SUPREME COURT OF INDIA

Indusind Media & Communications Ltd.

Vs.

Commissioner of Customs

C.A.No.2498 of 2018

(Uday U.Lalit and Vinay Saran,JJ.,)

27.09.2019

JUDGMENT

Uday Umesh Lalit,J.,

1. This Appeal under Section 130E of the Customs Act, 1962 (hereinafter referred to as 'the Act') arises out of Order No.C/A/57743/2017 dated 09.11.2017 passed by the Customs Excise and Service Tax Appellate Tribunal (for short, 'the Tribunal') dismissing Appeal No.C/51770 of 2016 preferred by the appellant herein.

2. The basic facts leading to the issuance of Show Cause Notice dated 27.06.2014 initiating proceedings against the appellant, as set out in the Order under appeal are as under:-

> "The appellant imported certain goods at air cargo complex, New Delhi and filed Bill of Entry 2660085 dated 26.6.2003. They declared the goods as Multiplexor Satellite Receivers, test and measurement equipment etc. and attached six invoices covering 19 items imported. They indicated individual classification for the various items under Chapter 84/85 of the Customs Tariff. The Bill of Entry was assessed as per declaration and applicable customs duty was paid. Subsequently, information was received from SIIB Air Cargo Complex Mumbai, that investigations had been commenced against the appellant for import of similar goods at Mumbai. Accordingly, Provisional Assessment was been ordered under Section 18 of the Customs Act.
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> 2. The investigation undertaken at Mumbai revealed as follows:-
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> The importer had placed the order at UK for purchase of equipments - one set for Mumbai and another set for Delhi. Each set of equipment, taken together constituted 'Head End' for cable TV operations. The 'Head End' was an equipment at a local TV office that originates the cable TV services and cable TV modem services to subscriber though Conditional Access System (CAS). All imported

equipments taken together contributes towards a clearly refined function i.e. 'Head End' for cable TV operations. The complete set of equipment together merits classification under Customs Tariff Heading (CTH) 8543 8999, in the light of Note 4 to Section XVI.

Thus, it appeared that individual classification indicated for 19 imported items amounts to mis-declaration. The search operation carried by SIIB, ACC, Mumbai at the premises of importer further revealed that the importer had also mis declared the value of the imported consignments at Delhi and Mumbai. They had suppressed the value of embedded software as well as value of services payable to the foreign supplier for carrying out integration of the system prior to shipment and provide complete commission and installation services at the customers premises. Further, it was noticed that the purchase order placed by the importer was revised to show as CIF instead of FOB."

3. In the aforesaid circumstances, Show Cause Notice dated 27.06.2014 was issued by the Department stating inter alia:-

"18. In view of the above, it appears that the Importer had fabricated documents by way of splitting of value of the goods and declared lesser value to the Customs Department with the sole intention to evade payment of Customs Duties. Therefore, it appeared that the Importer had intentionally not declared the true and correct value of the goods imported to the customs for the purpose of payment of Customs Duty. Further the cost of services was to be paid separately by the Importer to their supplier.

Hence, the Importer failed to make true declarations. Therefore, the goods imported vide Bill of Entry No.260085 dated 26.06.2003 filed at Air Cargo Complex, New Delhi also appear to be liable for confiscation under Section 111(m) of the Customs Act, 1962 due to their aforesaid act of omission and commission. It also appears that they have rendered themselves liable for penal action under Section 112(a) and/or Section 114AA of the Customs Act, 1962."

The appellant was thus asked to show cause why:

(a) the declared values should not be rejected under Rule 10A of the erstwhile Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 and the same should not be redetermined under Rule 9(1)

(e) (adding cost of services) of the erstwhile Custom Valuation (Determination of Price of Imported Goods) Rules, 1988;

(b) the invoice value of imported goods declared in the (Bill of Entry as Rs.1,02,91,463/- should not be enhanced to Rs.1,72,03,243/- (Rupees One Crore Seventy Two Lakhs Three Thousand Two Hundred and Forty Three Only) for the

purpose of assessment under Section 14 of the Customs Act, 1962 read with Rule 9(1)(e) of the erstwhile Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 and the provisional assessment made under Section 18 of Customs Act, 1962 should not be finalised accordingly.

4. According to the record, the appellant was given several opportunities but no written submissions, in response to the Show Cause Notice, were filed. The facts on record also disclose that the opportunity of personal hearing was also extended and the matter was adjourned from time to time but the appellant did not avail the opportunity of personal *hearing*[1]. After considering the facts on record, the Principal Commissioner of Customs (Import) by his order dated 29.12.2015 rejected the declaration by the appellant vide Bill of Entry No. 260085 dated 26.06.2003. It was observed that the appellant had intentionally not declared the true and correct value and correct classification of imported goods. The conclusion was drawn as under:-

> "26 I find that in the instant case, the Noticee(s) made a declaration at the time of filing of Bill of Entry that goods imported by them vide Bill of Entry No. 260085 dated 26.06.2003 were different parts classifiable under different CTHs whereas the goods under import were the complete equipment of head- end classifiable under CTH 85438999 and the goods were also declared undervalued, as discussed above. Brigadier R Deshpande (Retd.), Vice President, Technical of the importer had admitted his awareness in his statement dated 10.07.2003 that software was embedded in the machine. He in connivance with the supplier of goods fabricated document by splitting the values between the goods imported and the other services rendered by the supplier in connection with the imported goods and as such, I find that the declaration of the Noticee(s) was false in material particular. In view of above, I hold both the Noticee(s) are liable to penalty under Section 114AA of the Customs Act, 1962."
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> The Principal Commissioner of Customs (Import) then redetermined the value of all the goods imported under said Bill of Entry as under:-
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> "(a) The value of all the goods imported under the said B/E taken together is redetermined under Rule 9(1)(e) of the said Rules as US $ 361633 CIF and consequently after loading 1% towards landing charges and applying the relevant exchange rate, the assessable value is determined as Rs.1,72,03,243/-(Rupees One Crore Seventy Two Lakhs Three Thousand Two Hundred and Forty Three Only) for the purpose of Section 14 of the Customs Act, 1962 read with Rule 9(1)(e) of the Customs Valuation (Determination of Price of Imported Goods), Rules, 1988.
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> (b) The classification of all the components imported under the B/E No.260085 dated 26.06.2003 taken together is determined under CTH 85438999 of the Customs Tariff Act, 1975.
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> (c) The provisional assessment made in respect of B/E No.260085 dated 26.06.2003

is finalized under Section 18 of the Customs Act, on the basis of revised assessable value and classification as ordered above. Consequently, demand for differential duty amounting to Rs.54,19,475/- is confirmed. I order that the amount of Rs.54,19,475/- deposited at the time provisional release of the goods be appropriated towards the differential duty.

(d) The goods imported under B/E No.260085 dated 26.06.2003, which were provisionally released on execution of P.O. bond for Rs.1,72,03,242/-, are confiscated under Section 111(m) of the Customs Act, 1962. Since the goods are already released to the party, they are ordered to pay redemption fine of Rs.10,00,000/- (Rupees Ten Lakhs only) under Section 125 of the Customs Act, 1962 in lieu of confiscation thereof."

The Order dated 29.12.2015 proceeded to impose penalty as under:-

"(e) I impose a penalty of Rs.15,00,000/- (Rupees Fifteen Lakhs only) on M/s. Indusind Media & Communication Ltd., Mumbai under Section 112(a) of the Customs Act, 1962.

(f) I impose penalty of Rs.15,00,000/- (Rupees Fifteen Lakhs only) on M/s. Indusind Media & Communication Ltd., Mumbai under Section 114AA of the Customs Act, 1962.

(g) I impose a penalty of Rs.3,00,000/- (Rupees Three Lakhs only) on Brigadier R. Deshpande (Retd.), Vice President, Technical of M/s. Indusind Media & Communication Ltd., Mumbai under Section 112(a) of the Customs Act, 1962.

(h) I impose a penalty of Rs.2,00,000/- (Rupees Two Lakhs only) on Brigadier R.Deshpande (Retd.), Vice President, Technical of M/s. Indusind Media & Communication Ltd.,Mumbai under Section 114AA of the Customs Act, 1962.
(i) The redemption fine and penalties may be recovered by enforcing the Bank Guarantee executed at the time of provisional release of goods."

5. The appellant, being aggrieved, filed Customs Appeal Nos.51769- 51770 of 2016 before the Tribunal. It was submitted that there was no undervaluation of the goods; that the department had incorrectly included the amount towards software and post import services; and that Note 4 to Section XVI of the First Schedule to Customs Tariff Act, 1975 ("the Act', for short) had no application in the matter. It was alternatively submitted that the goods in question merited classification under Central Excise Tariff Heading (CETH) 8525 2019 as "transmission apparatus" and not under 8543 as contended by the Department. In response, it was submitted on behalf of the Department that out of 19 items indicated in the Bill of Entry, only 8 items were physically presented, as several cards were already assembled in the main unit; that the appellant had not given proper description in the Bill of Entry and the goods imported were complete 'Head End' and not parts; that the charges covered by the relevant invoice amounting to US $ 1,00,019 were rightly included since

they pertained to charges where the software covered by the invoice was already embedded in the equipment and that the goods were rightly classified under 8543.

6. After hearing rival submissions, following issues were framed by the Tribunal for consideration:-

> "1. First is the classification of the imported goods - whether 8543 as ordered by the adjudicated authority or 8525 as claimed by the appellant.

7. The Tribunal relied upon Note 4 to Section XVI and found that though different equipments were ordered, they were meant to be interconnected in such a way as to perform a common clearly defined function which was to be 'Head End'. However, according to the Tribunal, the goods would actually be covered by heading 8525 and not by heading 8543. For arriving at such conclusion, reliance was placed on the decisions in *SET India Pvt. Ltd. vs. Commissioner of Customs*[2], *Cochin and Commissioner of Customs vs. Multi Screen Media Private Limited* [3]. While considering the issue regarding valuation, the purchase order was relied upon, according to which, apart from supply of equipment, necessary software had to be embedded in the equipment before the supply was effected. Relying on Sub-Rule (iii) of Rule 10 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 (for short, 'the 2007 Rules') it was observed that since the software was already incorporated in the imported goods, the value of the same was required to be added to the transaction value. It was concluded:-

> "19. In view of the mis-declaration established in respect of valuation, the imported goods will be liable for confiscation under section 111 of the Customs Act and the appellant will also be liable for penalty."

In the premises, by Order under appeal, the matter was remanded to the adjudicating authority only for the purpose of recomputing the differential duty in the light of its conclusion that the classification of imported goods was to be under heading 8525 and not under heading 8543.

8. In this appeal, it has principally been submitted:-

> "A. The Imported Goods have been correctly classified by the Appellant.
> a. The following major components were imported by the Appellant from Tandberg:
> 1. Multiplexers
> 2. Satellite receivers
> 3. Test and measurement
> b. The following are the major components imported from other supplier by the Appellant:
> i. CAM Modules - Aston and Nagravision
> ii. Encoders
> iii Power Vu receivers - Scientific Atlanta

iv. Integrated receiver De-coder's (IRD's)
- Purchased from the channels directly
v. Encryption System -Nagravision

c.The Head End is the physical location in your area where the television signal is received by the provider, stored, processed and transmitted to their local customers (subscribters).

d. Undisputedly the Appellant being a Multi System Operator ("MSO") i.e. a cable network operator, receives encoded and scrambled signals from Network Broadcasters. The major function of a Head End is to decode and unscramble, the encoded and scrambled signals received from the Broadcasters. Such function admittedly could not be achieved without Encoders, IRD's, Power Vu Receivers and Encryption System which were imported by the Appellant from other suppliers.

e. Without these equipments working in conjunction network, the encoded and scrambled signals from Broadcasters could not be received at the Head End ("Power Vu Receivers") and neither can they be decoded (Encoders and IRD's) or unscrambled ("Encryption System") and thereafter could not be broadcasted to the recipient/subscribers. Therefore, the intended function of a Head End could not be achieved without Encoders, IRD's, Power Vu Receivers and Encryption System. These equipments admittedly were not part of the imported consignment under dispute. Admittedly these equipment's were imported separately from other suppliers.

f. Therefore, it can be concluded that the imported consignment does not constitute a complete Head End and that each component is to be classified under the relevant Chapter Heading." and following principal question has been raised:-

"A. Whether the CESTAT has erred in failing to consider the primary submission of the Appellant, that the 19 different items imported by the Appellant under the Bill of Entry No.2660085 dated 26.06.2003 ('BOE') even if taken together do not form one co posite 'Head-end' and that each item has an individual function, and each item is to be classified under the Chapter Heading it falls mainly CTH 85175010, CTH 85281299, CTH 85438910, CTH 84717010 and CTH 85249112."

9. Appearing in support of the appeal, Mr. Tarun Gulati, learned Senior Advocate, also submitted:-

a) The imports and Bill of Entry in the instant case were of the year 2003 and 2007 Rules would not apply.

b) Certain activities like engaging the services for appropriate software etc. as a result of which cards were embedded in items of import, were essentially post import activities and could not be taken into account for the purposes of valuation.

10. Mr. Aman Lekhi, learned Additional Solicitor General appearing for the respondent refuted all the contentions of the appellant and submitted that:-

a) Though the invoices in the case did mention individual items, the dominant intent had to be seen whether the intended user was of individual items or they were supposed to be used collectively as part of one apparatus, in which event Note 4 to Section XVI would provide guidance.

b) Rule 9 of the Customs Valuation (Determination of Price of Imported Goods) Rule, 1988 ("the 1988 Rules", for short) being almost identical to Rule 10 of 2007 Rules, the reliance was not misplaced.

c) In any case, Rule 10 of 2007 Rules which seeks to explain certain matters is clarificatory in nature and the meaning would be consistent with Rule 9 of 1988 Rules.

d) The submission that there were post import charges which were getting included in the valuation was incorrect and what was found as a fact was that all those software cards were embedded in various parts when the import had taken place.

11. It must be stated that the finding of the Tribunal that the imported goods would be classifiable under Tariff Item 8525 and not under 8543, has not been challenged by the respondent. Thus, insofar as issue of classification is concerned, the question is whether the items imported ought to be considered individually or whether the treatment given by the Department, with the aid of Note 4 to Section XVI was correct. Note 4 appears in Section XVI of the First Schedule to the Act. Said Section XVI has the heading:-

"Section XVI- Machinery and mechanical appliances; electrical equipment; parts thereof; sound records and reproducers, television image and sound recorders and reproducers; and parts and accessories of such articles"

Note 4 of Said Section XVI is to the following effect:-

"4. Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84 or Chapter 85, then the whole falls to be classified in the heading appropriate to that function."

Tariff Item 8525 appearing in Chapter 85 is as under:-

"Transmission apparatus for radio telephony, radio-telegraphy, radio-broadcasting or television, whether or not incorporating reception apparatus or sound recording or reproducing apparatus; television, cameras; still image video cameras and other

video camera recorders; digital cameras."

12. The Appellant is right in its submission that since the Bill of Entry in the present case was of the year 2003, 2007 Rules would not apply and that the appropriate Rules would be 1988 Rules. Rule 9 of 1988 Rules was set out by this Court in *Commissioner of Customs (Port), Chennai v. Toyota Kirloskar Motors P. Ltd*[4]. , while considering the issue whether technical assistance fees in terms of Article 4 of the Agreement between the parties had any direct nexus with importation of goods. It was observed:-

> "25. The Central Government in exercise of its power conferred upon it under Section 156 of the Act, made rules known as "the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988". Rule 3 provides for determination of the method of valuation, stating:
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> "3. Determination of the method of valuation.—
> For the purpose of these Rules,—
> (i) the value of imported goods shall be the transaction value;
> (ii) if the value cannot be determined under the provisions of clause (i) above, the value shall be determined by proceeding sequentially through Rules 5 to 8 of these Rules."
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> 26.How the transaction value would be determined has been laid down in Rule 4 of the Rules, stating that the same shall be the price actually paid or payable for the goods when sold for export to India adjusted in accordance with the provisions of Rule 9 of the said Rules. Rule 9 of the Rules provides for determination of transaction value, stating:
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> "9. Cost and services.—(1) In determining the transaction value, there shall be added to the price actually paid or payable for the imported goods,
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> (a) the following cost and services, to the extent they are incurred by the buyer but are not included in the price actually paid or payable for the imported goods, namely—
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> (i) commissions and brokerage, except buying commissions;
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> (ii) the cost of containers which are treated as being one for customs purposes with the goods in question;
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> (iii) the cost of packing whether for labour or materials;
>
> (b) the value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of imported goods, to the extent that such value has not been included in the price actually paid or payable,

namely—
(i) materials, components, parts and similar items incorporated in the imported goods;

(ii) tools, dies, moulds and similar items used in the production of the imported goods;

(iii) materials consumed in the production of the imported goods;

(iv) engineering, development, art work, design work, and plans and sketches undertaken elsewhere than in India and necessary for the production of the imported goods;

(c) royalties and licence fees related to the imported goods that the buyer is required to pay, directly or indirectly, as a condition of the sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable;

(d) the value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues, directly or indirectly, to the seller;

(e) all other payments actually made or to be made as a condition of sale of the imported goods, by the buyer to the seller, or by the buyer to a third party to satisfy an obligation of the seller to the extent that such payments are not included in the price actually paid or payable."

27. The issue before us is no longer res integra in view of the decision of this Court in Commr. of Customs (Port) v. J.K. Corpn. Ltd. wherein it is stated: (SCC para 9)
"9. The basic principle of levy of customs duty, in view of the aforementioned provisions, is that the value of the imported goods has to be determined at the time and place of importation. The value to be determined for the imported goods would be the payment required to be made as a condition of sale. Assessment of customs duty must have a direct nexus with the value of goods which was payable at the time of importation. If any amount is to be paid after the importation of the goods is complete, inter alia, by way of transfer of licence or technical know-how for the purpose of setting up of a plant from the machinery imported or running thereof, the same would not be computed for the said purpose. Any amount paid for post¬importation service or activity, would not, therefore, come within the purview of determination of assessable value of the imported goods so as to enable the authorities to levy customs duty or otherwise. The Rules have been framed for the purpose of carrying out the provisions of the Act. The wordings of Sections 14 and 14(1-A) are clear and explicit. The Rules and the Act, therefore, must be construed, having regard to the basic principles of interpretation in mind."

28. Reliance, as noticed hereinbefore, however, has been placed by the learned

Additional Solicitor General on Essar Gujarat Ltd."

Thereafter, the decision of this Court in Essar Gujarat Limited was considered and it was observed:

"36. Therefore, law laid down in Essar Gujarat Ltd. and J.K. Corpn. Ltd. is absolutely clear and explicit. Apart from the fact that Essar Gujarat Ltd. was determined on the peculiar facts obtaining therein and furthermore having regard to the fact that the entire plant on "as-is-where-is" basis was transferred subject to transfer of patent as also services and technical know-how needed for increase in the capacity of the plant, this Court clearly held that the post-importation service charges were not to be taken into consideration for determining the transaction value.

37. The observations made by this Court in Essar Gujarat Ltd.1 in para 18 must be understood in the factual matrix involved therein. The ratio of a decision, as is well known, must be culled out from the facts involved in a given case. A decision, as is well known, is an authority for what it decides and not what can logically be deduced therefrom. Even in Essar Gujarat Ltd.1 a clear distinction has been made between the charges required to be made for pre-importation and post-importation. All charges levied before the capital goods were imported were held to be considered for the purpose of computation of transaction value and not the post-importation one. The said decision, therefore, in our opinion, is not an authority for the proposition that irrespective of nature of the contract, licence fee and charges paid for technical know-how, although the same would have nothing to do with the charges at the pre-importation stage, would have to be taken into consideration towards computation of transaction value in terms of Rule 9(1)(c) of the Rules.

38. The transaction value must be relatable to import of goods which a fortiori would mean that the amounts must be payable as a condition of import. A distinction, therefore, clearly exists between an amount payable as a condition of import and an amount payable in respect of the matters governing the manufacturing activities, which may not have anything to do with the import of the capital goods."

13. The aforesaid decision found that the Technical Assistance Fee under Article 4 had direct nexus with post importation activities and not with importation of goods. That deduction was arrived at after considering the individual facts and the scope of Article 4 which was to the following effect:-

"4. Additional assistance

(a) At the licensee's written request, the licensor may furnish the licensee with manufacturing, engineering and other know-how and information relating to the licensed products which are not readily available in the licensor's records but which

the licensor is willing to develop especially for the licensee, and which shall be furnished through such documents and assistance as designated at the discretion of the licensor from among those stipulated in Appendix D attached hereto and any other documents and assistance from time to time designated by the licensor.

(b) In the event of the preceding para (a), the licensee shall pay the licensor all fees, and all costs and expenses incurred by the licensor in developing and furnishing such know-how, information, documents and/or assistance.

(c) If the assistance rendered under para (a) hereof is technical assistance or engineering assistance concerning the licensed products, such assistance will be provided in accordance with the procedures and conditions set forth in Appendix E attached hereto."

The subsequent decisions of this Court in *Commissioner of Customs, Ahmedabad vs. Essar Steel Ltd*[6]*.* , and in *Commissioner of Customs (Import), Mumbai vs. Hindalco Industries Ltd*[7]*.* have followed the same principle that technical agreements involved in said cases pertained to post-importation activity. To similar effect was the conclusion by this Court in an earlier decision in *Commissioner of Customs, New Delhi v. Prodelin India (P) Ltd*[8]*.* that technical know how fee was in respect of post-importation activities and could not be added to the value of the imported goods.

14. It is a matter of record that after considering the purchase order in the instant case, the Tribunal found that apart from supply of equipment, necessary software had to be embedded in the equipment before the supply was effected. The facts also disclose that out of 19 items indicated in the Bill of Entry, only 8 items were physically presented while the rest were already embedded in the main unit. These facts are not only reflective that the individual components were intended to contribute together and attain a clearly defined function as dealt with in Note 4 of Section XVI as stated above, but also indicate that software that was embedded through cards in the main unit, was not any post-importation activity. The value of the software and the concerned services were therefore rightly included and taken as part of the importation.

15. The facts on record as stated above further disclose that the Department was therefore right in invoking principle under said Note 4 and considering the imported items as part of one apparatus or machine to be classifiable under the heading appropriate to the function. The submission advanced by the Appellant in that behalf therefore has to be rejected.

16. Rule 9(1)(b) of 1988 Rules as quoted above in the decision in Toyota Kirloskar4, case shows that the value in respect of "materials, components, parts and similar items incorporated in the imported goods" has to be added while determining the transaction value. Said Rule 9 is almost identical to Rule 10 of 2007 Rules. Thus, even if the governing rule is taken to be Rule 9 of 1988 Rules, there would be no difference in the ultimate analysis.

17. Consequently, we do not find any merit in the present appeal. Affirming the view taken by the Tribunal, we dismiss this appeal, without any order as to costs.

Judgment Referred.

[1]*Paras 16 and 17 of the Order dated 29.12.2015*
[2]*(2003) (152) ELT 190 (Tri–Mu)*
[3]*(2015) (322) ELT 421 (SC)*
[4]*(2007) 5 SCC 0371*
[5]*(1997) 9 SCC 0738*
[6]*(2015) 8 SCC 0175*
[7]*(2015) 14 SCC 0750*
[8]*(2006) 10 SCC 0280*