(1969) 10 BOM CK 0016

Bombay High Court

Case No: O.C.J. Appeal No. 98 of 1963 in Miscellaneous Application No. 443 of 1962

H.R. Syiem — APPELLANT

Vs

P.S. Lulla — RESPONDENT

Date of Decision: Oct. 10, 1969

Acts Referred:

- Constitution of India, 1950 - Article 226

Citation: (1970) 72 BOMLR 534

Hon'ble Judges: S.P. Kotval, C.J; Vimadalal, J; Tarkunde, J

Bench: Full Bench

Judgement

S.P. Kotval, C.J.

This appeal comes to me on a difference of opinion between Tarkunde J. and Vimadalal J. On a previous occasion when I had heard the appeal an objection was taken that in the original order of reference dated April 24, 1968 the points on which the learned Judges differed had not been stated and that therefore such a statement was necessary having regard to Clause 36 of the Letters Patent. I had therefore made an order on March 14, 1969 requesting the learned Judges to state the points on which they differed and which required decision by me. By an order passed on March 21, 1969 the learned Judges have now stated the following questions for my decision :-

1, Whether the Assistant Collector of Customs was wrong in holding that the black insulating tapes imported by the respondent fell within the expression ''adhesive tapes'' in entry No. 38 in Part II of the Policy Statement in the Red Book.

2. If so, whether this Court can, in the exercise if its powers under Article 226 of the Constitution, interfere with the impugned order of the Assistant Collector of Customs.

The facts upon which this reference has arisen lie within a narrow compass. On August 3,1961 the respondent P. S. Lullaas the sole proprietor of Messrs. P. S. Lulla & Sons was granted a licence to import goods of the following description "Electric insulations including presspahn ( electrical grade) but excluding ebonite rods, tubes and sheets". The particular entry of the Import Trade Control Schedule (hereinafter referred to as the I. T. C. Schedule) under which the licence was granted was entry No. "38/11" by which is implied the entry No. 38 in Part II of the I. T. C. Schedule. At the foot of the licence there is an endorsement to the effect that-

This licence will be subject to the conditions in force relating to the goods covered by the licence, as described in the relevant Import Trade Control Policy Book, or any amendment thereof made up to, and including the date of issue of the licence, unless otherwise specified.

With the other conditions of the licence I am not as such concerned in this reference.

2. Acting upon this licence the respondent imported 10 cases of "black insulating tapes" from Japan by the Section s. "Nakashi Maru", The goods arrived some time about April 3, 1962. The value of the goods is insignificant being Rs. 995 but on behalf of the Collector it was stated before the Division Bench that it was a test case and therefore although other consignments of adhesive tapes were allowed to pass, the Collector took objection to these consignments. On April 24, 1962 the Collector called upon the respondent to show cause why penal action should not be taken against him and the goods confiscated u/s 167, Clause (8) of the Sea Customs Act because "the import licence No. 208515/61 issued against Ser. No. 38/11 of the I. T. C. Schedule produced is not valid to cover the goods imported, for the reasons mentioned on the reverse". The reason mentioned was "The Black Insulating Tapes in question are adhesive tapes. The import of adhesive tapes is banned vide remark (ii) against Serial No. 38/11 in the relevant I.T.C. Policy Book". This view of the Collector was challenged by the respondent in a letter which he wrote on May 4,1962 in reply to the show cause notice. The respondent contended;

Without prejudice to the aforesaid the firm submits that apart from the bare allegation that the goods in question are adhesive tapes there is no evidence or material disclosed in support of the said statement if by that it means that the goods imported are adhesive tapes only and cannot be used for electrical insulating purposes. The firm repeats that the goods imported are used for electrical insulating purposes only and that adhesiveness is one of the incidental qualities required for such use. The firm further submits that the primary use of the said tape is insulating tape. The firm states that no consumer of adhesive tapes would buy insulating tapes which may have adhesive quality as an insulating tape is more expensive and is a product known and available in the electrical market as distinct and different from the adhesive tape which is known and available in the medical market. The firm further points out that insulating tapes and adhesive tapes have

different ingredients, different uses and different sets of sellers and'' buyers and are (sic) different goods having distinct and different uses.

The respondent also pointed out to the Collector that several consignments of adhesive tapes had been allowed to pass and that there was no reason why this consignment should have been objected to. By a subsequent letter of July 13, 1962 the respondent also furnished to the Collector a certificate issued by the electrical Merchants Association and certificates issued by 24 leading electrical dealers and merchants certifying that the goods in question were known in the trade as black insulating tapes only and not as black adhesive tapes as was sought to be suggested. The respondent offered to produce evidence in that respect.

3. The Assistant Collector of Customs, however, stuck to his objection and on August 28, 1962 passed an order holding that the licence did not cover the goods imported and that therefore the goods were imported in contravention of Section 8(2) of the Imports & Exports (Control) Act, 1947. He therefore confiscated the goods under Clause (8) of Section 167 of the Sea Customs Act read with Section 3 of the Imports & Exports (Control) Act, 1947. He also gave the importers an option u/s 183 of the Act to pay in lieu of such confiscation a fine of Us. 2,000 and clear the goods for home consumption. An additional option was also given to re-ship the goods on a fine of Rs. 100 to the country of consignment viz. Japan.

4. Before I state the reasons which prevailed with the Collector of Customs for the view which he took it is necessary to refer to the relevant part of entry No. 38 of Part II of the I. T. C. Schedule under which the licence was granted. It is as follows :

| Part and S. No. of I.T.C. Schedule. | Description | Licensing Authority. | Policy for Established Importers. | Validity of Licences. | Remarks |
|---|---|---|---|---|---|
| 38. | Electric insulations including presspahn ( electrical electrical grade), but excluding ebonite rode, tubes and sheets. | Ports. | 20% | Six months. | i) ii) Quo will not for the import adhesive tapes adhesive tape cloth in rolls sheets and phenol resin laminated in t form of sheets rods and tubes including such phenol resin |

| | |
|---|---|
| | laminated unde<br>the trade name<br>Bake lite and<br>Tuffnel. |

The Collector relied upon the second entry in the Remarks Column and held that the black insulating tape which the respondent had imported were adhesive tapes and therefore whether " these are sold in the market as black tapes or Black insulating tapes is immaterial." On behalf of the respondent reliance was placed before the Collector on the Index to the I. T. C. Policy Book and it was pointed out that both black insulating tapes as well as adhesive tapes are not shown as distinct and separate categories under the heading "electric insulations" in the Index. The Collector answered the point by holding that the Index to the I. T. C. Policy Book is a guide for policy which is enunciated by the remarks in the remarks column against the relevant serial number.

Both the adhesive tapes and black insulating tapes are shown in the Index as falling under serial No. 38/11 under the heading "Electric Insulations". The tapes in question are insulation tapes. They therefore fall under serial No. 38/11. They are also adhesive. They therefore fall under "Adhesive Tapes" the import of which is banned, according to the remarks against serial No. 38/11 in the policy book.

The Collector also held that

The term ''Adhesive tape'' is not a trade or brand name. It indicates a tape which is adhesive and since this term appears against S. No, 38/11 it indicates a tape which is adhesive which may also be an insulating tape. The separate enumeration in the Index cannot have the effect of negotiating the policy laid down in the remarks against the serial number.

5. This order of the Assistant Collector was challenged in a petition filed by the respondent on the Original Side of this Court on January 14, 1963 and the petition, the reply and the rejoinder to that petition make out substantially the same case on behalf of both the parties. I shall refer to the relevant pleadings as I proceed to discuss the points which arise in this case,

6. The petition came up before Mr. Justice K. K. Desai and by an order passed on September 26, 1968 Mr. Justice Desai allowed the petition and set aside the order of the Assistant Collector. The learned Judge pointed out that the Collector''s duty was in the first instance to look at the original licence of the petitioner and to find out what goods were permitted to be imported under the licence. The Collector, however, did not approach the matter in that manner but

Having found that there was a ban on import of ''adhesive tapes'' the 1st respondent by making wrong approach inspected and examined the petitioner''s

goods to find out if in these goods there was quality of adhesiveness. Finding that there was such quality in the petitioner''s goads, he wrongfully held that the petitioner''s goods were ''adhesive tapes''.

The learned Judge then pointed out that the Index in fact shows that "adhesive tapes" is a separate category by itself and that the index also shows that "black insulating tapes" is also a separate category in respect of "electric insulations". In view of these distinct categories he could not hold that the "black insulating-tapes" which the respondent had imported were banned because of their adhesive quality. The learned Judge observed "To ascertain whether the goods of import are ''adhesive tapes'', it is not permissible for the Customs Officers to find out whether the goods have the quality of adhesiveness." He held that the findings are the result of wrong approach to the facts of the respondent''s case by the Collector and was accordingly arbitrary and perverse.

7. The learned Judge also referred to the decision of the Madras High Court in Sha Rikabdoss Bhavarlal Vs. Collector of Customs, Madras, where the same point was decided and under the same entry in the I. T. C. Schedule and he held "The failure of the 1st Respondent (the Collector) not to follow the decision of the Madras High Court was unjustified and the order, therefore, must be struck down". The learned Judge also referred to the several entries in the Index in the Import Trade Control Policy Hand Book for April to September 1961 (which was the relevant period) and pointed out that "the purpose of the index is to give notice to all concerned that as regards the articles severally described in the index and mentioned in the index, the relevant provisions in the Import Trade Control Order and the Schedule are those mentioned against such articles in the index". As regards the use of the index the learned Judge observed that the Customs Officer is bound to consider the contents of the index as binding and that "he is bound to arrive at his decisions on the footing that the index forms part of the law of Import Trade Control Order". He specifically held "I am, however, unable to accept his argument that the index contained in the Policy Books is merely for convenience and has no particular importance with reference to diverse categories of goods and articles mentioned in the index".

8. Against this order of Mr. Justice K. K. Desai the present appeal has been filed and it is clear from the judgments of my learned brethren that upon almost every point there has been a difference of opinion in the Division Bench. Mr. Justice Tarkunde upheld the judgment of Mr. Justice K. K. Desai and held that the appeal should be dismissed. He pointed out that it is indisputable that the term "adhesive tapes" in the index indicated the article known in the market as "adhesive tapes" and the entry regarding '"adhesive tapes" in the remarks column of entry 38 "was not descriptive of tapes which had the quality of being adhesive". Therefore the interpretation which the Assistant Collector had put upon the entry in the remarks column was patently wrong. As regards the use to be made of the index he held that "In view of the declared purpose of the Index, entries therein were clearly relevant

to the interpretation of the term ''adhesive tapes'' in the said entry in the Red Book against Serial No. 38 of Part II of the Schedule" and that "it was therefore unlikely that the term ''adhesive tapes'' was used in different senses in the Index, and in the policy statement in relation to one and the same serial number in the Schedule". He also pointed out that the other categories of "Adhesive tapes" such as "rubber tapes" and "P. V. C. tapes" were allowed to be imported by the Collector in Bombay. That fact has been admitted and there is no reason why in the present case black insulating tapes which could be imported under the second column of entry No. 88/11 should be banned because they happen to have the quality of being adhesive. Thirdly, Mr. Justice Tarkunde pointed out that the Collector had misinterpreted the decision of the Madras High Court in Rikabdoss v. Collector of Customs, M.B.B. and therefore he had failed to exercise his discretion judicially when he ordered the confiscation of the goods. Having regard to the provisions of entry No. 38 and the index he held that "the term ''adhesive tapes'' was used to denote a market commodity". As regards the contention raised before the Division Bench about the jurisdiction of the High Court to interfere in a matter like this, he pointed out that there was some conflict in the rulings given in certain decisions in the Supreme Court. In his view there was an error of law which was manifest on the face of the record in so far as the Collector''s interpretation of the relevant entry in the Red Book was concerned and that

In view of the list of articles in the Index referred to above, in view of the prevailing practice in Bombay in regard to rubber tapes and P. V. C. tapes, and in view of the interpretation adopted by the Division Bench of the Madras High Court, it would have been absurd for the Assistant Collector to have come to the conclusion that no other reasonable interpretation of the said entry was possible than the one which he was inclined to adopt. That being so, it was his duty to accept that interpretation which exempted the respondent from the penalty of confiscation of his goods.

In so holding Mr. Justice Tarkunde relied upon a recent decision of the Supreme Court in Jagannath Aggarwala v. B. N. Dutta (1967) Civil Appeal No. 801 of 1964, decided by Bacliawat and Shelat JJ., on January 10, 1967 (Supreme Court).

9. Mr. Justice Vimadalal after referring to the same authorities on the question of jurisdiction held that " the question in the present case is purely one of the construction of the import licence issued by the respondent (it should be "issued to the respondent") and of the relevant entry appearing in respect of serial No. 38 of Part II of the I.T.C. Schedule in the Import Trade Control Policy Book (which is well-known as the "Red Book") and of the Index thereto." He therefore held that the question which arose in the case was purely one of construction upon the admitted facts. As regards the decision in Jagannath Aggarwala''s case, upon which Mr. Justice Tarkunde had relied, Mr. Justice Vimadalal held "There is no doubt that in deciding Aggarwala''s case the Supreme Court has, as its judgment shows, not taken notice of three earlier decisions of its own which had a direct bearing on the question

before it, which I have mentioned above, and Mr. Sorabjee''s contention that the decision in Aggarwala''''s case must be taken to have been delivered per incuriam is therefore, correct". In a later passage the learned Judge further stated as regards the same decision "What has happened, therefore, is merely that the Supreme Court in Aggarwala''s case has not noticed the principles regulating the exercise of jurisdiction of Courts under Article 226 which have been laid down not, only in The Collector of Customs, Madras Vs. K. Ganga Setty, , but in several other cases by the Supreme Court itself and by other Courts." He therefore declined to follow the decision in Jagannath Aggarwala''s case. He then went onto point out how the view taken by the Collector was a plausible view and observed "Whether or not these views are in the ultimate analysis correct, or whether the better view is that the Index in the present case should lead to the contrary conclusion, is not material on the question of jurisdiction of the Court under Article 226 for the mere incorrectness of that view would not justify interference under that Article." So far as the decision of the Madras High Court in Rikabdoss''s case is concerned, Mr. Justice Vimadalal pointed out that there were no reasons given in the judgment to show why the learned Judges came to the conclusion that the Collector had proceeded on a "demonstrably absurd" basis and he was therefore unable to follow it. As regards the use of the index in the construction of entry No. 38 and particularly the remarks column thereof, Mr. Justice Vimadalal observed that it was nothing more than a mere catalogue or alphabetical list usually to be found at the end of a book for the sake of convenience of reference, "but that does not mean that the Index can control the plain meaning of the entry in respect of serial No. 38 of Part II as appearing in the Red Book." It will thus be noticed that on almost every point there has been a radical difference of opinion between the two learned Judges.

10. Since there is so much controversy as to the power or jurisdiction of this Court to interfere with the order of the Collector of Customs in a matter such as this, it would be expedient first to attempt to understand what is the nature of the dispute that has been raised; what was the nature of the decision which the Collector had given and the error if any which he has made before considering whether this Court would have jurisdiction to interfere or not. The consideration of the dispute between the parties on the merits is further complicated by the cardinal point in dispute as to what is the true effect of the Index appended to the I.T.C. Schedule and virtually the decision of my two learned brethren was influenced by the differing views which they took upon what use to make of the Index.

11. But before I turn to the Index, I must examine the entry as it stands and the effect upon entry No. 38 of item (ii) of the remarks column. The licence was in terms of column 2 of entry No. 38 which gives the description of the goods which may be imported. The licence was for the import of electric insulations and it is not in dispute that black insulating tapes were of the nature of electric insulations. Therefore in the first instance the goods imported were clearly of the description of the goods mentioned in the licence. In so far as "black insulating tapes" are usable

for electric insulations the requirements of the licence are fulfilled. No doubt a restriction has been stated in the licence. The restriction that it is subject to the conditions laid down in the Import Trade Control Policy Book and column (6) it is argued lays down the policy in that respect. The statement at the head of Section II of the Red Book entitled "The Policy Statement" in para. 5 says "Column 4 sets out the licensing policy regulating the value of import licences to established importers" and that the entry " nil " denotes that no quota licence will be issued. As regards column 6, para. 7 explains that column 6 in the schedule "gives details about licensing which could not be incorporated in any of the other columns." The "details" about licensing in Clause (ii) in the remarks column are "Quota licences will not be valid for the import of adhesive tapes..." The stand taken on behalf of the Department has been that by virtue of this remark all "Adhesive tapes" of whatever nature are banned and it was the policy of the Department not to allow the import of any "Adhesive tapes". Therefore it is urged that "black insulating tapes" which are also "Adhesive tapes" are banned.

12. The effect of this construction would be extraordinary. Under "electric insulations" black insulating tapes can be imported under column 2. Thus under the parent clause black insulating tapes can be imported but in the remarks column which gives the details of the licensing according to the argument black insulating tapes are totally banned. I cannot imagine a remark or details about licensing thus completely taking away the right to import given in categorical terms by the parent clause contained in column 2. The effect of this interpretation therefore is that there is first made a general provision permitting the import of black insulating tape and then in the same entry in another column a total ban on black insulating tapes is imposed. I do not think that such an interpretation would be consonant with the cardinal rules of construction. The remarks are in the nature of a qualification or exception upon the parent clause and the exception cannot be allowed to destroy the parent clause. Conditions or qualifications cannot take away the right to import the article altogether. That appears to me to be the proper construction of the bare entry as it stands without any adventitious aid and without seeking recourse to the Index (to which I shall presently advert) or any other part of the policy statement.

13. Secondly, the words used are "Adhesive tapes" and the word "tape" in the normal parlance means "narrow cotton or linen strip used for tying up parcels and in dress-making etc." but this is qualified by the word "adhesive" which means having the property of adhering or sticking. "Adhesive tape" therefore is a tape which is used for sticking things, whereas by its very description black insulating tape is a tape meant for insulation and therefore even upon a plain reading of the entry there does appear to be a clear-cut distinction between "adhesive tape" and "insulating tape" (the word "black" is immaterial for this purpose). If I were therefore called upon to construe this entry without any adventitious aid whatever, it seems to me that the plainest meaning which the entry read in the remarks column conveys, is that while column 2 refers to tapes principally or substantially usable as insulation

in contra-distinction with tapes principally or substantially usable for purpose of sticking. That would be the only way of construing these two columns in the same entry consistently with each other so as to endow them with some meaning. Otherwise as I have said an absurd result would follow that column 2 allows black insulating tapes to be imported and column 6 says that black insulating tapes cannot be imported because they are adhesive. If I were left to read the entry as it stands I would construe "Black insulating tapes" which are included in "electric insulations" as meaning tapes the principal use of which is insulation and "adhesive tapes" in column 6 as tapes the principal use of which is adhesiveness or principally meant for sticking. If so, I do not think that the remarks column can control column 2 to the extent claimed by the Department.

14. In the present case there is no dispute that black insulating tapes, although they have the quality of adhesiveness, are principally used for the purpose of insulation. The importer has stated in his letter dated May 4, 1962 and has reiterated in his pleadings that the goods imported are used for electrical insulating purposes only and that adhesiveness is one of the incidental qualities required for such use. That statement has not been challenged on behalf of the Department. See also para. 11 (a) of the petition and para. 10 of the affidavit of the Assistant Collector dated January 14,1963. In para. 10 of the affidavit dated January 14, 1963 it is admitted that black insulating tapes are classifiable under Serial No. 88 II of the I.T.C. Schedule. In this view I may incidentally say that I am unable to accept the view expressed by Mr. Justice K. K. Desai in his judgment that the words "Adhesive tapes" should consistently with the second column be read to mean electrical adhesive tapes. In my opinion there is nothing that compels such a view.

15. In this connection certain cardinal rules of construction have to be borne in mind. It does not appear that the several entries in the I.T.C. Schedule are classified upon any scientific basis or that any particular method has been followed in that classification. It rather appears that the entire enumeration is an empirical enumeration based upon the experience of the Department and having regard to the custom of the trade and the names given to the articles by the trade or the industry concerned. The second point that I would stress is that in interpreting these entires or any of the columns of the I. T. C. Schedule I do not think that the scientific meaning which can be attached to the various entries should be read into the entries. Rather it appears to me that these entries were made having regard to the custom or practice of the particular trade or industry in which the articles are used and that the enumeration and classification of the various articles of commerce is in the sense in which they are popularly understood in the market, that is to say, by persons engaged in and used to trading in that article.

16. That this is the correct way to look at these entires is clear from several decisions. The leading case is His Majesty The King v. Planters Nut and Chocolate Company Limited [1951] C.L.R. 122 . The question in that case was whether sales tax

on salted peanuts and cashew nuts could not be levied because salted peanuts and cashew nuts fell within the category of either fruit or vegetable, and the company had given strong evidence in that case of an Assistant Professor to show that from the botanical point of view peanut and cashew nut were fruits which was a special category of vegetables. Cameron J. held that from the botanical point of view therefore the evidence indicated that both the peanut and the cashew nut are vegetables in the wider meaning of that word and that each was a fruit and that neither was a nut. Nonetheless the learned Judge held that it would be taxable. In so far as the words "fruit" and "vegetable" which are not defined in the Act the learned Judge held at page 126 that "they are ordinary words in every-day use and are therefore to be construed according to their popular sense" and by popular sense, the learned Judge made it clear that, he implied "that sense which people conversant with the subject-matter with which the statute is dealing would attribute to it." In other words he accepted the common commercial understanding of the words and not their scientific or technical sense. The learned Judge remarked (see p. 128) "I think it can be asserted that in Canada both the peanut and cashew nut are considered by almost everyone (except possibly by botanists) as falling within the category of ''nuts''." Cameron J, also laid down another principle which would be equally applicable to the present case. He was construing the Excise Tax Act and he pointed out that "The object of the Excise Tax Act is to raise revenue, and for this purpose to class substances according to the general usage and known denominations of trade. In my view, therefore, it is not the botanist''s conception as to what constitutes a ''fruit'' or ''vegetable'' which must govern the interpretation to be placed on the words, but rather what would ordinarily in matters of commerce in Canada be included therein". Upon the same principle it seems to me that when we are dealing with the Import Export Trade Control Order, the words used in the I.T.C. Schedule must be understood in the sense in which traders importing these articles normally understand it. This view was affirmed by the Supreme Court in Commissioner of Sales Tax, Madhya Pradesh Vs. Jaswant Singh Charan Singh, , when it remarked at page 14S6 para. 4 "But it is now well-settled that while interpreting items in statutes like the Sales Tax Acts, resort should be had not to the scientific or the technical meaning of such terms but to their popular meaning or the meaning attached to them by those dealing in them, that is to say, to then commercial sense", and they referred to the Planters Nut and Chocolate Company''s case with approval. The same view was also taken in Rikabdoss''s case to which I have referred to above in another context.

17. Thus, upon a mere reading of entry 88 by itself it seems to me that the construction put upon it by the Collector was patently erroneous, but when I come to consider the Index attached to the I.T.C. Schedule the absurdity of the interpretation becomes patent. Now before I look into the Index it is necessary to settle the main point of dispute in this case, whether the Index can at all be looked at in the interpretation of the several entries in the I.T.C. Schedule. As regards the

use of the Index the Collector held in his order "The separate enumeration ii the Index cannot have the effect of negotiating the Policy laid down in the remark against the serial number" but a little earlier in the same para, the Assistant Collector had stated "The Index of the I.T.C. Policy Book is a guide for Policy which will be enunciated in the remarks against the relevant Sr. No. " It is little difficult to reconcile these two remarks of the Assistant Collector. When the matter came before Mr. Justice K. K. Desai he held that the Customs Officer is bound to consider the contents of the Index as binding and that "he is bound to arrive at his decisions on the footing that the index forms part of the law of Import Trade Control Order." This finding was challenged before the Division Bench and on the use to be made of the Index itself there was a sharp difference of opinion between my learned brethren.

18. Tarkunde J. held that the entries made in the Index were clearly relevant to the interpretation of the term "Adhesive tapes" in entry 88, whereas Mr. Justice Vimadalal held that the view taken by the Collector that the Index cannot have the effect of negativing what is laid down in the text of the Red Book itself, was the correct view. He observed "What it (the Index) purports to do is merely to catalogue, for the sake of convenience of reference of importers, a list of all items that may have anything to do with serial No. 38 of Part II of the I.T.C. Schedule, but that does not mean that the Index can control the plain meaning of the entry in respect of serial No. 88 of Part II as appearing in the Red Book."

19. The circumstances under which the I.T.C. Schedule is prepared, how it is prepared and what is its purpose are all clearly stated in the official Hand Book of Rules and Procedure issued by the Government of India entitled "Import Trade Control Hand Book of Rules and Procedure". In para. 8 of the introduction it is pointed out that the Schedule I to the Imports (Control) Order, 1955 reproduced in Appendix (2) commonly known as the I.T.C. Schedule "classifies all the articles that enter into the import trade". The Schedule is divided into six parts and broadly covers the various classes of goods and then deals with them in the sixth part of the I.T.C. Schedule, It is of importance to note that the I.T.C. Schedule therefore deals with classes of goods and attempts to classify all articles that enter the import trade. Paragraph 4 shows that an attempt is made as far as possible to co-relate the I.T.C. Schedule (except in Part VI) with the Indian Customs Tariff and that a constant review is undertaken to ensure that whenever there are changes in the I.C.T. or I.T.C. classifications, such changes are co-related with each other. Then para. 5 of the introduction points out that for the sake of convenience an exhaustive alphabetical index of articles is attached to the six monthly policy statements issued from time to time (hereinafter called the Red Book) and this will enable the importer to ascertain the correct I.T.C. classification of any particular item. Paragraph 5 impresses upon the importer the importance of correct classification which should be ascertained before making of an application for licence and it says further that

It is necessary for the intending importer to ascertain the correct classification of the goods he intends to import (with reference to the serial No. and Part of the I.T.C. Schedule) so that he may be able to apply to the proper licensing authority for a licence and know exactly the licensing policy in respect of the items for which he is applying...

Paragraph 6 again stresses the importance and advantages of correct classification and it says

The importance of ascertaining the correct classification of an article and entering it in the application for an import licence is too well known to be over-emphasised. If an item is incorrectly classified by an importer, there is a possibility of its being diverted to the wrong licensing authority, or of being rejected. It is, therefore, in the interest of importers to make sure of the correct classification of the articles for which they are applying. In addition, an importer should give the fullest description of the articles applied for, so that any mistakes in classification can be corrected at the time of licensing. A further advantage of giving the full description is that when an item is correctly described in the import licence, even if the classification shown is incorrect, no difficulty will be experienced in the clearance of the goods on arrival.

This paragraph shows therefore that before an importer can make an application for licence he must look at the entry under which he is applying for a licence and the classification under that entry which is to be found in the Index. It also shows that without referring to the Index it would be practically impossible for an importer to correctly specify the article which he wants to import and that by mere reference to the entries in the I.T.C. Schedule he cannot achieve that exactitude which is necessary for a proper application for a licence. It is a little difficult to see how in the face of these instructions and the stated object and purpose of the Index, the Index cannot be used in understanding the entries in the I.T.C. Schedule and if in order to understand what classes of goods fall under the broad categories stated in the entries of the I.T.C. Schedule it is essential to refer to the Index, I do not see, how the aid of the Index cannot be taken in understanding the remarks in the remarks column also, for the remarks pertain to only those items or articles or classes of goods which are mentioned in the parent entry. It is clear therefore that the Index is an aid to construction of the various entries in the I.T.C. Schedule.

20. Whether it is legally binding or not I do not think, it is necessary for me to decide. Mr. Justice K. K. Desai held that it was, but none of my brother in the Division Bench have accepted that reading of the Index. It seems to me that the entries in the Index are of the nature of aids to construction not necessarily legal and binding but which aids may be invoked in the case of doubt or difficulty. If I were to draw upon an analogy I would say that they play the same role as the subject headings of sections and chapters in a statute. Where there is doubt as to what was the true meaning of the provisions of the statute-the I.T.C. Schedule in the present case-it is clear that the Index may be resorted to in order to throw light upon what was

intended by the broad classification and broad entries in the remarks column in the I.T.C. Schedule. That is what is stated to be the object and purpose of the Index in the paragraphs of the introduction to which I have referred and that is also the use that we are enjoined to make of the Index by the same paragraph. There is also another reason why such use of the Index can and ought to be made. A perusal of para, 7 of the introduction to the "Hand Book of Rules & Procedure" shows that when an importer has doubt or difficulty as to the classification of a trade or a particular item and whether it can be imported the procedure prescribed is that he should make a reference to the appropriate regional licensing authority for clarification sending him all possible information about the article he wishes to import and the I. T. C. Authorities attend to such references on an urgent basis and if there happened to be still some doubt left or differences arise between one Regional authority and another then the doubt or difficulty is referred to the Chief Controller of Imports and Exports and the Chief Controller of Imports and Exports sits with a committee in his office and decides what should be the true classification of that article and para. 7 of the introduction tells us "The decisions taken by the office of the C.C.I. & E. in regard to I.T.C. classifications will be announced by means of a Public Notice wherever necessary. The decisions are also incorporated in the alphabetical index attached to the Red Book". (italics are mine.) In other words the Index attached to the I.T.C. Schedule incorporates important decisions taken by the Chief Controller of Imports and Exports as to classifications. This may endow the Index with legal validity but it is not necessary to go as far as that. It is sufficient to say that, in my opinion, the Index can and ought to be looked at in all cases where doubt or difficulty arises in understanding the broad entries in the I.T.C. Schedule. The Index cannot in a case like the present be ignored, for upon the submissions of the parties in the present case and the rival contentions it is clear that the true meaning of the words "Adhesive tapes" in the second item of the remarks column against entry No, 88 is thrown in doubt and the question must be of some difficulty because it has given rise to difference of opinion between two Judges of this Court. I am of opinion, therefore, that I am entitled to look into the Index in order to seek guidance whether the words "Adhesive tapes" in the remarks column against entry No. 88 imply a total ban on all "Adhesive tapes" including black insulating tapes as is contended on behalf of the Department and as the Assistant Collector has decided.

21. Turning to the Index, the description of the goods in the first column is in alphabetical order and the classification shows the sub-classification wherever necessary. With each classification or sub-classification in columns 2 and 3 are shown respectively the Part of the I.T.C. Schedule and the Serial Number of the entry. The entry, with which I am concerned, namely No. 38 of Part II is found classified under the heading "Insulations, electric" and under this main classification is to be found the following important sub-classification "Adhesive Tapes, Black Insulating tapes, Cotton Insulating Tapes, Impregnated Tapes & Cloth, Plastic compounds or what are otherwise known as P.V.C. tapes and Rubber tapes." All

these classifications are shown against entry No. 38 of Part II. It appears that all these categories of tapes are used in electric insulation. There is no doubt that there is a separate category of tapes also (See page xvi of the Index) under which there are several sub-classifications but particularly "Adhesive, paper backed tapes" (Part IV, entry 168) and "Adhesive, Cellulose (Cellotape)" (Part V, entry 122). It is of some significance, however, that no sub-classification under the heading "Tapes" is to be found in any of the sub-classifications under the heading "Insulations, electric".

22. Relying upon these two classifications it was urged no doubt with much plausibility that when the words "Adhesive tapes" are found as a sub-classification under the main classification "Insulations, electric", the "Adhesive tape" must necessarily mean "Adhesive electric" or "Electric adhesive tape". I have already said that I am unable to accept this contention. It seems to me rather on a perusal of these two main classifications of "Insulations, electric" and "Tapes" that the pith and substance of this dichotomy is that in the one case the entry contemplates all tapes which are used or usable as insulations against electricity and in the other case "tapes" which are used or usable for other purposes such as for the purpose of sticking or giving elasticity and so on, The emphasis is not upon the word "electric" but upon the word "Insulations" in the former classification, but a comparison of these two meanings is neither here nor there. A reading of the classifications to this Index shows that under the very heading "Insulations, electric" are to be found both the entries "Adhesive tapes" and "Black Insulating tapes". Obviously therefore there are two sub-classes of electric insulations namely black insulating tapes and adhesive tapes and it is with reference therefore to this classification that we must understand the words used in item (ii) of the remarks column against entry No. 38. The words "Adhesive tape" used in that entry would therefore be in contra-distinction with black insulating tape. If so, it is clear that black insulating tape which could be imported under the parent provision of entry No. 38 "electric insulations" would not be hit by the second entry in the remarks column of "Adhesive tapes".

23. A perusal of this Index further reinforces what I have said above on a mere perusal of entry 38 by itself viz. that the expression "Adhesive tapes" has reference to a marketable commodity and is not a description of several categories of marketable commodities as was contended on behalf of the Department. It is clear that the sub-classifications under the heading "electric insulations" are of categories of articles which are bought and sold in the market and which may be imported upon licences. The item "Adhesive tapes" is one such category of articles and the Index therefore gives a clue to the interpretation of the same words used in the remarks column. It cannot mean "Tapes" which have the quality of adhesiveness.

24. The view that I have taken was taken also in Rikabdoss''s case. There also the importer had imported black insulating tapes, but before the Collector the same objection was taken that they were "Adhesive tapes". At that time there was a face

value restriction on the import of "Adhesive tapes" and to the extent that the goods exceeded that value the same objection as in the present case was taken in that case. The Madras High Court held that the order of the Collector confiscating the goods should be set aside. The Court held that there was a category of goods known in the market as "Black Insulating Tape" and therefore without further clarification such a kind of tape could not be taken out of that category permissible under entry 38 of Part II of the schedule simply because it had adhesive quality and "may fall within the other class of ''adhesive tapes'' ". See para. 7. The decision of the Division Bench clearly amounted to saying that although it could fall within the category of "Adhesive tapes", incidentally; it was principally black insulating tape which the importer had imported and therefore the import could be justified under the entry in column (ii) of entry 88. No doubt as pointed out by Vimadalal J. there are not many reasons given for the decision but it is clear that the learned Judges interpreted the entry with reference to item (ii) in the remarks column and held that despite the entry (ii) in the remarks column the goods being black insulating tapes could be imported. For the reason that detailed reasons have not been given the authority does not lose all value nor do I feel that this Court can refuse to follow it, unless it is in a position to show that the decision was erroneous. The decision is in accord with the view that I have taken and with all respect I think Bikabdoss''s case was correctly decided. No doubt in para. 7 the learned Chief Justice used the word "prima facie" in giving his decision but I think that that was somewhat inadvertent and there is no doubt that on reading the entire judgment that was what was intended to be decided. The learned Judges also held in that case that the conclusion of the Collector was "demonstrably absurd" and therefore they have power to interfere having regard to the decision of the Supreme Court in Gulabdas and Co. and Another Vs. Assistant Collector of Customs and Others, . I am in respectful agreement with that view also. The same can be said of the present order passed by the Collector.

25. Thus it seems to me that there is in the present case a patent error made by the Collector on the face of the order passed by him. The error consists in this that he misconstrued the word "Adhesive tapes" in column (6) of entry 38 to mean that that was a mere description of several categories of goods and not a reference to a commodity known as "Adhesive tapes". Secondly, he was in error in not having regard to the Index to the I.T.C. Schedule which if he had seen would have indicated to him that "Adhesive tapes" was a separate category of goods in contrast with "Black Insulating tapes" and that the remarks column when it refers to "Adhesive tapes" refers to a category of goods different from "Black insulating tapes". Thirdly, the learned Collector made a patent error in declining to follow the Madras case by ''which he was bound. The Collector sought to distinguish it on the short ground that "As far as Bombay Custom House is concerned there has been no previous practice of permitting the clearance of such goods under licence issued against Sr. No. 38/11 of the I.T.C. Schedule. In case of earlier two consignments the licences

were not accepted straightway but as a special case on a warning". In giving this as the reason for not following the Madras case the Collector made a patent error and missed the whole point of the Madras decision. No doubt the Madras decision did refer to the equity of the case but that was not the ratio decidendi of the decision. The ratio was that "black insulating tapes" fell clearly in the opening words of entry 38 (column 2) and therefore the import was justified and it was immaterial if in an ancillary way it also fell within the category of "Adhesive tapes".

26. If these were the errors which in my opinion the Collector has committed in the present case, I turn to examine whether under those circumstances it is not open to the High Court to interfere having regard to certain principles. These principles have by now been crystallised and are fairly clear. There is no doubt that the Collector is a quasi-judicial authority and that the petitioner has prayed for a writ of certiorari and/or mandamus and/or prohibition. He asked for the writ of certiorari to quash the order of the Collector and the writ of mandamus for release of the goods which he has confiscated and to withdraw and cancel his orders. So far as this Court is concerned, we had occasion to consider these principles in our decision in Tarachand Gupta & Bros. V. Union of India (1966) O.C.J. Appeal No. 17 of 1964 decided by Kotval and Mody JJ. on July 8, 1966 (Unrep.) . We pointed out there that the normal rule is that the exclusion of the jurisdiction of the civil Courts is not to be readily inferred but such exclusion must either be explicitly expressed or clearly implied. Even if jurisdiction is so excluded, the civil Courts have jurisdiction to examine cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure. (See The Secretary of State Vs. Mask and Co., In Laxman Purshottam Pimputkar Vs. State of Bombay and Others, , the Supreme Court stated the principle at page 218 as follows :
....It is settled law that the civil courts have the power and jurisdiction to consider and decide whether a tribunal of limited jurisdiction has acted within the ambit of the powers conferred upon it by the statute to which it owes its existence or whether it has transgressed the limits placed on those powers by the legislature.

Lord Denning recently put the whole position very tersely in B. v. Paddington Valuation Officer [1965] 2 All. E.R. 836, while discussing the question "On what grounds will certiorari lie?" That eminent Judge said :

...The Divisional Court thought that it would only lie for excess of jurisdiction or error of law on the face of the list. But the word ''jurisdiction'' in this context has innumerable shades of meaning. Some advocates are prone to say that, whenever a tribunal or other body decides wrongly, it exceeds its jurisdiction. It has only jurisdiction, they say, to decide rightly, not to decide wrongly. This is too broad a view altogether. I would say that, if a tribunal or body is guilty of an error which goes to the very root of the determination, in that it has approached the case on an entirely wrong footing, then it does exceed its jurisdiction.

(Italics are mine).

In my opinion, the Collector in the present case has committed an error which goes to the very root of the determination, in so far as he has construed the words "Adhesive tapes" in the remarks column. He has also approached the case on a wrong footing in so far as he has declined to take the aid of the Index in reading entry No. 88.

27. In Bombay Business House Vs. S. Venkatesan, , no doubt it has been observed by Chief Justice Chagla that

Under the Sea Customs Act, 1878 it is for the Deputy Collector of Customs to decide whether a particular article contravenes the law with regard to imports and if a party is aggrieved by that finding the Act provides aright of appeal u/s 188. If the aggrieved party attempts to challenge the finding of fact given by the Deputy Collector of Customs by approaching the High Court for the issue of the requisite writs under Article 226 of the Constitution of India, the High Court would have no jurisdiction to sit in judgment as a Court of appeal on a finding of fact given by the authority designated by law to give that finding.

In that case, however, the dispute was clearly whether the goods fell under a particular entry and nothing else. The question was whether certain bearings imported by the petitioners were not water pump bearings and therefore did not fall within the ambit of the import licence. In the present case there is no question that the goods imported fell within the ambit of entry 38, but the further and the crucial question raised is whether the entry in the remarks column under "Adhesive tapes" makes the goods which were validly imported under item (ii) of entry 38 of Part II contraband and that question depends upon a pure construction of the entry in the remarks column. Moreover there is a dispute as to the very rules of construction and whether the aid of the Index can be taken or not. AH these are pure questions of law and if upon an erroneous view of law the authority assumes jurisdiction then surely the exercise of that jurisdiction can be questioned. Even in the Bombay Business House case (sup. cit.) Chief Justice Chagla pointed out that the error apparent on the face of the record which will justify the High Court in issuing a writ of certiorari is not any error in the sense that the tribunal or authority takes one view of the law rather than another, but the error must be an error so manifest that no reasonable person or reasonable judicial mind or legal mind could possibly have come to the conclusion to which the authority came and that the position is identical with regard to the writ of mandamus. Here in the present case I have pointed out that in my opinion the refusal of the Collector to follow the Madras decision was something which no reasonable man would do quite apart from the fact that the view which he had taken that "adhesive tapes" is only a compendious description of a number of categories of goods and not a marketable commodity is itself "demonstrably absurd" to quote the Madras case.

28. In Collector of Customs v. Ganga Setty, the Supreme Court laid down that

It is primarily for the Import Control authorities to determine the head or entry in tariff schedule under which any particular commodity fell; but if in doing so, these authorities adopted a construction which no reasonable person could adopt i.e., if the construction is perverse, then it is a case in which the Court is competent to interfere. In other words, if there were two constructions which an entry could reasonably bear, and one of them which was in favour of Revenue was adopted, the Court has no jurisdiction to interfere merely because the other interpretation favourable to the subject appeals to the Court as the better one to adopt.

In that case again it was merely a question of applying the terms of an entry to the article imported. The importer in that case had imported whole grain "feed-oats" without obtaining any licence for the import and the question was whether what was imported was "Fodder, bran and pollards" or was "grain". The Customs Authorities had classified uncrushed feed-oats as grain and not as fodder. The Supreme Court held that that was a plausible construction and therefore the High Court could not interfere as they had done in that case. This was the case which Mr. Justice Vimadalal has also relied upon. With all respect, it seems to me that the question in the case before me is entirely different. In the present case as I have said the import of "Black Insulating tapes" is fully justified under the second column of entry 38 because it is admittedly "electric insulations" but it is the Collector who by giving a certain meaning to the words "Adhesive tapes" in the remarks column has tried to overthrow that conclusion and attempted to make what was admittedly importable non-importable. He only succeeded in doing so by mis-interpreting the words "Adhesive tapes" by refusing to refer to the Index and by refusing to follow a reported decision of a High Court, The question is could any reasonable officer have acted in that manner. In my opinion, No. If so, the case would be taken out of the principle in Ganga Setty''s case.

29. The same view has been taken by the Supreme Court in A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhwani and Another, and in Girdharilal Bansidhar v. Union of India13. No doubt there are some remarks in the decisions of the Supreme Court as pointed out both by Tarkunde J. and Vimadalal J. which show some conflict of views but I need not go into these views or decide as to what should be done in the circumstances because it seems to me that the error committed in the present case is so manifest that no reasonable officer would have committed it. It is a patent mis-construction by virtue of which the Collector has purported to acquire jurisdiction to seize the respondent''s goods. Reference to the latest decision of the Supreme Court in Jagannath Aggarwala''s case shows that where it is a question of construction of a provision of the licence and the exercise of the discretion is patent upon such construction the decision given by the Collector can be challenged under Article 226, Jagannath Aggarwala''s case goes upon a different principle namely that where powers of confiscation or forfeiture of goods

and imposition of penalty and fine are exercised, those are penal statutes and therefore if there is doubt in such a case about the proper interpretation of the licence and any erroneous construction is put upon it then the jurisdiction of the High Court is not ousted. In Jagannath Aggarwala''s case the Supreme Court actually set aside the decision of the High Court dismissing the writ petition by holding that

The Assistant Collector of Customs for appraisement on an erroneous construction of the licence held that the import of camphor B.P. was not authorised by it and by such erroneous construction wrongfully assumed the jurisdiction to confiscate the goods. The error appears on the face of the record and goes to the root of his jurisdiction.

With the greatest respect I say that this is in accordance with the decision of the Privy Council in Secretary of State v. Mask & Co. and I say this because Vimadalal has declined to follow this case upon the view that it did not follow the earlier authorities. In my opinion, the view canvassed in Jagannath Aggarwala''s case was not canvassed in the earlier cases. It was not argued that because the Sea Customs Act, Section 167 (8) was a penal statute therefore any doubt should be resolved in favour of the subject. That principle was not involved in the earlier cases and that is why it seems that the earlier cases were not referred to in Jagannath Aggarwala''s case. I think that the two categories of cases are distinct and must be kept apart. Even regarding the present proceedings as penal, which they undoubtedly are, Jagannath Aggarwala''s case would show that the Collector''s decision was wrong.

30. In Amba Lal v. Union of India A.I.R.[1961] S.C. 264 , when the same principle was invoked namely that the provisions of the Sea Customs Act are penal in character, the Supreme Court expressed the same view namely that the burden of proof is on the Customs authority because the provisions of the Sea Customs Act are penal in character. In Abdus Shukoor Shaikh Dawood Vs. A.M. Chatterjea and Another, , a Division Bench of this Court took the view that where a penal statute is invoked if there be any doubt, the doubt must be resolved in favour of the subject. The Division Bench quoted with approval the remark of Lord Simonds in L.N.E.R. v. Berriman [1946] 1 All. E.R. 255, "a man is not to be put in peril upon an ambiguity".

31. Thus looking at it from any point of view I am satisfied that the errors committed by the Collector in the present case are errors which can and ought to be corrected by the High Court in the exercise of its constitutional powers. In the result, I am, with respect, in agreement with the view taken by Mr. Justice Tarkunde and with respect not in agreement with the view taken by Mr. Justice Vimadalal. I would hold with respect that the decision of Mr. Justice K. K. Desai was a correct decision and that the order of the Collector was rightly set aside.

32. For the reasons stated I answer the two questions referred as follows :

Question No. 1-Yes.

Question No. 2-Yes.

The papers may now be put up before a Division Bench for final disposal of the appeal. The costs of the hearing before me shall be costs in the appeal.

33. Mr. Rana at this stage pointed out that in the original referring order dated April 24, 1968 the Division Bench had stated that " The costs of the hearing before us may be dealt with by the Judge or Judges to whom the appeal may be referred." Since I am referring this appeal to a Division Bench for final disposal, the question of costs of that appeal may also be dealt with by that Division Bench.