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C.A.No. 3942-3944 OF 2001

ITEM NO. 104 COURT NO. 3 SECTION: III

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

CIVIL APPEAL NOS. 3942-3944 OF 2001@@
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COMMISSIONER OF CUSOTMS (SEA), CHENNAI ..... APPELLANT(S)

Versus

M/S BALLARPUR INDUSTRIES LTD. ..... RESPONDENT(S)

(With office report)

Date: 11/09/2001 These appeals were called on for hearing today.

CORAM:
HON'BLE MR. JUSTICE B.N. KIRPAL
HON'BLE MR. JUSTICE K.G. BALAKRISHNAN
HON'BLE MR. JUSTICE P. VENKATARAMA REDDI

For Appellant(s) Mr. M.L. Verma, Sr. Adv.
Mr. M. Gourishankarmurthy, Adv.
Mr. B. Krishna Prasad, Adv.

For Respondent(s) Ms. Indu Malhotra, Adv.
Ms. Pooja Sriram, Adv.
Mr. M. Venkataraman, Adv.
Ms. Madhu Sweta, Adv.

UPON hearing counsel, the Court made the following
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The appeals are allowed, the order of the Tribunal as well as that of Commissioner (Appeals) are set aside and remand the case to the Commissioner (Appeals) for a decision on the question as to whether the refund of Rs. 2.50 Crores was correct or any part thereof was correctly allowed on merits.

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Kalyani. (S.L. GOYAL)@@
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COURT MASTER @@
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(Signed Reportable Order is placed on the file.)@@
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IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 3942-3944 OF 2001@@
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Commissioner of Customs (Sea), Chennai ..... Appellant

Versus

M/s Ballarpur Industries Ltd. ..... Respondent

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In the instant case, some goods were imported by the respondent under three bills of entry. The claim of the respondent was that what was imported were essentially accessories and under an exemption notification no customs duty was payable in respect thereof.

The record shows that a letter dated 12th September, 1992 was written by the appellant with regard to the said import. It was stated in this letter that some discussions had taken place between the representatives of the appellant and the respondent and as the goods imported were urgently required so as to meet Export Shipment Deadline appellant was paying duty under protest at the rate proposed by the appellant herein. The request was made to release the consignment for assessment, payment of duty and early clearance.

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After the goods were cleared, an application for refund of the duty paid was filed. There is a dispute between the parties as to when was the application filed. According to the respondent, the application was filed on 5th March, 1993, whereas according to the appellant the application was received in the Refund Section only on 7th April, 1993. The application bore more than one stamp and there was a dispute with regard to the date of receipt of the said application.

The Assistant Collector allowed the refund of about Rs. 2.50 crores after examining the goods in question and holding that they were accessories. With regard to another set of goods, details of which are contained in the order of the Assistant Collector, it was held that the same were spare parts and no refund in respect thereof was permissible.

It seems that a notice under Section 28 was issued by the Department on the premise that an excess refund had been ordered. We are not concerned with this in the present case because the Commissioner passed an

order under Section 129D of the Customs Act holding that

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the order of refund was not legal and proper on the basis of the ground contained in the enclosure to the said order under Section 129D. He, therefore, directed the Assistant Collector of Customs to file an appeal before the Collector of Customs against the order of refund.

The Collector of Customs (Appeals) came to the conclusion that the application for refund had not been filed within the prescribed period. It did not accept the contention of the respondent herein that the application had been filed on 5th March, 1993. As it came to the conclusion that the application for refund was barred by time and therefore the refund should not have been ordered, the Commissioner (Appeals) did not give a categorical finding on the merits as to whether what was imported and in respect of which refund was allowed was spare parts or accessories.

Against the order of the Commissioner(Appeals), the respondent filed an appeal before the Tribunal. The Tribunal, after examining the evidence on record, came to the conclusion that the application for refund had been filed on 5th March, 1993 and the same was within the

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period of limitation. The Tribunal, however, while allowing the appeal of the respondent, did not go into the other aspect as to whether the refund was properly allowed on merits, namely, whether what was imported were accessories or spare parts. It can be noticed that the exemption notification only permitted accessories from being exempt from tax and not spares. In our opinion, the finding of fact arrived at by the Tribunal that the application for refund of duty was within the period of limitation calls for no interference. We are, however, informed that there is a criminal prosecution which has been launched alleging that the letter dated 5th March, 1993 was a forgery. That prosecution will take its own course and we have nothing to say in respect thereto. We will, however, not go into a disputed question of fact namely, whether the application for refund was filed on 5th March, 1993 or not and we do not propose to disturb the finding of the Tribunal.

Proceeding on the premise that the application for refund was filed within time, the authorities had to consider whether the refund had been properly ordered. In our opinion, the order of the Commissioner of Customs

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under Section 129D did not suffer from any infirmity. The said Section enables an order being passed, if the Commissioner is not satisfied as to the legality or propriety of the order of the Assistant Collector. In

the instant case, we find that the Assistant Collector did consider in detail the items which he regarded as spares valued at approximately Rs. 18,74,620/- and in respect of which refund was denied. After dealing with this item, in respect of other items for which refund of about Rs. 2.50 crores was ordered, the Assistant Collector observed as follows:-

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"The functions of other items were verified and they were found to be installed in the relevant equipments. I agree that they are forming part of the relevant equipments itself which can be classified as Capital Goods. The Chartered Engineer has also confirmed that these items are accessories. I accept the same and extend the concession under the EPCG Scheme for these items."

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We are of the opinion that the aforesaid cryptic order of the Assistant Collector would not be regarded legal. Just as the Assistant Collector had considered each item and came to the conclusion that they were spares, it was incumbent upon him to give details of the other items before coming to the conclusion that they

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were accessories and not spares. It is to be borne in mind that the duty was paid by the respondent on the basis of the claim of the appellant, namely, that what was imported were spares and not accessories. The refund could be ordered only if there was a positive finding based on tangible material to the effect that what was imported were accessories and not spares. It was necessary, therefore, for the Assistant Collector to have examined and given details thereof in the order which was passed. This not having been done, apart from anything else, the Commissioner was justified in passing an order under Section 129D and directing the filing of an appeal. The Commissioner (Appeals) did not deal with the question as to whether what was imported and in respect of which the refund was allowed were spares or accessories. This question was also not gone into by the Tribunal. The Commissioner (Appeals) did not decide it because it was of the opinion that the application for refund itself was barred by time, inasmuch as the application for refund is not to be regarded as having been filed within time. It is incumbent upon the Commissioner to give a finding with regard to the goods imported as to whether they were spares as claimed by the Department or accessories as

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claimed by the respondent. The orders of the Commissioner(Appeals) and the Tribunal are, therefore, liable to be set aside.

Before parting with the case, we may advert to

one more aspect arising out of the impugned order of the Tribunal. The Tribunal expressed the view that the order passed by the Collector of Customs under Section 129D(2) is beyond the scope of his powers for the reason that the Collector cannot go into fresh facts or fresh evidence and he has to confine himself to the facts already on record. According to the Tribunal, it was not open to the Collector to raise the question as to the correctness or genuineness of the seal on the refund application as it involves a detailed enquiry. Such a power, according to the Tribunal, could only be exercised under Section 28. Assuming that the Tribunal's understanding of the scope and ambit of Section 129D (2) is correct, it is not possible in the instant case to hold that the Collector of Customs travelled beyond the record and culled out fresh facts or fresh evidence in support of his conclusion. The Collector, in our view, restricted himself to the examination of the facts apparent from the

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record and drew the inferences and conclusions of his own on an appreciation of the material on record and in the light of the extent procedures. He did not launch upon an investigation of the facts which can be said to be extraneous to the record placed before him. The basic assumption underlying the view taken by the Tribunal is, therefore, incorrect.

We, therefore, allow these appeals, set aside the order of the Tribunal as well as the Commissioner(Appeals) and remand the case to the Commissioner(Appeals) for a decision on the question as to whether the refund of Rs. 2.50 crores was correct or any part thereof was correctly allowed on merits.

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(B.N. KIRPAL)

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(K.G. BALAKRISHNAN)

New Delhi,
September 11, 2001.

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(P. VENKATARAMA REDDI)