions were fulfilled which entitled the Customs Officer to apply Section 30(b) and not Section 30(a). Thus, it is only where the wholesale cash price as contemplated in Section 30(a) is not ascertainable that provisions in Section 30(b) are attracted, apart from holding that the correctness of the decision of a Customs Officer on the real value of imported goods is not open to review. But where the valuation u/s 30(b) is arrived at without any finding as to importation and the cost of the imported goods at which goods of the like kind and quality could be delivered at the place of importation, the decision is illegal and without jurisdiction. In such a case, the decision is liable to be reviewed by the High Court by way writ of certiorari.

41. Mr. Sen, after referring to the denials of the said company's case as made out by the respondents in their successive and several affidavits as indicated hereinbefore, claimed and contended that since there was no unauthorised, arbitrary, irregular and illegal use of power and jurisdiction in this case and more particularly when the determinations have also been made by the authorities, in due exercise of discretion, no interference should or need be made. He further contended that power, in this case, has been used and exercised bonafide and that also, on the basis of the declarations as made by the said company and more particularly as it was found on available materials, that such declarations and the available evidence, gave rise to some difference in price, for which, it was felt and opined that there was short-levy. It was also and further claimed that on the facts of this case, there would be no justification in holding that principles of natural justice were violated or the determination was made, on taking into consideration, extraneous matters. It was indicated by Mr. Sen that the wholesale cash price is not the same as the cost of goods on the basis that the goods should be taken as being sold to the exporter at the price which cost him to place them for shipment. To establish what such cash price would mean and how the same should be determined and so also the applicability of Sections 39 and 137 of the Act of 1878 amongst others, Mr. Sen relied on the determinations in the case of *Baroness Wilhelmine von Maltazan v. Collector of Customs* AIR 1958 AP 122, where it has been observed that the wholesale cash price is not the same as the cost of goods on the basis that the goods should be taken as being sold to the exporter at the price which cost him to place them for shipment. The expression wholesale cash price clearly indicates that it must mean the wholesale cash price for which the goods of a like kind and quality are sold or are capable of being sold at the time and place of exportation. The words clearly indicate that it must be the price which the exporters would be able to realise on a wholesale disposal of goods by them. The expression could not be construed as meaning the price which the exporter may have paid for purposes of exporting the goods, apart from holding that it may well be, as it appears to be the case on the language of the section, that the legislature has adopted one

test for cases covered by Clause (a) and is satisfied with the next best test in other cases, to which the first case cannot, be applied. Where the petitioner says that neither in Visakhapatnam nor anywhere in the area was there any market where the goods of the like kind and quality were at all available for sale and purchase and she further said that there was no market at all for manganese ore as such for local buyers in India, Section 30(a) was not applicable and Section 30(b) would apply. In that case, it has also been held that from the mere circumstances that at one place the authorities have accepted the statement of the petitioner and at another place they have taken the statement of the analyst and ignored the statement of the petitioner, it cannot be said that the calculation was arbitrary and Section 39 relates to payment of duties, short-levied or erroneously refunded. Where the amount claimed is not the amount of refund, but the actual amount of the difference, Section 39 does not apply. The said determination further states that where the provisional assessment was made at the instance of the petitioner's husband, though such a provisional assessment was not permitted by the provisions of the Sea Customs Act, yet, when the petitioner's husband has taken advantage of the same, the petitioner cannot, later on turn round and challenge it, apart from holding that Section 32 provides for a procedure where goods are undervalued by the owner and Section 137 refers to clearance for shipment and though neither u/s 32 nor u/s 137 any action was taken by the respondents, the question did not arise in the instant case because there was a provisional assessment and the assessee had agreed to pay the balance amount after the final assessment.

42. The price appropriate to the goods under assessment u/s 30(a) will be deduced, if at all, from the actual price relating to other goods of the kind and quality. But if there is an actual price for the goods themselves at the time and place and if the same is a wholesale cash price less trade discount, Sub-section (a) of Section 30 will not apply for want of sale price of other goods. The goods under assessment under Clause (a) may be considered a class and their price as obtained, may correctly represent the price obtainable for goods of the same kind and quality. The language of the section, viz., "or are capable of being sold" does not exclude all possibility of arriving at the price defined by sub-clause (a) upon the basis of actual price, though some adjustment may be needed to eliminate the difference between the cash and a month's credit. The above were in fact the observations in AIR 1938 15 (Privy Council) . In the case as indicated above, the appellants imported into India from Canada, on occasional requirements, submitted by various distributors at different places in India and delivery made on payment of the price less trade discount according to the published price lists supplied to the distributors current at the time of arrival of the cars and the price mentioned in the list was in all cases for a vehicle in running order, it was held that the appellants' price to their distributors was a wholesale price within the meaning of Section 30 and the same was a cash price. It cannot be doubted that the "wholesale cash price" should primarily be the price current for staple articles, the amount of which, if not a subject of daily

publication in the press, is easily ascertainable in appropriate trade circles and in terms of the decision in AIR 1932 168 (Privy Council) , it must be, for the great bulk of dutiable goods in their infinite variety, the only available basis. Such expression "wholesale cash price" in Sub-section (a) of Section 30 means the wholesale cash price which the goods of like kind and quality are sold, or are capable of being sold. The words "of the like kind and quality" as in Sub-section (b) of Section 30, should mean to cover the goods themselves and in terms of the Andhra Pradesh judgment as cited hereinbefore, the fact that one place the authorities have accepted the statement of the petitioner and at another place they have taken the statement of the analyst, ignoring the other statement would not make the calculation arbitrary. There is no doubt that the legislature has left the jurisdiction to determine the real value of the goods with the Customs Officers and if such jurisdiction is duly used in appropriate conformity with the statutory provision, this Court will not be justified to sit over such act as a Court of appeal or reinvestigate the case.

43. There is, in my view, no illegality in the notices as impeached, but it cannot be doubted, that there was violation of principles of natural justice as the samples as examined, were drawn behind the back of the petitioners and that apart, the taking into account of the analyst's report, without any copy to the petitioners or any opportunities to them, in either to meet or contradict the same, was not only improper but that also constituted infraction of the principles of natural justice and fairness in act on, which was expected of the authorities concerned in this case. I have recorded and indicated of the character of the authorities concerned in this case and thus the necessary pre-requisites they are to follow in a proceeding like this earlier and such being the position, if not on other grounds as claimed, the rule should at least on the ground of violation of principles of natural justice or for not following them and thus, for lack of fairness in action of the authorities concerned, may succeed. Such shortfalls or shortcomings in the case would take the same out of the mischief of the determinations in *Baroness Wilhelmine von Maltazan v. Collector of Customs* AIR 1958 AP 122 as cited by Mr. Sen in support of his contentions that this court should not interfere when there is a case for discretion and there is nothing on record to establish that such discretion has not been duly exercised or has been exercised illegally, irregularly and unauthorisedly. In a case of admitted requirements of the principles of natural justice, as in this case, discretion in my view, will have no application.

44. Such and above being the position, nullity can be said to have crept in the proceedings from the initial stage and the same could have been cured. But, since such defect was not appropriately cured upto the stage of the appeal, the order as made there and so also the subsequent steps or actions as taken on that basis cannot also be sustained.

45. It should also be noted that Section 189 of the said 1878 Act contemplates deposit in the hands of the Customs Collector at the port where the dispute

arises, the amount demanded by the officer passing the impugned decision or order, when the appeal relates to any duty or penalty liable to be paid in respect of the goods. Such deposit is a condition precedent for maintaining an appeal and for the failure to comply with such requirement, the appellant will certainly run the risk of dismissal of the appeal. But, these provisions or requirements cannot be expected to be complied with or such non-compliance, will not be a bar, when the original order itself, is a nullity, as in this case. Even if the appeal has been dismissed in this case, for non-compliance with the requirements of the deposits as mentioned above, such inaction on the part of the petitioners would not disentitle them to the reliefs in this case, as the initial order, for the reasons as indicated, was a nullity or void ab initio. I must also hold that in view of the fact that notices as indicated hereinbefore, were served on the said company, here at Calcutta, this Court will have jurisdiction to entertain this proceeding. I am also of the view that there would not have been any difficulty in transmitting the certificate for execution to the Certificate Officer, in case the order as impeached, was a proper one or could be sustained.

46. Above being the position and my findings, the rule is made absolute on the grounds as indicated. There will be no order as to costs. The respondents, if they so intend or if they are so advised, may proceed in the matter afresh and complete the proceedings in accordance with law.