SUPREME COURT OF INDIA

Indure Ltd.

Vs.

Commercial Tax Officer

C.A.No.1123 of 2003

(Dalveer Bhandari and Deepak Verma JJ.)

20.09.2010

JUDGEMENT

Deepak Verma, J.

1. Following questions of law projected, are required to be adjudicated by this Court in the aforesaid Appeal:-

> "(i)Whether import of MS Pipes by Appellants was pursuant to a term of contracts between Appellant No.1 and National Thermal Power Corporation Limited (for short 'N.T.P.C.').
>
> (ii)Whether import of said MS Pipes and supply thereof by the Appellant No. 1 to N.T.P.C. Constitutes an integral and inseparable part of the Contracts between them."

2. Brief history of the case is as under:- Appellant No. 1 is a Limited Company duly incorporated under the provisions of Companies Act, 1956, engaged in the business of Works contract. Appellant No. 2 was working for gain as Senior Manager of Appellant No. 1 (hereinafter referred to as 'the Company').

3. Tenders were invited by N.T.P.C on 08.01.1988 for submitting bids for Ash Handling Plant Package for its Farakka Super Thermal Power Project, Stage-II, by way of International Competitive Bidding, popularly known as Global Tender.

4. The scope of work involved in such package included designing and engineering, manufacture, inspection and testing at suppliers works, packing, transportation to site, unloading, storage and handling at site, erection, testing and commissioning of complete Ash Handling Plant for 2 x 500 MW Steam Generating Units (for short 'the plant'). Such type of works contract is known as 'On Turnkey Basis'. Bids made by bidders were to cover whole of the work as abovementioned. Bid made by any person not covering the entire scope of work was liable to be treated as incomplete and could be rejected on that ground only.

> "The bidder was required to quote a lump sum price in its proposal for the entire scope of work covered under the bid documents. It further required that bidders shall indicate the bid price in their home currency or in US dollars."

5. The aforesaid project of Ash Handling Plant for 2 x 500 MW Steam Generating Units was to be partially financed by a credit/loan from International Bank for Reconstruction and Development (for short 'IBRD') or by International Development Association (for short 'IDA').

6. Pursuant to issuance of notice to invite tender, the Company submitted its bid furnishing therein all the information as required by the aforesaid notice and also indicated its bid price inclusive of foreign expenditure.

7. Thereafter, a meeting was convened between the officials of N.T.P.C. and authorized representatives of the Company, at N.T.P.C's Office on 21.07.1988, wherein various terms and conditions were discussed between the parties regarding erection of plant for which the Company had submitted its bid.

8. Since project was partially financed by credit/loan from IDA or IBRD and in view of the terms of Import Export Policy, Volume-I (April, 1988 to March, 1991) supplies made in such project under the procedure of International Competitive Bidding were to be treated as 'deemed exports'. Suppliers to such project enjoyed benefit of customs duty exemption for import and unless the part of the contract involving importation of equipments and accessories for use in such project is not separately treated as a supply contract such benefit cannot be availed of at all by the importer on such importation.

9. The total contract was agreed to be divided into two separate contracts, (i) Supply Contract, and (ii) Erection Contract, with a cross fall breach clause wherein breach of either of the contracts would entitle the owner/ contractee (N.T.P.C) to cancel the other contract also.

10. In the said meeting itself, it was agreed between the Company and N.T.P.C that separate formulae shall be applicable in respect of calculation of price adjustment for indigenous supplies and imported supplies. It was, further, agreed that if Sales Tax on imported items is leviable due to future enactment of sale/interpretation of law/ interpretation of law by court, the same will be reimbursed by N.T.P.C to the Company at actuals against documentary evidence.

11. By way of Letter of Award dated 16.08.1988, N.T.P.C awarded two contracts to the Company for performing the work of erection of aforesaid plant on Turnkey Basis. Even though, two contracts were entered into between the parties but in nutshell it was only one contract for the simple reason that N.T.P.C kept a right with it with regard to cross fall

breach clause meaning thereby that default in one contract would tantamount to default in another and whole contract was liable to be cancelled.

12. In the said Letter of Award, clause 2 deals with intent and scope of award and is reproduced hereinbelow:-

> "2.1 We confirm having accepted your proposal dated March 28, 1988 and mentioned in at para
>
> 1.1 (ii) above, read in accordance with communications/ clarifications/ agreements referred to at para 1.1 above and award on you the 'Supply Contract' for the work of design, engineering, manufacture, shop testing, inspection and testing of manufacture works, inspection and testing at manufacturer's works, packing and forwarding from your manufacturing works/ place of despatch (both in India) and successful performance testing at NTPC site and handling over of the 2 x 500 MW Ash Handling Plant for Farakka STPP, Stage-II on F.O.R. place of despatch in India basis. The items which are not specifically mentioned in the specifications, but are needed to complete the equipment package shall also be furnished by you unless otherwise specifically excluded in our bid documents read with Agreed Amendments."
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> In clause 4.5, the exchange rate of currencies of the various countries had been indicated.
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> In clause 4.5.1 and 4.5.2, Price Adjustment is indicated but relevant portion thereof, is reproduced hereinbelow:- "4.5.1. .....For equipment of Non-Indian origin, you shall submit the details of the indices and co-efficient in line with the provisions of Bid Documents within three months of the date of this Award Letter.
>
> 4.5.2 The list of components/ material/ equipment to be imported by you, for which the adjustment on exchange rate variation is to be made under US$, DM and J Yen will be furnished by you within three months of the date of this Award Letter. The items as declared as per these lists shall only be eligible for exchange rate variation claims."

13. It, further, contemplated that ownership of equipment supplied by the Company, under the supply portion of the contract shall vest exclusively with N.T.P.C upon despatch in India and negotiation of despatch document with N.T.P.C. Term of Contract Agreement contemplated that the Company guaranteed to the N.T.P.C that the equipment package under the contract shall meet the ratings and performance parameters, as stipulated in the Technical Specifications (Volume-II) and in the event of any deficiencies found in the requisite performance figures, N.T.P.C. may at its option reject the equipment package and recover the payment already made or alternatively accept it on the terms and conditions and subject to levy of the liquidated damages in terms of contract.

14. Since during the course of the discussion it was decided that project would need certain imported items to be used exclusively for the plant, the Company had written a letter to N.T.P.C on 02.11.1988 inviting its attention, with regard to clause 4.5.2 of the Letter of Award, giving details of the items to be imported for the said project.

> "As many as twelve different type of components were sought to be imported for completion of the project."

15. MS Pipe to be imported from M/s. Daewoo Corporation, South Korea, was one of the items shown in the list prepared by the Company which was subsequently presented to N.T.P.C.

16. The Company, thereafter, submitted an application before DGTD, Import Export Directorate, New Delhi on 23.02.1989 for Special Imprest Import License against Turnkey contract for supply of complete Ash Handling System to N.T.P.C's Farakka Super Thermal Power Project (2 x 500 MW).

17. Alongwith the Annexures submitted by the Company full specifications of the MS Pipes were also given. It also contained details of other items required to be imported by the Company in accordance with the list presented to N.T.P.C., for completion of the project.

18. Necessary declaration required to be furnished by the Company was complied with, the Licensing Authority clearly mentioning therein that all components sought to be imported were to be exclusively used by it for the aforesaid project of N.T.P.C. Accordingly, Special Import License was granted to the Company for importing MS Pipes of various diameters upto 500 MB with different wall thickness together with other components to be imported for usage in the said plant.

19. Admittedly, there is no dispute that MS Pipes were imported from outside India (South Korea) and were sold to N.T.P.C., Farakka. According to Appellant such sales were covered under Section 5(2) of the *Central Sales Tax Act, 1956 (hereinafter shall be referred as 'Act')* and had been exempted from imposition of Sales Tax under Section 5(2)(a)(v) of the *Bengal Finance (Sales Tax) Act, 1941 (for short 'BFST Act')*.

20. It is worth mentioning here that M/s. Daewoo Corporation Limited, South Korea was specifically directed by the Company to emboss on each pipe the following marking:

> "NTPC-FARAKKA STG-II (2 X 500 MW) INDURE LIMITED (ASH HANDLING)"

21. The special marking on each pipe would go to show that it was to be exclusively used as an integral component of the said project. The Special Imprest Import License was granted to the Company on 21.08.1989 by Controller of Imports and Exports with specific condition that the goods supplied therein shall be used exclusively for the plant of N.T.P.C. only.

22. After the pipes were received at Calcutta port the same were transported to Farakka in the month of December, 1989 and End Use Certificate was issued on 03.06.1991 by N.T.P.C., Farakka Super Thermal Power Project certifying that MS Pipes imported from M/s. Daewoo Corporation of South Korea had been supplied fully to N.T.P.C. in terms of their Letter of Award/ purchase order.

23. The Company, thereafter, filed its Return claiming benefit under Section 5(2) of the Act as sale in the course of import. The Commercial Tax Officer, Durgapur Charge, in assessment proceedings disallowed the claim of the Company and raised a demand of Rs. 12,60,795.00/- as Sales Tax. Company preferred an appeal under Section 11(1) of the BFST Act before Assistant Commissioner (Commercial Taxes) but the same also came to be dismissed and the order of the Commercial Tax Officer was confirmed. The Revision Application was moved against the said order before West Bengal Commercial Taxes Appellate and Revisional Board, but after contest the said Revision Application was also dismissed against the Company. It, thereafter, preferred an application under S.8 of the West Bengal Taxation Tribunal Act, 1987 before the West Bengal Taxation Tribunal, challenging the orders passed by the authorities below but the same was also rejected.

> "The Appellants were then constrained to file a Writ Petition before Division Bench of the High Court of Calcutta, challenging the said orders. However, the Appellant's Writ Petition also came to be dismissed by the Division Bench of the said Court on 19.10.2001, giving rise to this appeal."

24. The case of the Respondents right from the very beginning had been that it was neither obligatory nor mandatorily required for the Company to have imported the goods in question. There was no contractual or legal obligation on their part to do so. The only obligation required to be performed by the Company under the terms of the Letter of Award and the contract was to design, supply, erect and commissioning the Ash Handling Plant for N.T.P.C., irrespective of the components to be used therein. Appellant's further obligation was that the materials used in the execution of the said contract should conform to the specification stipulated by N.T.P.C. Such supplies would be effected by the Company either from imports or procured from within the country.

25. Furthermore, learned counsel for the Respondents have contended that the imports effected by the Company were on its own accord and under special licensing scheme which enabled it to import raw materials and components, for manufacturing in India. The imports if at all to be made were subject to a further condition that the Company would in the process of manufacturing of the goods add at least 33 percent value to them before exporting the manufactured goods. In terms of the declarations made by the Company to the Licensing Authority, the Appellant was not to 'trade' in the imported goods and undertook to re- export them after further manufacturing and value addition of atleast 33 percent. The sale made to N.T.P.C. by the Company was, therefore, not of the goods which were imported by the Company. Thus, provisions contained in Section 5(2) of the Act would not at all be attracted.

26. As per the Special Import License granted to the Company, it was entitled to divert the goods by re-using them in the manufacture of other goods or by transferring them to another actual user in accordance with the Import Export Policy.

27. The imports thus, made by the Company was neither pursuant to any stipulation in the Contract nor as an incidence thereof. Section 5(2) of the Act, covers only those cases, which occasions the import. The decisions on which the Appellants have placed reliance have considered the question whether the sales therein had occasioned the import. In none of those cases did the contracts for sale stipulate any condition with regard to the imports in question. In other words, they have contended that imports or exports, as the case may be, did not occasion the sales in question. It has also been their case that actual user license had not been obtained by the assessee. The Company was only acting on behalf of the ultimate purchaser for whom the work was being conducted.

28. It has also been contended by them that the decisions on which reliance has been placed by the Appellants, in unequivocal terms emphasised that the transaction of import and the transaction of sale have to be so integrated to each other as to form one single chain without a break. The various factors, including contractual stipulation, are considered only to ascertain if the integrated chain is maintained to fulfill the conditions laid down in Section 5(2) of the Act. That is to say such sale or purchase occasioned the import.

29. They have, therefore, strenuously submitted that the Appellants have lost before all the Authorities below and the reasoning adopted by West Bengal Taxation Tribunal has been affirmed by Division Bench of the High Court, thus, no case for interference has been made out in this Appeal, which deserves dismissal.

30. In the Written Submissions of the Respondents, they have further taken the following plea:- It is thus clearly established that the goods which were imported by the Appellant, were to be imported by them for their own purposes though ultimately to be utilised for N.T.P.C'S Ash Handling Plant.

> "The goods were to undergo processing at the premises of the Appellant and only after their conversion into a final product were to be handed over to N.T.P.C. The Appellants thus clearly admitted that there was to be a value addition to the equipments which were to be imported from the foreign sellers before they could be utilised for the Ash Handling Plant.
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> Not only the Appellant utilised the Special Imprest License on import of the goods with the declaration that the imports were in the nature of raw material components which would be utilised for further manufacturing in its premises and with value addition thereon would be sold to N.T.P.C, but even when the imported goods were dispatched to the site office of the Appellant at N.T.P.C Farakka, the Appellant made

a declaration under FORM XXX, prescribed under the West Bengal Sales Tax Rules to the following effect:

"We also undertake to duly account to you the disposal of above goods and to pay tax on the sales thereof in accordance with the provisions of the said Act." ('Act' in this context, refers to Bengal Finance (Sales Tax) Act, 1941).”

31. In this Court Respondents have taken a further plea that Company had admitted that the raw materials imported by it were manufactured by it. Further, with a view to secure the value addition of at least 33 percent, such raw materials cannot remain the same after being processed into final product. At least the Company has produced no material to substantiate the claim that the raw material imported by it remained the same even after value addition.

“Since the Company was seeking exemption under the Act, the burden squarely fell on it to establish that they were entitled to such exemption. Furthermore, the Respondents have also argued that it was required to be established by the Company that the goods imported and dispatched to Farakka would also be in the nature of raw materials or components or it underwent further processing at the site office of the Company and then with value addition thereon were sold to N.T.P.C to be used exclusively for the plant which it failed to establish or prove. For all these reasons Respondents have contended that the matter having been dealt with and considered from all angles, no case for interference has been made out and the Appeal being devoid of any merit and substance deserves to be dismissed.”

32. We have, accordingly, heard learned Senior Counsel Shri S. Ganesh and Mr. Amar Dave, Mr. Gaurav Goel, Mr. Mahesh Agarwal, Mr. Rishi Agrawala and Mr. E.C. Agrawala, Advocates for the Appellants and Mr. A.K. Ganguli, learned Senior Counsel and Mr. Avijit Bhattacharjee, Advocate for Respondents at length and perused the record.

33. For proper adjudication of the Appeal it is foremost important to consider the provision of Section 5(2) of the Act, which is reproduced hereinbelow:-

“5 When is a sale or purchase of goods said to take place in the course of import or export.

5.1 xxx xxx xxx xxx

5.2 A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India."

5.3 xxx xxx xxx xxx

5.4 xxx xxx xxx xxx 5.5 xxx xxx xxx xxx"

34. Before we proceed to decide the questions of law as projected hereinabove, one material fact pertinent to the issue involved in this Appeal requires special mention. We have already mentioned hereinabove that alongwith MS Pipes, the disputed goods in this Appeal, the Company had also imported 11 other components/ items to be used in the plant for its erection and commissioning. Other 11 imported goods, utilised by the Company in the erection of the plant have been held to be sales in the course of import made by Company to N.T.P.C and accordingly benefit under Section 5(2) of the Act has been granted by the concerned State Government. It was only this particular component MS Pipes, which has been denied this benefit.

35. Sales Tax Assessment Order passed by Assistant Commissioner (Commercial Tax), Ghaziabad, State Of Uttar Pradesh has been filed before us to show that such benefit has been accrued to the Company for remaining 11 items. Since MS Pipes were shipped at Calcutta Port, thus it was Respondents who treated them exigible for Sales Tax. If the benefit of the Sales Tax exemption has been given to the Company for 11 components/ items there is no reason why it is to be denied in respect of MS Pipes. This we are quoting so that the facts may be put on record correctly.

36. Leading case dealing with Section 5(2) of the Act is Commissioner of Commercial Taxes decided by a Constitution Bench of this Court. In the aforesaid judgment, two questions were projected for consideration by the Constitution Bench namely, if the sales were in the course of import within the meaning of Section 5(2) of the Act; and, secondly if the property in the goods passed in Belgium and consequently the sales were outside the State within the meaning of Article 286(1)(a) of the Constitution. The Constitution Bench was of the opinion that the assessee must succeed on the first point and it will not be necessary to deal with the second point. Court has held as under:- "The next question that arises is whether the movement of axle-box bodies from Belgium into Madras was the result of a covenant in the contract of sale or an incident of such contract. It seems to us that it is quite clear from the contract that it was incidental to the contract that the axle-box bodies would be manufactured in Belgium, inspected there and imported into India for the consignee. Movement of goods from Belgium to India was in pursuance of the conditions of the contract between the assessee and the Director-General of Supplies. There was no possibility of these goods being diverted by the assessee for any other purpose. Consequently we hold that the sales took place in the course of import of goods within Section 5(2) of the Act, and are, therefore, exempt from taxation."

37. In the case in hand, it is to be noted that import had occasioned only on account of the covenant entered into between the Company and N.T.P.C. and the imported pipes were used exclusively for erection and commissioning of the plant. Respondents have failed to establish that these pipes were not used in the plant of N.T.P.C. Similar question had again come up for consideration before two learned Judges of this Court *reported in*[1], State of been held as under:-

“9. In this case (K.G. Khosla & Co.(P) Ltd. the Constitution Bench specifically held that sale need not precede the import and this decision is a complete answer to the argument advanced by the learned counsel for the appellant.

10. Learned counsel then tried to argue that the decision of the Constitution Bench in Khosla case is not applicable to the present case as in the said case, the materials were to be inspected at Belgium and London and thereafter the goods were to enter into India. This argument is not correct. In Khosla case the inspection of goods was to be carried out in Belgium as well as on arrival into India. In the present case, the inspection was to be done on arrival of goods into India and as such, there is no distinction on facts between the present case and that of Khosla. Learned counsel then urged that the decision of the Constitution Bench in Khosla case has not been correctly decided and as such this case be referred to a larger Bench. We have considered the matter and found that Khosla case has held the field nearly more than three decades and its correctness has not been doubted so far. We, therefore, reject the prayer of learned counsel for the appellant.

11. Learned counsel then urged that this case is covered by decisions of this Court in the cases of Binani Bros. (P) Ltd. v. Union of India, Mohd. Serajuddin v. State of Orissa and K. Gopinathan Nair v. State of Kerala. The decision of this Court in the case of Binani Bros. is distinguishable as in that case no obligation was imposed on the appellant to supply the imported goods to DGS&D after they had been imported and the same could be directed to other channels.

Similarly, the decision of this Court in the case of Mohd. Serajuddin is not applicable to the present case as in that case it was found that the appellant in the said case sold the goods directly to the Corporation which entered into a contract with a foreign buyer and it was found that the immediate cause of export was the contract between the foreign buyer who was the importer and the Corporation who was the exporter. Such sales were described as back-to-back contract. This decision rested on the peculiar facts of that case. We are, therefore, of the view that the appellant cannot derive any assistance from the said decision. The last case which was brought to our notice was K. Gopinathan Nair v. State of Kerala. In the said case, on facts it was found that on account of the sale to CCI by foreign exporters raw cashewnuts were imported into India. The importer being the CCI and not the local user, this Court held that principles evolved by it in para 12 of the judgment were not applicable to that case. We do not, therefore, find that this decision is helpful to the appellant's case.

12. The result of the aforesaid discussion is that while interpreting the expression "sale occasions import" occurring in sub- section (2) of Section 5 of the Act, it is not necessary that a completed sale should precede the import."

38. Test to determine if the sales were in the course of import has been elaborately considered in a judgment of learned three Judges' Bench of this Court *reported in*[2], Deputy Commissioner of Agricultural Ltd.

39. Para 4 thereof dealing with the issue is reproduced hereinbelow and finally in para 6 while distinguishing[3] in the matter of M/s. Binani Bros (P) under:- "4. The test of integral connection or inextricable link between the sale and the actual import or export in order that the sale could become a sale in the course of import or export has been clearly enunciated by this Court in Ben Gorm Nilgiri Plantations Company case. There the question related to sale of tea which was claimed to be in the course of export out of the territory of India and though by majority it was held that the sales in question were not "in the course of export", the Court at p. 711 of the Report laid down the test thus:

> "A sale in the course of export predicates a connection between the sale and export, the two activities being so integrated that the connection between the two cannot be voluntarily interrupted, without a breach of the contract or the compulsion arising from the nature of the transaction. In this sense to constitute a sale in the course of export it may be said that there must be an intention on the part of both the buyer and the seller to export, there must be obligation to export, and there must be an actual export. The obligation may arise by reason of statute, contract between the parties, or from mutual understanding or agreement between them, or even from the nature of the transaction which links the sale to export.
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> A transaction of sale which is a preliminary to export of the commodity sold may be regarded as a sale for export, but is not necessarily to be regarded as one in the course of export, unless the sale occasions export. And to occasion export there must exist such a bond between the contract of sale and the actual exportation, that each link is inextricably connected with the one immediately preceding it. Without such a bond, a transaction of sale cannot be called a sale in the course of export of goods out of the territory of India.
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> Conversely, in order that the sale should be one in the course of import it must occasion the import and to occasion the import there must be integral connection or inextricable link between the first sale following the import and the actual import provided by an obligation to import arising from statute, contract or mutual understanding or nature of the transaction which links the sale to import which cannot, without committing a breach of statute or contract or mutual understanding, be sapped (sic snapped).
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> 6. Counsel for the appellant fairly conceded that the facts in K.G. Khosla & Co. case were on all fours with the facts obtaining in the instant appeals and that the ratio of that decision would appear to govern the question arising in these appeals, but he contended that a different view has been taken by this Court in Binani Bros (P) Ltd. v. Union of India and in view of this later decision the High Court ought not to have

applied the ratio of K.G. Khosla & Co. decision to this case. It is not possible to accept this contention as in our view Binani Bros case is clearly distinguishable on two material aspects. In that case the assessee itself held the import licence and the goods were imported on the strength of such import licence and not on the strength of any Actual Users' Licence as is the case here. Secondly, unlike in the present case there was no term or condition prohibiting diversion of the goods after the import. In fact, it is these two factors obtaining in the instant case which establish the integral connection or inextricable link between the transactions of sale and the actual import making the sales in the course of import. In fact as pointed out earlier, the movement of the goods from the foreign country to India was in pursuance of the requirements flowing from the contract of sale between the respondent- assessee and the local purchaser and as such the sales in question must be held to be in the course of import."

40. Learned Counsel for Respondents has placed reliance on Binani Bros. supra specially para 14, reproduced hereinbelow:- "14. Be that as it may, in the case under consideration we are concerned with the sales made by the petitioner as principal to the DGS&D. No doubt, for effecting these sales, the petitioner had to purchase goods from foreign sellers and it was these purchases from the foreign sellers which occasioned the movement of goods in the course of import. In other words, the movement of goods was occasioned by the contracts for purchase which the petitioner entered into with the foreign sellers. No movement of goods in the course of import took place in pursuance to the contracts of sale made by the petitioner with the DGS&D. The petitioner's sales to DGS&D were distinct and separate from his purchases from foreign sellers. To put it differently, the sales by the petitioner to the DGS&D did not occasion the import. It was purchases made by the petitioner from the foreign sellers which occasioned the import of the goods. The purchases of the goods and import of the goods in pursuance to the contracts of purchases were, no doubt, for sale to the DGS&D. But it would not follow that the sales or contracts of sales to DGS&D occasioned the movement of the goods into this country. There was no privity of contract between DGS&D and the foreign sellers. The foreign sellers did not enter into any contract by themselves or through the agency of the petitioner to the DGS&D and the movement of goods from the foreign countries was not occasioned on account of the sales by the petitioner to DGS&D."

41. However, we are of the considered opinion that it has not been the Respondents' case that the MS Pipes imported by the Company were not used for the erection and commissioning of the plant for N.T.P.C. Thus, from the facts of Binani Bros supra, it is clearly spelt out that the facts of the case in hand are different. Thus, the ratio of the said case would not be applicable to it.

42. In fact, the ground, sought to be raised for the first time before this Court that MS Pipes were put to manufacturing process and thereby converted into distinct end product had not been raised before any of the Authorities earlier. It was not the Respondents case that pipes so imported were not necessary components for the erection and commissioning of the plant.

Admittedly, the said pipes were used as components in the Ash Handling Plant in the same condition as they were imported without altering its originality. Thus, the ground which was sought to be raised before us for the first time has not been considered by any of the Authorities and in our opinion rightly so. Thus, we also do not deem it fit and proper to consider the same at this belated stage.

43. Apart from the aforesaid reasons, we are also of the considered opinion that such import would fall within the Constitutional umbrella. It is also to be noted that Company had admittedly imported the goods into India for completion of the Project on Turnkey Basis of N.T.P.C.

> "Thus, by virtue of Article 286 (1) (b) of the Constitution, it would not be taxable. For ready reference, Article 286 (1) (b) of the Constitution is reproduced hereinbelow:
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> "286. Restrictions as to imposition of tax on the sale or purchase of goods - (1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place- (a) outside the State; or (b) in the course of the import of the goods into, or export of the goods out of, the territory of India.
>
> See (1998) (7) SCC 19 Minerals & Metals Trading"

44. In the facts and circumstances of the case we are of the opinion that the order passed by Division Bench of the High Court as also the orders passed by Tribunal and other Authorities cannot be sustained in law. Same are hereby set aside and quashed. Appellant is held entitled to claim benefit of Section 5(2) of the Act.

45. We have been given to understand that pursuant to the demand notice issued by Respondents, the Company has already deposited the Sales Tax liability "under protest".

> "Respondent State would refund the same to the Company with Simple Interest at the rate of 6 percent from the date of its deposit till its refund within a period of three months, from the date of communication of the said order. In case amount is not refunded within three months, from the date of communication of said order, then Respondents would be liable to pay Compound Interest on the amount deposited by Appellants with the Respondents at the rate of 12 percent per annum."

46. The Appeal thus, stands allowed with costs throughout, Counsel's fee Rs. 50,000/-.

[1]*(1997) 7 SCC 190*
[2]*(1985) 4 SCC 119*
[3]*(1974) 1 SCC 459*