

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

Petition(s) for Special Leave to Appeal (Civil) No(s).19411/2009

(From the judgement and order dated 28/04/2009 in RFA No.44/2001 of The
HIGH COURT OF GUWAHATI ,ASSAM)

OCL INDIA LTD. & ANR.

Petitioner(s)

VERSUS

STATE OF ASSAM & ORS.

Respondent(s)

(With appln(s) for permission to place addl. documents on record, Amendment
of Cause Title and office report)

Date: 15/01/2013 This Petition was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE SURINDER SINGH NIJJAR
HON'BLE MR. JUSTICE ANIL R. DAVE

For Petitioner(s)

Mr. Jayant Bhushan, Sr.Adv.
Mr. Gaurav Junesja, Adv.
Mr. Rahul Chandra, Adv.
Mr. Aditya Gaaju, Adv.
for M/S. Khaitan & Co.,Adv.

For Respondent(s)

Mr. Avijit Roy, Adv.
for M/S Corporate Law Group,Adv.

UPON hearing counsel the Court made the following
O R D E R

I.A. No. 1

For the reasons stated in the aforesaid application, the prayer
is allowed. Let the cause title be amended as indicated in prayer
'A'.

I.A. No. 2

I.A. No. 2 is dismissed.

Leave granted in the special leave petition.

The appeal is disposed of in terms of the signed order.

(Sukhbir Paul Kaur)
Court Master

(Indu Bala Kapur)
Court Master

(Signed order is placed on the file)

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.367 OF 2013
(Arising out of S.L.P.(C) No.19411 of 2009)

| OCL INDIA LIMITED AND ANOTHER

| Appellant(s) |

Versus

| STATE OF ASSAM AND OTHERS

| Respondent(s) |

O R D E R

We have heard learned senior counsel for the petitioners as well as learned counsel for the respondents.

Leave granted.

This appeal is directed against the judgment and order dated 28th April, 2009 passed by the Gauhati High Court in R.F.A. No. 44 of 2001 whereby the High Court had allowed the appeal of the respondents and set aside the judgment and decree passed by the trial Court in favour of the appellants.

The trial Court gave directions to the respondents herein to produce the original documents which were sought to be relied upon by the appellants in support of its claim against the respondents. However, the respondents failed to produce any documents in response to the orders passed by the trial Court. Consequently, the trial Court drew an adverse inference against the respondents in view of Section

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114 of the Indian Evidence Act, 1872 (in short 'the Act') and decreed the suit in favour of the appellants. The respondents took the matter in appeal to the High Court on the ground that the trial Court has wrongly drawn an adverse inference against the respondents. In view of the provisions contained in Sections 65 and 66 of the Act, the High Court has come to a conclusion, in our opinion rightly, that on the facts pleaded in this case a presumption under Section 114 of the Act could not have been drawn against the respondents, in the absence of the appellants having produced secondary evidence on which its claim was founded. Mr. Jayant Bhushan learned senior counsel appearing for the appellants submitted that the respondents are trying to defeat the just claim of the appellants by raising a wholly technical and frivolous defence. He submits that in view of Clause 4 of the letter dated 8.1.1992, it was no longer open to the respondents to plead that the payment for a statutory increase in central excise duty and railway freight would not be paid to the appellants unless the same was claimed in the original bill. Clause 4 of the aforesaid letter is as under :-

"4. Enhancement of rate :

As per terms and conditions of the tender dated 22.4.1991 a statutory increase in central excise

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duty and railway freight made by the Government will be paid extra on actual basis on production of valid documents."

It appears that unless the respondents can effectively satisfy the Court that the condition contained in Clause 4 was not accepted by the Government, the claim of the appellants perhaps could

not be rejected on the ground that it was not included in the original bill. But even if such a conclusion can be reached on the basis of the pleadings of the parties, it would still be necessary for the appellants to prove to the satisfaction of the Court that the appellants had actually made payment of any enhanced excise duty. This could only be proved either by the production of the primary evidence or secondary evidence. It is a matter of record that the respondents had not produced the original documents in Court even though a direction had been issued by the Court to produce the same.

Learned counsel for the respondents, however, brought to our notice that a specific plea was taken by the respondents before the trial court that the aforesaid documents are not traceable in the record of the respondents. It was also stated that since the documents are not available in the record, the appellants be required to produce the secondary evidence. In spite of such plea having been taken, the

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appellants failed to produce the secondary evidence. In such view of the matter, we are of the opinion that the conclusion reached by the High Court cannot be said to be either erroneous or illegal.

However, at the same time, we are of the opinion that the claim made by the appellants ought not to be permitted to be defeated for the failure of the appellants to produce the secondary evidence. Ultimately, upon examination of the documents which may be produced by the appellants, the trial Court may well come to the conclusion that the plea raised by the respondents is purely technical. In such circumstances, it would be appropriate that the appellants be given another opportunity to produce the secondary evidence.

At this stage, Mr. Jayant Bhushan has brought to our notice that an application has, in fact, been filed in this Court, being interlocutory application No.2, for production of the secondary evidence in this Court. We are not inclined to accept the prayer made by learned senior counsel as the evidentiary value of the documents shall have to be seen by the trial Court. Accordingly, interlocutory application No. 2 is dismissed.

For the reasons stated above, we see no reason to interfere in the conclusions recorded by the

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High Court on issues No. 2 and 3 and the interpretation of Sections 65,66 and 114 of the Act. However, in the interest of justice, we remand the matter back to the trial Court to permit the appellants to produce the secondary evidence in support of his claim and to reconsider the question as to whether the appellants have actually paid the statutory increase in central excise duty and railway freight on the basis of the secondary evidence produced in Court.

We direct the trial Court to dispose of Money Suit No. 137 of 1995 within six months from the date of receipt of copy of this order.

The appeal is, accordingly, disposed of.

.....J.
(SURINDER SINGH NIJJAR)

.....J.
(ANIL R. DAVE)

New Delhi,
January 15, 2013