

(2010) 07 GUJ CK 0079
In the Gujarat High Court

Case No : Letters Patent Appeal No. 256 of 2010 in Special Civil Application No. 12964 of 2009 and LPA No's. 312, 313, 315, 319, 316, 317, 314 and 318 of 2010 and SCA No's. 504 of 2008, 13004, 13003, 13342, 13341, 13343, 13005, 13344 and 13345 of 2009 and CA No"

Union of India (UOI)

APPELLANT

Vs

Oswal Agricomm Pvt. Ltd.

RESPONDENT

Date of Decision : 06-07-2010

Acts Referred:

Customs Act, 1962 — Section 108, 111, 112, 113, 114
Environment (Protection) Act, 1986 — Section 25, 6, 8
Foreign Trade (Development and Regulation) Act, 1992 — Section 5
Hazardous Wastes (Management and Handling) Rules, 1989 — Rule 3(1)
Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008 — Rule 12, 13, 14, 16
Special Economic Zones Act, 2005 — Section 1, 10, 11, 12, 13
Special Economic Zones Rules, 2003 — Rule 28
Special Economic Zones Rules, 2006 — Rule 2

Citation : (2011) 268 ELT 21 : (2010) 3 GLH 765

Hon'ble Judges : S.J. Mukhopadhaya, C.J.; Akil Kureshi, J

Bench : Division Bench

Advocate : P.S. Champaneri, ASG, for the Appellant; P.M. Thakkar and Navin K. Pahwa, for the Respondent

Judgement

S.J. Mukhopadhaya, C.J.—The Petitioners of all the original petitions challenge the action of the Customs Officials of Customs Stations at Kandla and Mundra in seizing and detaining the containers imported on behalf of the Petitioners in the Kandla Special Economic Zone ("Kandla SEZ" for short) having served with the notices u/s 124 of the Customs Act, 1962 seeking to take action for alleged breach of the Import Policy. Such notices have also been challenged on the ground that the authority had no jurisdiction.

2. Some of the writ petitions having allowed, the Union of India preferred Letters Patent Appeals challenging the common judgment asserting the right of the

Customs Officials to take action against the writ Petitioners situated within the Kandla SEZ.

3. The Petitioners are permitted to import plastic waste and scrap under the Letter of Approval granted by the competent authority pursuant to the Import Policy made by the Government of India under Public Notice No. 392(PN)/92-97 dated 1-1-1997. The said Policy was announced as per Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (hereinafter referred to as "the FTDR Act"). The Petitioners while importing plastic waste and scrap, many of their consignments were seized. That was the stage when the Petitioners, being situated within the Kandla SEZ, Gandhidham, Kutch and imports having made within the said zone, raised the question of jurisdiction of the Customs Officials in seizing their goods and having served with the notices u/s 124 of the Customs Act, 1962, such notices have also been challenged.

4. In most of the cases, it is alleged that the imported goods pertaining to particular bills were examined at Mundra International Container Terminal, MP & SEZ, Mundra in presence of independent panchas. They were examined in the chemical laboratory and they were found to be wastes of plastics or polythene packing material of different types and sizes and used in packing of various articles; many of which were dirty; many of whom were found to have markings/logo of different brands/Companies; waste pieces were torn and thus hazardous wastes have been imported alongwith plastic scrap.

5. The learned Counsel appearing on behalf of the Petitioners would contend that the FTDR Act, a Central Act, is a complete code by itself. The said Act provides for consequences of breach of the Policy by an importer and also provides for the adjudicatory mechanism. The Director General of Foreign Trade is the adjudicating authority. The Import Policy, also known as Foreign Trade Policy, is defined under Rule 2(o) of the Special Economic Zone Rules, 2006. Rule 2(q) defines "Handbook", which means Handbook of Procedures framed under the Foreign Trade Policy. The Import Policy, which is a statutory policy, is binding on all concerned. Under the said Policy, a complete mechanism of import of plastic waste/scrap has been provided. Under Clause (vii), the customs authority is required to draw representative samples from the consignments and send the same to the nearest laboratory/office of the Central Institute of Plastic Engineering & Technology (CIPET) and verify whether such imported consignment is in conformity with the Import Policy.

6. The learned Counsel for the Petitioners would further contend that the Central Government by notification dated 13-1-2010 has provided that the offences covered under the FTDR Act shall be the "notified offences" u/s 21(1) of the Special Economic Zones Act, 2005 (hereinafter referred to as "the SEZ Act, 2005") and the Development Commissioner of the concerned zone shall be the Enforcement Officer u/s 21(2) of the said Act. Accordingly, with effect from 31-1-2010, the Development Commissioner of the concerned zone, which in the present case is Kandla SEZ, is the competent authority to take any action in the

case of the alleged violation of the Import Policy and Public Notice No. 392(PN)/92-97 dated 1-1-1997 and since then the customs authorities under the Customs Act, 1962 have no jurisdiction to seize the consignment nor have the jurisdiction to issue notice u/s 124 of the Customs Act.

7. The learned senior counsel for the Petitioners while brought to the notice of the Court the changes brought in the Customs Act, 1962 by Finance Act, 2002 with effect from 13-5-2002 by introducing Chapter X-A in the Customs Act dealing exclusively with the SE Zs, would contend that the major implication of the aforesaid change was that the SEZ came to be treated as a different territory, outside the purview of the Customs Act. Subsequently, a self contained legislation i.e. Special Economic Zones Act, 2005, having come into force with effect from 10-2-2006, the Special Act will prevail over the matter.

He would contend that u/s 52 of the SEZ Act, 2005, Chapter X-A of the Customs Act, 1962, Special Economic Zones Rules, 2003 and Special Economic Zones (Customs Procedure) Regulations, 2003 shall not apply to the SEZs. In furtherance to the same, by notification No. SO 320(E) dated 14-3-2006, the provisions of Chapter X-A have been made inapplicable to the SEZs. Only the offences committed before the commencement of the said Act may continue under the provisions of the Customs Act, 1962 or the Special Economic Zones Rules, 2003 or the Special Economic Zones (Customs Procedure) Regulations, 2003 in view of the protection made under Sub-section (2) of Section 52 of the SEZ Act, 2005. Similarly, under Sub-section (3) of Section 52, anything done or any action taken or purported to have been taken shall be deemed to have been done or taken under the earlier provisions of the Customs Act, 1962. This very aspect establishes the fact that the provisions of the Customs Act, 1962 are not applicable to the SE Zs.

8. Referring to Section 53 of the SEZ Act, 2005, the learned senior counsel for the Petitioners would contend that the SEZ is deemed to be a territory outside the customs territory of India for the purpose of undertaking the authorized operation. Therefore, there would not be any question of applicability of the Customs Act, 1962 to the SE Zs, since the Customs Act, 1962 is not applicable to the exports being effected from the units located in a territory outside the customs territory of India. He would further contend that the SEZ Act, 2005 has the overriding effect of the Customs Act, 1962 in view of Section 51 of the said Act, in case of inconsistency between the same. There being inconsistency in the present case, the SEZ Act, 2005 will be applicable over the Customs Act, 1962.

9. On factual aspect, it was brought to the notice of the Court that the Customs Officials at the transit ports, who are under the office of the Commissioner of Customs at Kandla/Mundra SEZ, started taking impugned action of seizure/detention of containers imported by the Petitioners in Kandla SEZ, since July, 2009; the representative samples were drawn by these officers and were sent to the CIPET, Ahmedabad, which is the nearest CIPET laboratory. This was done as per Clause (vii) of the Public Notice No. 392(PN)/92-97 dated 1-1-1997. The

CIPET, after examination of the samples, submitted reports and found all the containers to be positive. In spite of the fact that the samples were found to be in conformity with the Import Policy, it appears that the Customs Officials sent another set of samples to the CIPET, Chennai. Second time, the samples sent to the CIPET, Chennai were also found to be in conformity with the Import Policy.

10. The learned Counsel for the Petitioners would contend that the Customs Officials, thereafter with the sole object of harassing the Petitioners, have sent the samples to the Customs House Laboratory, Kandla and obtained some sort of report purported to be against the Petitioners.

11. The learned Counsel for the Petitioners would contend that as per the Import Policy, which is statutory, the CIPET, being the designated laboratory, is competent to make examination and submit report. It is not open for the Customs Officials to obtain report from any other laboratory including their In-house Laboratory for taking any action against the Petitioners based on such report of the recognized laboratory. It is only on the basis of the report of the so-called In-house Laboratory, the officials of the Customs at Kandla/Mundra have rendered all the units of the Kandla SEZ as un-operational. Several representations between July and December, 2009 to various authorities were forwarded with a request to interfere in the matter and to take steps to enable the industries in the Kandla SEZ to resume their operations, but no action having taken, the writ petitions were preferred.

12. The Respondent-Deputy Commissioner of Customs, SEZ, under the authority of Ministry of Commerce & Industry, Department of Commerce, SEZ Division, has filed a detailed affidavit in reply in Special Civil Application No. 12964 of 2009 and detailed the complete procedure of import of plastic scrap/waste as per the Import Policy. This authority has in terms confirmed what the Petitioners have been urging. The authority has in terms stated that the Customs Officials situated in the zone are the competent customs authorities for the purpose of imports in the Kandla SEZ and that the competent authority is CIPET which has submitted no adverse reports against the Petitioners. The Joint Development Commissioner, Kandla SEZ has taken similar view as that of the Ministry of Commerce in the aforesaid SCA No. 12964 of 2009.

13. The Union of India, Ministry of Finance (original 2nd Respondent) while accepted that the Petitioner-units are located in the Kandla SEZ, had taken a specific plea that the Petitioners are engaged in the business of re-cycling of plastic scrap into plastic granules and agglomerates agro products in their respective units. According to the Union of India, in relation to import of plastic waste, the Director General of Foreign Trade issued Public Notice No. 392/97 dated 1-1-1997 empowering import of plastic waste scrap (except PET bottle waste/scrap) only against license. The definition of plastic waste/scrap has been shown at Clause I(i) and is permitted to import in different forms like compressed film in cut condition, cut tape soft waste, flakes, order, pieces of irregular shape (not exceeding the size of 3" x 3")- Any other category of plastic scrap/waste not

shown in the description/definition are not permitted to be imported. Such plastic scrap/waste conforming to the description are permitted to be imported only by the actual users who have the required facility for re-cycling such a scrap/waste and who are duly registered with the competent State/Central authority and also possess pollution clearance certificate from the concerned State Pollution Control Board where the unit is located as well as the capacity assessment certificate. Under the aforesaid Clause I(i), the plastic scrap/waste imported against an import license should accompany with a certificate from the factory in which it is generated to the effect that it confirms to the description/definition as shown in the aforesaid Clause. The importers of the plastic scrap/waste are required to furnish a declaration to the customs authorities at the time of clearance of the goods certifying that the plastic scrap/waste imported by them for which clearance is being sought, strictly confirmed to the description/definition shown in the aforesaid Clause and that such item is free from any kind of toxic/non-toxic contamination and has not been put to any previous use whatsoever. Before clearance of the plastic scrap/waste, all imported consignments of such plastic scrap/waste are subjected to scrutiny and testing of samples. The customs authorities for the said purpose draw a sample and send the same to the nearest laboratory/office of the Central Institute of Plastic Engineering & Technology with a view to having the same analyzed and verified that such imported consignments are in conformity with the description/definition as given under the said Clause.

14. Mr. P.S. Champaneri, learned Assistant Solicitor General, referring to the Special Economic Zones Act, 2005, would submit that the said Act has been given effect vide notification dated 10-2-2006, but by the said notification Sections 1 to 19, 25 to 30 and 42 to 58 were made operative and other Sections were not made operative. As all the provisions of the Special Economic Zones Act, 2005 were not made operative, in the further clarification dated 3-8-2006 in respect of the provisions which have not been operationalized by the notification came to be issued by the Government of India, Ministry of Commerce & Industry, Department of Commerce (SEZ Section). According to the learned Counsel for the Appellant-Union of India, as per the Hazardous Wastes (Management, Handling & Transboundary Movement) Rules, 2008 (hereinafter referred to as "the Hazardous Wastes Rules of 2008"), import of plastic scrap is listed in Schedule-III (Part B), Basel No. 3010. The said list is based on Annexure-II of the Basel Convention on Transboundary Movement of Hazardous Wastes and comprises of wastes not characterized as hazardous under Article I of the Basel Convention. As per Clause (5) of Rule 16, "the Port and Customs authorities shall ensure that shipment is accompanied by the movement document in Form-9 and the test report of analysis of hazardous waste consignment in question, from a laboratory accredited by the exporting country". As per Clause (6) of the said Rule 16, "the customs authority shall collect three randomly drawn sample of the consignment (prior to clearing the consignment as per the provisions laid down under the Customs Act, 1962) for analysis and retain the report for a period of

two years, in order to ensure that in the event of any dispute, as to whether the consignment conforms or not to the declaration made in the application and movement document".

15. It was further contended that as per Clause (5) of Rule 28 of the SEZ Rules, 2003, the goods imported by the unit or developer shall be allowed to be transferred from the port or airport to the Special Economic Zone without examination by the customs authority at the port or airport, as the case may be, provided the goods may be examined with prior permission of the Assistant or Deputy Commissioner of Customs in writing in case there is specific adverse information or intelligence.

The customs authorities at the Port had an intelligence, on the basis of which the customs authorities inspected, verified, took the samples of imported goods of the respective Petitioners under a proper panchnama pertaining to Bill of Entry and effected seizure under reasonable belief that the same is liable for confiscation under the Customs Act, 1962.

16. Referring to the Supreme Court's order dated 24-9-2003 in W.P. No. 657 of 1995 in Research Foundation for Science Technology and National Resource Policy v. Union of India, relating to import of hazardous waste, allowing a time period of 12 months for up gradation of Customs Laboratory at gateway ports as well as posting of manned staff for testing of potentially hazardous wastes and recyclables, it was contended that in compliance of the said direction of the Supreme Court, the Customs House Laboratory, Kandla has been upgraded with advanced analytical equipments for testing of potentially hazardous waste samples installed in the years 2005 and 2006 and necessary fund allocation has also been made as communicated by the Commissioner of Customs, Kandla vide letter dated 21-11-2007. After such installation of equipments and operationalization thereof the Customs House Laboratory, Kandla vide their letter dated 14-4-2008 has informed all the field formation/ports at Kandla/Mundra/Jamna-gar/Pipavav/Bhavnagar for testing of, such samples of potentially hazardous waste in their laboratory at Kandla. During the investigation it was found that earlier all such samples of plastic waste were being tested by the officers of the Kandla SEZ at CIPET, Ahmedabad, which had formed different adverse reports stating the samples as consumer domestic wastes, even though at the same time reporting the sample as of virgin category, which is found to be contradictory. According to the Appellant-Union of India, the CIPET, Ahmedabad during testing of such samples has failed to understand that as per Public Notice No. 392/97 dated 1-1-1997, only plastic scarp/waste generated by various plastic processing operations or fractions generated in the production process of plastic in a plant, which have not been put to any use whatsoever and can be termed as virgin or new material are allowed import. The importer-Petitioners were called for recording their statements and production of the document by different summons issued in October, 2008 u/s 108 of the Customs Act, 1962. Statements of the authorized persons of the respective Petitioners were recorded

and during the statement they have admitted that they have imported plastic scrap/waste containing stickers, which are cut and the same are sent to Ahmedabad and Juna Kataria for burning and dumping. The officers of the 3rd and 4th Respondents had collected samples from the Petitioner-units in Kandla SEZ and their statements were recorded u/s 108 of the Customs Act. During their statements, they have admitted that they have only verified the mark numbers and seal of the containers as per the order of the Appraiser and were not aware of the Import Policy for plastic scrap and the provisions of the Hazardous Wastes Rules, 2008 pertaining to import of plastic scrap. The plastic scraps/wastes were examined in the laboratory of the customs authority situated within Kandla SEZ and having not found in conformity with the Acts and the Rules, show cause notices have been issued on different Petitioners u/s 124 of the Customs Act, 1962 read with Hazardous Wastes Rules, 2008.

17. The learned Counsel for the Appellant would contend that merely on the basis of the observations made by this Court in its interim order passed in SCA No. 504 of 2008; Bharti J. Gandhi Vs. Union of India (UOI), the learned Single Judge held that the Appellant had no authority to issue show cause notice as the authority under the Customs Act does not figure anywhere in the provisions of the SEZ Act, 2005 and thereby has erred in passing the impugned order.

18. The questions required for determination in this case are -

1. Whether the customs authorities have jurisdiction to issue any notice or to take any penal u/s 111, Section 113 and Section 114 read with Section 124 of the Customs Act, 1962 against any unit situated within the Special Economic Zone.

2. Whether the report submitted by the Customs House Laboratory, Kandla will prevail over the report submitted by the Central Institute of Plastic Engineering & Technology (CIPET), Ahmedabad and Chennai.

19. The Customs Act, 1962 was brought into force with effect from 1-2-1963 all over India. In the said Act, Chapter X-A was inserted with effect from 1-4-2004 vide Notification No. 43/2003 -Cus. (NT.), dated 22-7-2003, etc. whereby special provisions relating to Special Economic Zones were inserted. u/s 76A, while the Central Government was empowered to notify and specify Special Economic Zones comprising specifically delineated areas where any goods admitted shall be regarded, in so far as duties of customs are concerned, as being outside the customs territory of India as provided under the said Chapter, u/s 76B, the provisions of the said Chapter X-A and other Chapters are to apply to the goods admitted to a Special Economic Zone, but in the event of conflict between the provisions of Chapter X-A and other Chapters, the provisions of Chapter X-A were to prevail. Section 76-C while empowered the Central Government to make Rules specifying the requirements relating to goods or class of goods admissible to a Special Economic Zone, etc., u/s 76D, any goods imported directly from outside India or procured from within India were to be authorized for admission to a

Special Economic Zone. Section 76E while empowered exemption of duties of customs to any goods admitted to the Special Economic Zone, Section 76F empowered to levy duty of customs to any goods admitted to the Special Economic Zone. Section 76G while dealt with "authorized operation" including processing or manufacturing as may be specified in the Rules, Section 76H relates to goods utilized within the Special Economic Zone. The other provisions have been made under Sections 76-1 to 76N of the said Act.

20. The Special Economic Zones Act, 2005 was notified on 23-6-2005. By Notification No. SO 195(E), dated 10-2-2006, the provisions of Sections 1 to 19, 25 to 32 and 42 to 58 were given effect from 10-2-2006. Sections 31 to 41 came into force on 1-10-2008 vide Notification No. SO 2320 (E), dated 1-10-2008.

Under Section 51 of the SEZ Act, 2005, as it was stipulated that the provisions of the said Act shall have the effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force, and similar provisions like Chapter X-A of the Customs Act, 1962 were promulgated, the said Chapter X-A containing Sections 76A to 76N was omitted by Act 22 of 2007, Section 99, with effect from 11-5-2007.

21. We have noticed that u/s 51 of the SEZ Act, 2005, the provisions of the SEZ Act shall have the effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than the said Act.

22. u/s 52, certain provisions are not to apply. The learned Counsel for the Petitioners and the learned Single Judge having given much stress on this provision, it is necessary to notice the said provisions as quoted hereunder:

52. Certain provisions not to apply. - (1) The provisions contained in the Chapter XA of the Customs Act, 1962 (52 of 1962) and the Special Economic Zones Rules, 2003 and the Special Economic Zones (Customs Procedure) Regulations, 2003 made thereunder shall not, with effect from such date as the Central Government by notification appoint, apply to the Special Economic Zones.

(2) Notwithstanding anything contained in Sub-section (1), all offences committed, before the commencement of this Act, under any provisions of the Customs Act, 1962 (52 of 1962) and the Special Economic Zones Rules, 2003 and the Special Economic Zones (Customs Procedure) Regulations, 2003 made thereunder, shall continue to be governed by the said Act or rules, as the case may be.

(3) Anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any permission or authorization or exemption granted or any document or instrument executed under the said provisions of the Act, rules and regulations referred to in Sub-section (1) shall, in so far as they are not inconsistent with the provisions of this Act, be deemed to have been done or taken or made or issue or granted

under the corresponding provisions of the Act or rules or regulations referred to in that Sub-section.

23. Chapter X-A of the Customs Act, 1962 has been omitted with effect from 11-5-2007. Therefore, the question of application of the said provisions does not arise, particularly in these cases where actions have been taken and imports having made after 11-5-2007. As per Section 52, the Special Economic Zones Rules, 2003 and the Special Economic Zones (Customs Procedure) Regulations, 2003 made under the Customs Act, 1962 shall not apply with effect from such date, as the Central Government by notification appoint, to Special Economic Zones.

The Kandla SEZ having notified as a Special Economic Zone-Port u/s 53, vide Central Government SO No. 319(E) dated 14-3-2006, Kandla SEZ, Gandhidham shall be deemed to be a territory outside the customs territory of India for the purpose of undertaking authorized operation. Said Kandla SEZ, in view of such notification dated 14-3-2006 issued by the Central Government, shall be deemed to a Port u/s 7 of the Customs Act, 1962.

24. "Authorized operation" has been defined u/s 2(c) of the SEZ Act, 2005 which means operation which may be authorized under Sub-section (2) of Section 4 and Sub-section (9) of Section 15 of the said Act. Sub-section (2) of Section 4 of the SEZ Act, 2005 stipulated as follows:

4. Establishment of Special Economic Zone and approval and authorization to operate to, Developer. -(2) After the appointed day, the Board may, authorize the Developer to undertake in a Special Economic Zone, such operations which the Central Government may authorize.

Similarly, under Sub-section (9) of Section 15 of the SEZ Act, 2005, the following provisions have been made:

15. Setting up of Unit. -(9) The Development Commissioner may, after approval of the proposal referred to in Sub-section (3), grant a letter of approval to the person concerned to set up a Unit and undertake such operations which the Development Commissioner may authorize and every such operation so authorized shall be mentioned in the letter of approval.

25. From the aforesaid provisions, it will be evident that after the appointed day, i.e. 14-3-2006, (i) it is the Board which may authorize the developer to undertake in Kandla SEZ such operation which the Central Government may authorize and (ii) the Development Commissioner may grant a letter of approval to the person concerned to set up a unit and undertake such operation which the Development Commissioner may authorize and every such operation so authorized shall be mentioned in the letter of approval. The customs authority has no such power either to authorize the developer to undertake any operation in the Special Economic Zone nor they have any power to approve any proposal to set up a unit or to undertake any operation within the Special Economic Zone.

But that is not the question involved in the present case.

We have noticed that the question involved is whether the custom authorities have power to take penal action under Sections 111, 113 and 114 of the Customs Act and thereby power to issue notice u/s 124 of the said Act.

Section 20 of the SEZ Act, 2005 relates to a agency which may carry out survey or inspection for securing compliance with the provisions of any Central Act by a developer or entrepreneur within the Special Economic Zone. u/s 21 of the SEZ Act, 2005, the Central Government by notification may specify any act or omission made punishable under any Central Act and for that may authorize any officer or agency to be "Enforcement Officer" or "Agency" in respect of any notified offence committed in a Special Economic Zone. u/s 22, the agency or the officer so specified u/s 20 or Section 21 may make investigation and inspection in a Special Economic Zone with prior intimation to the Development Commissioner. All the aforesaid provisions being relevant are quoted hereunder:

20. Agency to inspect. - Notwithstanding anything contained in any other law for the time being in force, the Central Government may, by notification, specify any officer or agency to carry out surveys or inspections for securing of compliance with the provisions of any Central Act by a Developer or an entrepreneur, as the case may be, and such officer or agency shall submit verification and compliance reports, in such manner and within such time as may be specified in the said notification.

21. Single enforcement officer or agency for notified offences. - (1) The Central Government may, by notification, specify any act or omission made punishable under any Central Act, as notified offence for the purposes of this Act.

(2) The Central Government may, by general or special order, authorize any officer or agency to be the enforcement officer or agency in respect of any notified offence or offences committed in a Special Economic Zone.

(3) Every officer or agency authorized under Sub-section (2) shall have all the corresponding powers of investigation, inspection, search or seizure as is provided under the relevant Central Act in respect of the notified offences.

22. Investigation, inspection and search or seizure. - The agency or officer, specified u/s 20 or Section 21, may, with prior intimation to the Development Commissioner concerned, carry out the investigation, inspection and search or seizure in the Special Economic Zone or in a Unit if such agency or officer has reasons to believe (reasons to be recorded in writing) that a notified offence has been committed or is likely to be committed in the Special Economic Zone:

Provided that no investigation, inspection and search or seizure shall be carried out in a Special Economic Zone by any agency or officer other than those referred to in Sub-section (2) or Sub-section (3) of Section 21 without prior approval of the Development Commissioner concerned.

Provided further that any officer or agency, if so authorized by the Central Government, may carry out the investigation, inspection and search or seizure in the Special Economic Zone or Unit without prior intimation or approval of the Development Commissioner.

26. As on the date, the seizure was made by the Appellant-Union of India through its Customs officials, Sections 20 to 23 of the SEZ Act, 2005 had not been given effect. This was a specific plea taken by the Union of India and not denied by the Respondent-writ Petitioners. It is only after filing of the writ petitions, the Central Government from its Ministry of Commerce & Industry (Department of Commerce) vide notification No. SO 75 (E) dated 13-1-2010 appointed "13-1-2010" as the date on which Sections 20, 21 and 22 of the SEZ Act, 2005 have been given effect, as quoted hereunder:

SO 75(E). In exercise of the powers conferred by Sub-section (3) of Section 1 of the Special Economic Zones Act, 2005, (28 of 2005), the Central Government hereby appoints the 13th January, 2010 as the date on which Sections 20, 21 and 22 of the said Act shall come into force.

By another notification No. SO 76 (E) dated 13-1-2010, the Central Government from its Ministry of Commerce & Industry (Department of Commerce) in exercise of the powers conferred by Sub-section (1) of Section 21 of the SEZ Act, 2005 specified the acts or omissions punishable under the Foreign Trade (Development and Regulation) Act, 1992 as notified offences for the purposes of the Special Economic Zones Act, 2005, as quoted hereunder:

SO 76(E). In exercise of the powers conferred by Sub-section (1) of Section 21 of the Special Economic Zones Act, 2005 (28 of 2005), the Central Government hereby specifies the acts or omissions punishable under the Foreign Trade (Development and Regulation) Act, 1992 (28 of 2005) as notified offences for the purposes of the Special Economic Zones Act, 2005.

By third notification No. SO 77 (E) dated 13-1-2010, in exercise of powers conferred under Sub-section (2) of Section 21 of the SEZ Act, 2005, the Central Government authorized the Development Commissioner of the jurisdictional Special Economic Zone to be the Enforcement Officer in respect of the notified offences committed in a Special Economic Zone. The relevant portion of the notification is quoted hereunder:

SO 77(E). Whereas the Central Government, in exercise of the powers conferred by Sub-section (1) of Section 21 of the Special Economic Zones Act, 2005, (28 of 2005), has specified the acts or omissions punishable under the Foreign Trade (Development and Regulation) Act, 1992 (28 of 2005) as notified offences for the purposes of the Special Economic Zones Act, 2005 (28 of 2005);

Now, therefore, in exercise of the powers conferred under Sub-section (2) of Section 21 of the Special Economic Zones Act, 2005 (28 of 2005), the Central Government hereby authorizes the Development Commissioner of the

jurisdictional Special Economic Zone to be the enforcement officer in respect of the notified offences committed in a Special Economic Zone.

27. From the aforesaid notifications, while it will be evident that the offence under the Foreign Trade (Development and Regulation) Act, 1992 has been notified as "notified offence" under Sub-section (1) of Section 21 and for that purpose the Development Commissioner of the jurisdictional Special Economic Zone has been made "Enforcement Officer" under Sub-section (2) of Section 21, no offences punishable under other Central Act viz. the "Customs Act, 1962" or "the Hazardous Wastes (Management, Handling & Transboundary Movement) Rules, 2008" have been notified either as "notified offence" nor any officer or agency has been notified as "Enforcement officer" or "Agency" in respect of such other offence or offences committed in a Special Economic Zone.

28. The Hazardous Wastes Rules, 2008 have been framed in exercise of the powers conferred under Sections 6, 8 and 25 of the Environment (Protection) Act, 1986 by superseding the earlier Hazardous Wastes Rules, 1989. "Hazardous waste" has been defined under Rule 3(1) and "waste" has been notified in the Schedule thereto, as evident from the Rule aforesaid and quoted hereunder:

3. Definitions. - In these rules, unless the context otherwise requires, -

12. "hazardous waste" means any waste which by reason of any of its physical, chemical, reactive, toxic, flammable, explosive or corrosive characteristics causes danger or is likely to cause danger to health or environment, whether alone or when in contact with other wastes or substances, and shall include-i. waste specified under column (3) of Schedule I, ii. wastes having constituents specified in Schedule II if their concentration is equal to or more than the limit indicated in the said Schedule, and iii. wastes specified in Part A or Part B of the Schedule III in respect of import or export of such wastes in accordance with Rules 12,13 and 14 or the wastes other than those specified in Part A or Part B if they possess any of the hazardous characteristics specified in Part C of that Schedule;

Part B of Schedule III of Hazardous Wastes Rules, 2008 contains "List of Hazardous Wastes applicable for import and export not requiring prior informed consent". Basel No. B3010 deals with solid plastic waste, relevant portion of which is quoted hereunder:

PARTB LIST OF HAZARDOUS WASTES APPLICABLE FOR IMPORT AND EXPORT NOT REQUIRING PRIOR INFORMED CONSENT (Annexure IX of the Basel Convention)

Basel No. Description of Wastes

B3 Wastes containing principally organic constituents, which may contain metals and inorganic materials

B3010 Solid plastic waste:

The following plastic or mixed plastic waste, provided they are not mixed with

other wastes and are prepared to a specification:

- Scrap plastic of non-halogenated polymers and copolymers, including by not limited to the following:

Ethylene

Styrene

Polypropylene

Polyethylene terephthalate

Acrylonitrile

Butadiene

Polyacetals

Polyamides

Polybutylene tere-phthalate

Polycarbonates

Polyethers

Polyphenylene sulphides

Acrylic polymers

Alkanes C10-C13 (plasticizer)

Polyurethana (not containing CF Cs

Polysiloxanes

Polymethyl methacrylate

Polyvinyl alcohol

Polyvinyl butyral

Polyvinyl acetate

- Cured waste resins or condensation products including the following:

urea formaldehyde resins

phenol formaldehyde resins

melamine formaldehyde resins

epoxy resins

alkyd resins

polyamides

- The following fluorinated polymer wastes (excluding post-consumer wastes):

Perfluoroethylene / propylene

Perfluoroalkoxy alkane

Metafluoroalkoxy alkane

polyvinyl fluoride

polyvinylidene fluoride

29. In this case, the parties are concerned with the solid plastic waste as shown in Basel No. B 3010, which has admittedly been imported without prior consent, but the plastic or mixed plastic waste alleged to be mixed with other wastes and are prepared to a specification, as shown in the Basel aforesaid.

30. Chapter XIV of the Customs Act, 1962 deals with "confiscation of goods and conveyances and imposition of penalties". u/s 111 of the Customs Act, confiscation of improperly imported goods, etc. is permissible including any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under the Customs Act or any other law for the time being in force [Sub-section (d) of Section 111]. u/s 112, the authorities are empowered to impose penalty for "improper importation" of goods, etc. u/s 113, confiscation of goods attempted to be "improperly exported" is permissible, whereas the customs authorities are being empowered for imposing penalty for the goods "improperly exported" u/s 114.

No order confiscating any goods or imposing any penalty on any person can be made under the aforesaid Chapter XIV unless the owner of the goods or such person is served with a show cause notice before confiscation of the goods u/s 124 of the Customs Act.

31. In the present case, while notice u/s 124 has been issued in most of the cases, violations of Sections 111(d), 112, 113(d)(i) and 114(ii) of the Customs Act have been alleged.

32. We have noticed that except the acts or omissions punishable under the Foreign Trade (Development and Regulation) Act, 1992, no other offence including the offence if any committed under the Customs Act or any other Central Act have been declared as "notified offence" under Sub-section (1) of Section 21. Similarly, no officer or agency has been declared as "Enforcement officer" or "Agency" under Sub-section (2) of Section 21 of the SEZ Act, 2005 for the purpose of the Customs Act or any other Central Act.

33. We have also notified that Section 53 of the SEZ Act has been given effect in regard to Kandla SEZ, Gandhidham with effect from 14-3-2006. From the date of such notification, the Kandla SEZ, Gandhidham is deemed to be a territory outside the customs territory only for the purpose of undertaking the "authorized

operation". That means the customs authority, who were empowered u/s 76G (repealed since 11-5-2007), has no power to authorise any developer to undertake any operation in the Special Economic Zone nor has the power to approve any proposal for setting up any unit within the Kandla SEZ.

34. But Section 53 being limited to that extent of "authorized officer", who was earlier empowered to perform certain jobs under Chapter XA, the power of the Customs authorities under the Customs Act, including the power to confiscate and impose penalty under Sections 111 to 114, as enumerated in Chapter XIV of the Customs Act, is not taken away.

35. Thus, we hold that the competent authorities under the Customs Act are still empowered to confiscate any goods under Sections 111 and 112 and impose penalty under Sections 113 and 114, in appropriate case, even with regard to the units situated within the Special Economic Zone. The competent authorities are also empowered to take penal action under any other Central Act, if such violation is found to have been committed by any or other unit of SEZ including the writ Petitioners, with regard to which no notification has been issued either under Sub-section (1) or Sub-section (2) of Section 21 or Sub-section (1) or Sub-section (2) of Section 22 of the SEZ Act, 2005.

36. The first question is thereby answered in affirmative in favour of the Appellant and against the Respondent-writ Petitioners. For the same very reason, we hold that the learned Single Judge erred in coming to the conclusion that the customs authority had no jurisdiction to seize the goods for alleged violation of the Central Act.

37. The next question is whether the report submitted by the Customs House Laboratory, Kandla has any overriding effect on the report submitted by the CIPET, Ahmedabad and Chennai.

38. It is not in dispute that the import of plastic scrap is governed by Public Notice No. 392 (PN)/92-97 dated 1-1-1997 issued by the Union of India from its Ministry of Commerce. In the said notice, giving reference to the Handbook of Procedure (I) 1992-97 which relates to all types of plastic waste/scrap (except PET bottle waste /scrap) and animal dung or animal excreta, while it was reminded that the import of the same should not be permitted except license, for grant of licenses for the import of plastic waste, certain conditions were specified by the Central Government. While the provisions were made to accompany certain certificates for import of plastic scrap/waste against an import license, it was suggested to have test of samples of such imported consignment of plastic scrap/waste through the nearest institute and laboratory. The relevant portion of the notification dated 1-1-1997 is quoted hereunder:

(vi) Each consignment of plastic scrap/waste imported against an Import License issued in this regard shall be accompanied with a certificate from the factory in which it is generated to the effect that it confirms that to the description/definition as given in the sub-paragraph (i) above. The imported of the plastic

scrap/waste would also required to furnish a declaration to the customs authorities at the time of clearance of goods certifying that the plastic scrap/waste imported by him and for which clearance is being sought strictly confirmed to the description/definition as given in the sub-para (i) and (ii) above and that it is free from any kind of toxic/non-toxic contamination and has not been put to any previous use whatsoever.

(vii) Before the clearance of the plastic waste/scrap, all imported consignments of such plastic scrap/waste shall be subjected to scrutiny and testing of sample. Custom authority shall for this purpose draw a sample and send the same to the nearest laboratory/office of the central institute of plastic engineering and technology (CIPET) with a view to having same analyzed and verified that such imported consignment are in conformity with the description/definition as given in para (i) and (ii) above.

(ix) In case of mis-declaration regarding the material being free from any toxic/hazardous substance by the importer, action as per laws of Ministry of Environment and Forests applicable under the Environment (Protection) Act for committing offences leading to damage of environment and increase in pollution in country as and modified in force from time to time would be taken by the competent authority. For any other mis-declaration, the law formulated by the Directorate of Foreign Trade, in force from time to time also apply and action as per Foreign Trade (Development and Regulation) Act, 1992 shall be initiated by the competent authority.

39. In the present case, it appears that after the seizure of the imported consignments of the Petitioners, samples under the seal and signature were sent to CIPET, Ahmedabad. According to the writ Petitioners, which was not disputed by the Appellant-Union of India, the CIPET, Ahmedabad submitted its report in "positive" giving clearance in favour of the writ petitions that their materials are not hazardous wastes. The matters are stated to have sent to the CIPET, Chennai where the matters are either pending or favorable reports have been submitted in favour of the writ Petitioners. However, the samples were subsequently forwarded by the Customs department to its in-house laboratory viz. "Customs House Laboratory, Kandla". In their local in-house laboratory, after verification of the samples in the form of cut piece of colorless and transparent plastic film while it was reported that the same composed of "polyethylene", after physical and chemical examination of the sample, it has been opined that the "material appears to be street waste and does not confirm to the provisions of the Public Notice No. 392(PN)/92-97 dated 1-1-1997 of the DGFT". But total hazardous heavy metals in the composite sample stated to be available within the permissible limit. Based on the aforesaid report of the Customs House Laboratory, Kandla, confiscation has been made and notices have been issued u/s 124 of the Customs Act wherein while it was alleged that during examination, the sample was found to be waste of plastic, and does not confirm to the provisions of Public Notice No. 392(PN)/92-97, dated 1-1-1997, the Petitioners

have been asked to show cause as to why they may not be held liable for confiscation u/s 111(d) of the Customs Act, 1962 or not liable for penal action u/s 112(a) of the Customs Act, 1962. Similar notices have been issued under the provisions aforesaid.

40. The learned Counsel appearing on behalf of the writ Petitioners would contend that -(a) the report of the CIPET, Ahmedabad will prevail over the report submitted by the Customs House Laboratory, Kandla in view of the policy decision of the Central Government vide Public Notice No. 392 (PN)/92-97 dated 1-1-1997; and (b) the report of the Customs House Laboratory, Kandla is otherwise vague and not specific about any hazardous material and on the contrary it is accepted that heavy metals are within the permissible limit. It is further alleged that it is not scientific and based on assumption and not on the basis of any test.

41. Per contra, according to the counsel for the Appellant-Union of India, in view of the direction of the Supreme Court in *Research Foundation for Science Technology and National Resource Policy v. Union of India* (supra), Customs House Laboratory, Kandla has been upgraded; as per the policy decision No. 392 (PN)/92-97 dated 1-1-1997, the nearest laboratory being Customs House Laboratory, Kandla, the said report will prevail over the report by the CIPET, Ahmedabad.

42. We have also noticed Clause (vii) of Public Notice No. 392(PN)/92-97, dated 1-1-1997, which relates to clearance of imported plastic waste/scrap. Therein it has been specified that "the customs authority shall for this purpose draw a sample and send the same to the nearest laboratory/office of the Central Institute of Plastic Engineering & Technology (CIPET) with a view to having the same analyzed and verified that such imported consignment are in conformity with the description/definition as given in sub-para (i) and (ii) above". The guidelines being specific and unambiguous that "the sample should be sent to the nearest laboratory or office of the CIPET", we hold that the Appellant had no business to send the same sample to its own laboratory viz. Customs House Laboratory, Kandla, that too after obtaining the reports from CIPET, Ahmedabad.

43. It will be evident from the original action taken by the officials of the customs department that they properly understood Clause (vii) of the Public Notice No. 392(PN)/92-97, dated 1-1-1997 and, therefore, they drew the sample and sent such sample to the nearest laboratory at CIPET, Ahmedabad. Having received the report in favour of the writ Petitioners, as claimed by them, it is not clear as to why they again sent the same sample to CIPET, Chennai. Further, it has not been made clear that why without awaiting for the report of the CIPET, Chennai, they have forwarded another sample to its own laboratory and, leaving aside the report of the CIPET, Ahmedabad, have tried to take steps and action under Chapter XIV of the Customs Act. If anything found wrong pursuant to the report submitted by the CIPET, Ahmedabad or found on the basis of the report submitted by the CIPET, Chennai, one can understand the genuineness of the

steps taken by the customs officials, but they have failed to explain their action particularly when the Development Commissioner and other officers of the SEZ are supporting the stand of the writ Petitioners that the samples drawn are well within the parameters and thus no action is called for.

44. We, therefore, hold that the competent authority of the customs departments cannot take any action against the writ Petitioners on the basis of the report submitted by the Customs House Laboratory, Kandla though it has power to take such action, as permissible under the law, if any irregularity is found pursuant to the report submitted by the CIPET, Ahmedabad or the CIPET, Chennai.

45. As all the reports submitted by the CIPET, Ahmedabad or the CIPET, Chennai are not before us, we are not expressing any opinion, but leave it open to the officials of the competent authority of the customs department to decide the show cause reply on the basis of the report submitted by the CIPET, Ahmedabad or the CIPET, Chennai, without giving any credential to the report submitted by the "Customs House Laboratory, Kandla". A decision in one or other way be taken immediately, but not later than a period of one month from the date of receipt/production of this order. If nothing is found against one or other Petitioners, the seized goods, if any, should be released and the proceedings should be dropped. However, if any adverse decision is taken on the basis of the report submitted by the CIPET, Ahmedabad or Chennai, the authority may pass appropriate reasoned order taking into consideration the reply, if any, submitted by one or other writ Petitioners, but within the aforesaid period of one month from the date of receipt/production of this order. The learned Single Judge, having failed to notice the aforesaid facts and the provisions of law and having erred in coming to the conclusion that the officials of the customs departments has no jurisdiction to take any steps in view of the Section 53 of the SEZ Act, 2005, we set aside the order passed by the learned Single Judge.

46. All the Letters Patent Appeals, writ petitions and the Civil Applications stand disposed of with the aforesaid observations and directions, but there shall be no order as to costs.