

JVS

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**WRIT PETITION NO. 1794 OF 2017
WITH
INTERIM APPLICATION NO. 1006 OF 2021**

Aban Offshore Ltd. & Anr. .. Petitioners

Vs.

Union of India & Ors. .. Respondents

Mr. V. Sridharan, Senior Advocate a/w Mr. Yogesh Patki a/w Mrs. Rashna Khan and Ms. Poorva Garg i/by Mulla & Mulla and Craigie Blunt and Caroe for petitioners.

Mr. Pradeep S. Jetly, Senior Advocate a/w Mr. J. B. Mishra for respondent nos.1 and 2.

Mr. D. P. Singh for respondent no.3

**CORAM: DIPANKAR DATTA, CJ &
M. S. KARNIK, J.**

**HEARD ON: DECEMBER 2, 2021
JUDGMENT ON: APRIL 6, 2022.**

JUDGMENT [Per DIPANKAR DATTA, CJ.]:

The Challenge:

1. An order-in-original dated 27th February, 2017 [spread over 46 (forty-six) pages] passed by the Principal Commissioner of Customs (Import-I), which was preceded by a show-cause notice dated 24th November, 2015 [spread over 35 (thirty-five) pages] issued by the Principal Additional

Director General, Directorate of Revenue Intelligence (hereafter "the DRI", for short) is challenged in this writ petition dated 17th April, 2017. Although the show cause notice and the order-in-original are very lengthy, fortunately, there is a summary of discussions and findings in such an order at paragraph 34 thereof. Also, the next paragraph records the operative part of the order. For facility of appreciation of what the findings and the conclusion are, we consider it appropriate to quote the same below:

"34. I hereby summarise the discussions and findings mentioned above:

a) The Impugned Drill Ship ABAN-ICE was never used for the Petroleum Operations undertaken under the contract dated 22.12.2008 as specified in the Essential Certificate dated 04.11.2013 for the contract area Block MB-OSN-2005/06 thus violated the mandatory condition to be treated as the goods for which the duty exemption is allowed against the Sr. No.359 of Exemption Notification No. 12/2012-Customs dated 11.03.2012.

b) The amendments (additions of blocks) to the Essentiality Certificate dated 04.11.2013 by issuing the No Objection Certificate dated 06.07.2015 were in contravention to the Doctrine of Curability as at the time of the issuance of the said amendments, the said Essentiality Certificate was not valid (It had the validity of six months from the date of issue). The bonafide intention was also lacking in the act of getting the blocks added to the said Essentiality Certificate as the said act was initiated after the investigation into import of ABAN-ICE by DRI was undertaken and clearly was the fall out thereof. It was the valiant efforts to regularize the misdeeds of employing the ABAN ICE in other blocks not relevant to the specified contract dated 22.12.2008.

c) The purpose of issuance of Essentiality Certificate is just to validate the conditions put forth by importer to claim the import of goods under the exemption notifications claimed. It is Customs responsibility to examine and investigate into whether the conditions stipulated for duty exemption are being complied with by the importer. Thus the substantial compliance of submission of Essentiality Certificate by noticee to claim duty exemption is not sufficient unless the mandatory condition of utilizing the said Drill Ship for the Petroleum operations undertaken under specific contract dated 22.12.2008 under New Lease Exploration Policy is also fulfilled. The noticee has failed to fulfill the said mandatory condition in the case. The import of Drill Ship ABAN-ICE is thus not liable for any duty exemption as it failed to be goods eligible for the duty exemption against Sr.359 of Exemption Notification No.12/2012-Cus Dated 11.03.2012.

d) The noticee has willfully suppressed the facts and the Drill Ship ABAN-ICE is being utilized for the other blocks which are not covered under the specific contract dated 22.12.2008 for which it was imported under duty free under the exemption notification claimed. Their efforts to add on blocks to the essential certificate are also of not much help to them as any additions to the invalid Essential certificate are not legal in terms of Doctrine of Curability. Even if they wanted to get the operations in other blocks to get regularized, it would be mandatory to get the said blocks added to the said specified contract dated 22.12.2008 under New Lease Exploration Policy as the goods to be eligible for the exemption against Sr.No.359 ibid. required to be goods which would be utilized in the Petroleum operations undertaken under specified contracts under New Lease Exploration Policy. Thus it is the case where the noticee was well aware that the ABAN-ICE has to be used for the petroleum operations undertaken under the specified contract dated 22.12.2008 under New Lease

Exploration Policy as per the submission before Customs authorities but they willfully used the said Drill Ship for other purpose and also suppressed their activities till the same were disclosed during the investigation by DRI. Therefore in view of the misstatement and willful suppression of facts on the part of the noticee, the invocation of provisions of Section 28(4) of the Customs Act, 1962 to demand duty and interest thereon from the noticee are legal & proper and noticee for their act of misstatement and willful suppression of facts are also liable for penalty under Section 114A of Customs Act, 1962.

e) The noticee is the owner of the Drill Ship ABAN-ICE and fulfills all the criteria of importer in terms of definition of 'Importer' under section 2(26) of Customs Act, 1962. As the ABAN-ICE is not entitled for duty exemption under Sr.No.359 ibid., duty of Rs. 91,60,43,316/- (being the customs duty foregone due to exemption being allowed) along with appropriate interest thereon is payable by the noticee under Section 28(4) and 28 AA of the Customs Act, 1962 respectively.

(underlining for emphasis by us)

35. On the basis of the foregoing findings, I pass the following order:

ORDER

i) I deny the benefit of Sr.no.359 of Exemption Notification No.12/2012-Cus dated 17-03-2012 to the Drill Ship ABAN-ICE imported under Bill of Entry No.3718047 dt. 05-11-2013 by M/s Aban Offshore Ltd. (Noticee) for unauthorized diversion of the Drillship as brought out by the investigation, in contravention of condition no.44 of the said notification read with EC No. ECIN201311040060 dated 04-11-2013.

ii) I confirm the demand of Customs duty amounting to Rs.91,60,43,316/- [Rupees Ninety One Crore Sixty Lakh Forty Three Thousand Three Hundred

and Sixteen only] (being the customs duty foregone due to exemption allowed) from M/s Aban Offshore Ltd. (Noticee) under the provisions of Section 28(4) of the Customs Act, 1962 and order the recovery of said amount forthwith.

iii) I confirm the demand of interest at appropriate rate from M/s Aban Offshore Ltd. (Noticee) on the non-paid Customs duty as shown in para (ii) above under Section 28AA of the Customs Act, 1962 and order the recovery of said amount forthwith.

iv) I confiscate the imported goods i.e. the Drill Ship ABAN-ICE having declared CIF value of Rs.616,48,55,767/- [Rupees Six Hundred Sixteen Crore Forty Eight Lakh Fifty Five Thousand Seven Hundred and Sixty Seven only] as per Bill of Entry [CIF value of Rs.620,69,93,704/- (Rupees Six Hundred Twenty Crore Sixty Nine Lakh Ninety Three Thousand Seven Hundred and Four only) as per the said Essentiality Certificate], under Section 111(o) of the Customs Act, 1962 which was seized under proviso to Section 110(1) of the Customs Act, 1962 and released provisionally against Undertaking/Bond. However I give an option to M/s. Aban Offshore Ltd. (Noticee) to redeem the said goods in lieu of confiscation on payment of redemption fine of Rs.60,00,00,000/- [Rupees Sixty Crore Only], under Section 125 of Customs Act, 1962.

v) I impose a penalty amounting to Rs.91,60,43,316/- [Rupees Ninety One Crore Sixty Lakh Forty Three Thousand Three Hundred and Sixteen only] on M/s. Aban Offshore Ltd. (Noticee), under Section 114A of the Customs Act, 1962. However, if the duty and interest amount as determined above is paid within 30 days from the date of the communication of the order, the amount of penalty liable to be paid by such person under this Section shall be 25% of the duty and interest so determined subject to the condition that the said

amount of penalty is also paid within the period of 30 days.”

Facts giving rise to the challenge

2. The pleaded case in the writ petition, relevant for the purpose of adjudication, runs thus:

(a) Petroleum being an extremely important natural resource, all petroleum operations and in particular off-shore petroleum operations require permission and approval of the Central Government. Initially, it was only Oil and Natural Gas Commission (hereafter “ONGC”, for short) which was granted petroleum mining lease (hereafter “PML”, for short) by the Central Government to carry out petroleum production operation on nomination basis. Thereafter, roughly during the period 1992-1993, the Government entered into “production sharing contract” with private companies (also known as specified contracts) for small/medium sized fields (with proven reserves discovered by ONGC/Oil India). Later, roughly since April, 1999, petroleum operations were opened up for private and foreign companies including ONGC through international competitive bidding process. Various New Exploration Licensing Policies (hereafter “NELP”, for short) were announced by the Central Government from time to time, being NELP I to NELP XI. Production sharing contracts were entered into between the Central Government and various companies including ONGC post April, 1999 under NELP. For historical reasons and also for the purpose of convenience of petroleum operations, the entire continental shelf has been bifurcated in various area/pockets

by the Central Government. These are usually referred to as blocks (or fields). Blocks are marked and identified by the Central Government for possible reserves, based on preliminary survey undertaken by the Geological Survey of India. Permission to carry out petroleum operations in the continental shelf is granted by the Central Government block-wise, and off-shore petroleum operations to be undertaken by ONGC on individual blocks has to be permitted by the Central Government. The diverse blocks where petroleum operations were undertaken by ONGC with the permission/license granted by the Central Government fell within PML or production sharing contracts issued under NELP. Accordingly, drill ships used for drilling to produce crude oil move between various blocks as per drilling programme finalized by ONGC from time to time.

(b) ONGC, as per usual practice, invited tenders for a charter hire of drill ship for its off-shore petroleum operations. The petitioner no.1, Aban Offshore Ltd. (hereafter "AOL", for short), successfully bid in the tender process. Pursuant thereto, a letter of award dated 6th June 2013 was issued by ONGC in favour of AOL. Thereafter, AOL and ONGC entered into a formal contract dated 19th September 2013 which, *inter alia*, provided that the drill ship, imported by AOL, would be deployed by it only for jobs arising out of the contract. The contract also specifically provided that the drill ship will be deployed in eligible PML areas (issued or renewed after 1st April 1999) and NELP areas only, where customs duty exemption is available as

per Customs Notification No. 12/2012-Cus dated 1st March, 2012 (hereafter "the said exemption notification", for short).

(c) The Central Government had recognized the position that the customs authority may not have requisite skill and expertise to determine any use of goods mentioned in the said exemption notification. For such reason and other reasons, the said exemption notification mandated certification by the Director General of Hydrocarbon (hereafter "DGH", for short) that the imported goods are required in connection with petroleum operations as detailed in Condition Nos. 41 and 44 relatable to Sr. Nos. 356 and 359 of the said exemption notification, respectively.

(d) AOL having applied for an Essentiality Certificate for a drill ship named Aban-ICE, ONGC recommended to the DGH for grant thereof. Problem arose in the on-line application form for grant of Essentiality Certificate. There was no direction or column in the on-line application form for mentioning the particulars of all the individual blocks where operations are to be carried out as per the contract of the importer with ONGC. There was yet another problem in such application form in that, it did not permit indication of both Sr. Nos. 356 and 359 as being applicable in a given case. This is a practical problem in the case of ONGC alone, since some petroleum operations undertaken by ONGC are governed by Sr. No. 356 (PML) while some others are governed by Sr. No. 359 (NELP). This problem, however, does not exist for private operators who would be governed only by Sr. No. 359. Since the form of application is not prescribed in the customs notification and there is no

reference to the blocks at all in such notification, mentioning of the block in the Essentiality Certificate is not a requirement of the said exemption notification. It is a harmless surplusage not being a condition of such notification, particularly so for goods like a drill ship which has no use whatsoever except for petroleum operations only.

(e) Pursuant to an application made by AOL to ONGC dated 22nd October 2013 for issuance of Essentiality Certificate, ONGC on its part duly recommended it. Thereafter, the DGH issued Essentiality Certificate dated 4th November, 2013 under Sr. No. 359 of the said exemption notification. It was certified by the DGH that Aban-ICE is required for petroleum operations and the contract dated 19th September, 2013 between ONGC and AOL was duly mentioned in the said certificate. The certificate further mentioned the block where Aban-ICE could be put to use for petroleum operations as MB-OSN-2005/6. It was also indicated in the last line of the certificate that it was valid for a period of 6 (six) months from the date of issue.

(f) Block MB-OSN-2005/6 was covered by a production sharing contract dated 22nd December 2008 entered into by and between the Central Government and ONGC under NELP VII and such block was the first block where petroleum exploration activities under the contract between ONGC and AOL were expected to commence in terms of a letter dated 22nd August, 2013 issued by the former to the latter. It was in pursuance of such letter dated 22nd August, 2013 that AOL/ONGC indicated MB-OSN-2005/6 as the first block in the on-line application made to the DGH dated 22nd October 2013. Consequently, the

Essentiality Certificate specified the said block where the drill ship Aban-ICE could be deployed for petroleum operations.

(g) However, 6 (six) days after the application for essentiality certificate was filed by AOL on 22nd October 2013, ONGC vide letter dated 28th October 2013 conveyed to AOL that the details of First Drilling Location for Aban-ICE have been changed and the new location is NELP block MB-OSN-2005/5. This block was also covered by the production sharing contract dated 22nd December, 2008 between the Central Government and ONGC under NELP-VII. Accordingly, Aban-ICE was directly deployed in MB-OSN-2005/5 block as IOL was obligated to deploy it as directed by ONGC. Aban-ICE was never deployed at block MB-OSN-2005/6 of NELP area, as initially indicated by ONGC but deployed initially at MB-OSN-2005/5, also a NELP area.

(h) Deployment in different blocks within production sharing contracts granted under NELP has never been objected to by the customs, including even in the present show cause notice or order-in-original. Therefore, though ONGC's letter dated 28th October, 2013 changed the location of first deployment to MB-OSN-2005/5 block (prior to grant of Essentiality Certificate on 4th November, 2013 indicating the location of the block as MB-OSN-2005/6, neither AOL nor ONGC thought it necessary to amend the application from filed with the DGH, since block MB-OSN-2005/5 was also within NELP area.

(i) After importing Aban-ICE and filing bill of entry dated 5th November, 2013, AOL claimed the benefit of the said

exemption notification. The Essentiality Certificate dated 4th November, 2013 was also duly filed with the customs. After complying with all formalities, the bill of entry was duly assessed and goods allowed to be cleared by the proper officer of the customs. Thus, Aban-ICE was cleared without payment of customs duty under Sr. No. 359 of the said exemption notification.

(j) In addition to import of Aban-ICE, AOL also separately imported parts, spares and other capital goods on filing of separate bills of entry for import thereof based on the recommendation of ONGC and consequent issuance of separate Essentiality Certificates by the DGH.

(k) On 25th May 2015, the DRI seized Aban-ICE on the ground that it was not deployed in the block mentioned in the contract. Aggrieved by such seizure, the petitioners approached this Court by instituting a writ petition being W.P. No. 2006 of 2015.

(l) Close on the heels of such seizure, ONGC had recommended on 5th June, 2015 to the DGH to amend the Essentiality Certificate dated 4th November, 2013. DGH amended such certificate on 6th July, 2015 to include various blocks where Aban-ICE could be deployed. An affidavit was filed on 31st July, 2015 by DGH in W.P. No. 2006 of 2015 confirming conditions of PE-PML blocks in the Essentiality Certificate.

(m) On 3rd August 2015, the writ petition was disposed of by a coordinate Bench of this Court directing release of Aban-ICE from seizure on compliance of the conditions imposed therein by the petitioners. The authorities were left free to

initiate proceedings in accordance with law against the petitioners, if they so desired. Before parting, the coordinate Bench thought it appropriate to invite the attention of all concerned to the decision of the Supreme Court in **Commissioner of Customs (Imports), Mumbai vs. Tullow India Operations Ltd.**,¹ and accordingly, quoted paragraphs 23 to 36 thereof in the concluding paragraph. It is not in dispute that compliance of all the conditions led to release of Aban-ICE.

(n) Availing the leave granted by order dated 3rd August 2015, the DRI issued show-cause notice dated 24th November, 2015 alleging that AOL had contravened the conditions of the said exemption notification in the import of Aban-ICE and that there had been consequent evasion of customs duty by it. The petitioners responded to the show-cause notice by filing a detailed reply as well as compilation of case laws.

(o) During the pendency of the show-cause notice, the petitioners had taken out Notice of Motion No. 475 of 2016 in the disposed of W.P. No. 2006 of 2015. By an order dated 19th December, 2016, the notice of motion was disposed of in terms of prayer (a) reading as follows: -

“(a) this Hon’ble Court be pleased to order that the drill ship seized by the Respondents and provisionally released in terms of this Hon’ble High Court’s Order dated August 3, 2015 as and when deployed beyond December 31, 2016 only within India for ONGC contracts – present and future – as per directions and written instructions of ONGC and also when merely stationed in India during monsoon will be in compliance with the Order dated August 3, 2015 passed by this Hon’ble High Court;”

¹ AIR 2006 SC 536

The order recorded that the respondents in the writ petition had no-objection to such prayer being granted so long Aban-ICE is required for deployment within India.

(p) It was on 27th February, 2017 that the Principal Commissioner of Customs (Imports-I) made the impugned order together with findings which have been noted at the beginning of this judgment and order.

(q) The impugned order relied on the decision of the Punjab & Haryana High Court in **Supreme Castings Ltd. vs. Jt. Director General of Foreign Trade, Ludhiana**², to hold that an Essentiality Certificate cannot be amended after expiry. According to the petitioners, the decision in **Supreme Castings** (supra) is clearly distinguishable and it is the decision of the Division Bench of this Court in **Bhilwara Spinners Ltd. vs. Union of India**³ [which set aside the larger bench decision of the CESTAT dated 18th January, 2008 and a Division Bench decision of the same tribunal to the extent the same held that the licensing authorities have no power to amend the licenses with retrospective effect from the dates of grant and the decision of the customs authorities seeking to recover duty with interest and penalty], which ought to have been followed. It was also contended by the petitioners that **Tulrow India Operations Limited** (supra) having held that once an Essentiality Certificate is issued, the same is sufficient compliance with the provisions of the exemption notification ought to have clinched the issue.

² 2016 (342) ELT 176 (P&H)

³ 2011 (267) ELT 49 (Bom)

(r) Finally, it is pleaded that seizure of Aban-ICE violates Article 19(1)(g) of the Constitution of India, 1950 by restricting the petitioners right to carry on trade.

Proceedings before the Court

3. As the arguments advanced by the respondents in course of hearing would unfold, which we propose to narrate later, it is of utmost importance to notice certain relevant orders passed by this Court on this writ petition. They are referred to hereafter:

(a) By an order dated 26th April 2017, this Court accepted the request of the respondents 1 and 2 for posting the writ petition on 19th June, 2017 to enable them file their reply affidavit. The statement made on behalf of the such respondents that no coercive measures would be initiated against the petitioners on the basis of the impugned order-in-original till 23rd June, 2017 was recorded and accepted as an undertaking to the Court. The petitioners were required to deploy Aban-ICE for the contract (copy at page 315 of the writ petition) and any activity including moving of the vessel beyond the limits of the contractual stipulation was restrained.

(b) Order dated 19th June, 2017 permitted the petitioners to add the Ministry of Petroleum as a party. Notice was directed to be issued to the added party, returnable on 10th July, 2017. The Court expressed the view that an attempt would be made to dispose of the writ petition at the stage of admission itself, considering the objection raised by the respondents 1 and 2 regarding availability of an alternative remedy to the petitioners.

(c) The Court by an order dated 15th September, 2020 disposed of Interim Application (L) No. 3078 of 2020 of the petitioners by modifying the order dated 26th April, 2017 and directing that Aban-ICE shall be permitted to be parked at Inner Anchorage, Mumbai Port as the vessel could not remain at the contract site because of nearing of the completion of the contract period.

(d) On 6th October 2020, the writ petition was admitted by this Court upon hearing the parties. The following detailed order was passed:

“P.C.:

Heard Mr. Sridharan, learned senior counsel for the petitioners and Mr. Jetly, learned senior counsel for the respondents.

2. Challenge made in this writ petition is to the order in original dated 27/2/2017 passed by the Principal Commissioner of Customs (Import-I), Mumbai.

3. Primary contention of Mr. Sridharan is that the adjudicating authority has questioned the action of Director General of Hydrocarbon, Government of India in making the amendments to the Essentiality Certificate dated 4/11/2013, which is beyond the competence of the adjudicating authority. The same has vitiated the impugned order. In support of his submissions he has placed reliance on the following decisions:

1) Zuari Industries Vs. Commissioner of Central Excise & Customs, 2007 (210) ELT 648 9SC);

2) Bombay Chemicals Vs. Union of India and Ors., 1982 (10) ELT 171 (Bom);

3) Bhilwara Spinners Lts. Vs. Union of India, 2011 (267) ELT 49 (Bom);

4) ONGC Vs. Commissioner of Customs, 2006 (20) ELT 321 (SC).

4. On the other hand Mr. Jetly submits that the impugned order is an appealable one under section 128 of the Customs Act, 1962. He submits that the conclusions

summarized by the adjudicating authority are based on determination of facts which can be gone into in an effective manner only in an appellate proceeding. Besides, the amendments were made to the Essentiality Certificate after the period was over.

5. Be that as it may, after having minutely considered the impugned order in original as well as the judgments cited at the bar, *prima facie* we are of the view that the adjudicating authority was not justified in discarding the amendments to the Essentiality Certificate; thus imposing customs duty, interest and penalty on the petitioner who is a subcontractor of Oil and Natural Gas Corporation (ONGC), engaged in providing offshore drilling and production services in relation to oil exploration at various sites in Mumbai High.

6. Admit.

7. Since the parties are represented and affidavits have been filed, issuance of formal notice stands obviated.

8. In the meanwhile, there shall be stay of the impugned order in original dated 27/2/2017 (Exh. A to the writ petition).

9. Since pleadings are complete, list the matter for final hearing on 26/11/2020.

***"

(e) Although the Court, in the aforesaid order, recorded that the affidavits had been filed and the writ petition was directed to be listed for final hearing, no prayer was made before us for leave to file an additional reply-affidavit at the instance of the respondents 1 and 2. The parties have, therefore, referred to the pleadings before us which, *inter alia*, include the reply affidavit of the respondents 1 and 2 dated 29th May, 2017 and the reply affidavit of the respondent no. 3 dated 20th December, 2017.

Affidavit in Reply of the Respondents 1 & 2

4. The affidavit in reply of the respondents 1 and 2, affirmed

on 29th May 2017 does not deal with the contents of the writ petition at all; instead, it seeks to furnish reasons why the writ jurisdiction of this Court ought not to have been invoked by the petitioners. It also attempts, after referring to portions of the show-cause notice and various passages from the order-in-original passed by the Principal Commissioner, to urge this Court that the impugned order does not suffer from any legal infirmity so as to warrant judicial interdiction.

(a) The case of the respondents 1 and 2 in the reply affidavit is majorly three-limbed.

(b) They have first and foremost pleaded that remedy under Article 226 cannot be availed of in the present case as the petitioners have not exhausted all other available remedies. The order under challenge could be carried in an appeal provided by section 129A of the Customs Act, 1962, which the petitioner has not pursued. Moreover, they have pleaded that the present case is not of an exceptional nature, where breach of Fundamental Rights is complained of or violation of natural justice is alleged justifying interference by the Court by way of entertainment of the writ petition despite the statutory alternative remedy. Since the appellate remedy is available to the petitioners and particularly when a matter relating to revenue is involved, it has been urged that the Court should decline interference in view of the decision of the Supreme Court in **Titaghur Paper Mills Co. Ltd. vs State of Orissa**⁴.

⁴ AIR 1983 SC 603

(c) Secondly, it has been pleaded that the petitioners have disputed facts which are recorded in the impugned order. This, according to the respondents 1 and 2, necessitates adjudication of disputed questions of fact, which cannot be had in writ jurisdiction. It has also been pleaded that a writ court does not function as an appellate court while exercising the power of judicial review. Reference has been made to the decision in **Union of India vs. Guwahati Carbon Ltd.**⁵, in this regard.

(d) Thirdly, the impugned order has been sought to be supported by referring to the show-cause notice as well as the findings in such order.

5. Based on the above, the respondents 1 and 2 have prayed for dismissal of the writ petition.

Affidavit in Reply of Respondent No. 3

6. The affidavit sworn by Mr. Sandeep Saxena, working as HOD (Essentiality Certificate) at the Directorate of Hydrocarbons, says that the Essentiality Certificate dated 4th November 2013 was issued covering block MB-OSN-2005/6 because the particulars of the said block were indicated in the application. In paragraph 4, it is conceded that No Objection Certificate (hereafter "NOC", for short) was issued by the DGH on 6th July 2015, *ex-post facto*, by adding another block, namely, MB-OSN-2005/5. According to the deponent, the role of the respondent no. 3 is limited to the extent of issuing the Essentiality Certificate and it has no concern whatsoever with

⁵ 2012 (278) ELT 26 (SC)

the issuance of the impugned order-in-original. Paragraph 7 of the affidavit in reply refers to the general procedure for applying and issuance of Essentiality Certificate. Insofar as validity of the Essentiality Certificate is concerned, it is stated in paragraph 9 that Essentiality Certificate issued by the DGH has a validity of 6 (six) months or its use for clearing the goods from customs and availing the exemption of custom duty (whichever is earlier) and that the same cannot be used beyond the period of 6 (six) months, unless the same is amended. The Essentiality Certificate once utilized, cannot be amended or modified as its existence then is null and void. Paragraph 11 of the affidavit in reply refers to the fact that the area of deployment of Aban-ICE was changed by ONGC from MB-OSN-2005/6 to MB-OSN-2005/5 block prior to the application for Essentiality Certificate, yet, the application was made for such certificate for deployment in block MB-OSN-2005/6 only. Paragraphs 18 and 22 refer to the fact that the application for Essentiality Certificate was submitted on 1st November, 2013 by an operator of ONGC without mentioning the change of the drilling location. In paragraph 29, it is asserted that since on the date of generation of the application for issuance of Essential Certificate the petitioner no. 1 as well as ONGC were both aware of change of the location of initial deployment, therefore, it was open to the petitioner no. 1 and ONGC to indicate the proposed initial deployment of Aban-ICE appropriately and correctly in Sr. No. 13 on the on-line application form and that the petitioners cannot now take advantage of their own wrong.

Affidavit in Rejoinder to Affidavit in Reply by the Respondents 1 & 2

a) It is contended that the contents of the affidavit in reply do not counter the specific averments made in the writ petition.

b) It is contended that remedy under Customs Act, 1962 is not effective and relief claimed in this writ petition, if granted, will be effective and complete.

ARGUMENTS ON BEHALF OF THE PETITIONERS

7. Appearing on behalf of the petitioners, Mr. Sridharan, learned senior advocate contended that:

a) The contract dated 19th September, 2013 between ONGC and AOL required the latter to carry out petroleum exploration at any place in off-shore Indian waters. Aban-ICE was to be deployed in eligible PML areas and NELP areas where customs duty exemption is available as per the said exemption notification [Sr. No. 356 and 359]. This is duly referred in Clause 1.1.12 (page 104 of WP), clause 3.8 (page 112 of WP) and clause 15.6 (page 132 of WP).

b) Essentiality Certificate dated 4th November, 2013 was granted *qua* this contract (pages 173-174 of the WP at Sr. No. 1) where there is reference to this contract.

c) ONGC vide letter dated 22nd August, 2013 (page 179 of the WP) initially intimated the first block to be MB-OSN-2005/06. Later, vide letter dated 28th October, 2013 (page 181 of the WP), this block was changed by ONGC to MB-OSN-2005/05. Thereafter, based on the request of AOL, application was filed by ONGC on 1st November, 2013 for grant of

Essentiality Certificate (page 163 of the WP). However, due to lack of attention with respect to precise details, the block number was not changed in the application made for the Essentiality Certificate; hence, the Essentiality Certificate indicated the Block as MB-OSN-2005/06 eligible under Sr. No. 359 of the said exemption notification (page 173 of the WP). There is no allegation with respect to Essentiality Certificate issued for import of consumables/spares for Aban-ICE. Aban-ICE was imported along with various spares and consumables by filing bill of entry dated 5th November, 2013 and exemption was granted based on the Essentiality Certificate. When exemption is extended to spares/consumables, it is completely illogical not to extend the benefit of the exemption to the drill ship.

d) After import of Aban-ICE, various other consumables and spares required for Aban-ICE were imported one week after the import of Aban-ICE, which were also eligible for exemption in terms of Sl. No. 357 of the said exemption notification. Essentiality Certificate dated 14th November, 2013 was issued for these consumables/spares indicating the changed block MB-OSN-2005/05 and being eligible under Sr. No. 359 of the said exemption notification for the same contract dated 19th September, 2013. The exemption has been granted by the Customs department and this has not been disputed (pages 346 and 347 of 'Further Affidavit in support of Petition' filed by Ajit Muzumdar, petitioner no.2). Similarly, some other spares/consumables for Aban-ICE were imported in March 2014 for PML Block and Essentiality Certificate issued showing

eligibility under Sr. No. 356 of the said exemption notification (page 399 of 'Further Affidavit in support of Petition' filed by Ajit Muzumdar).

e) At the request of AOL and recommendation made by ONGC, *post facto* approval was granted by the DGH for addition of various blocks where Aban-ICE was used for the purposes of the contract dated 19th September, 2013 (page 247 of the WP). In all cases, import was made within 6 months from the Essentiality Certificate as is evident from the bills of entry.

f) Affidavit (page 196 of the WP) filed by ONGC reinforces the position that AOL is a sub-contractor pursuant to the contract dated 19th September, 2013. ONGC also filed undertaking (page 197 of the WP) to the effect that Aban-ICE will be used for petroleum operations and in case of any violation of the said exemption notification, ONGC will pay the duty, fine and penalty.

g) In the earlier round of litigation against seizure in the year 2015, the DGH filed an affidavit confirming that they have indeed granted *ex-post facto* approval/NOC (page 253 of the WP). In the present petition, the affidavit filed by the DGH (Sandeep Saxena for respondent no. 3, paragraph 6 of 'Affidavit in Reply') also confirms that they have granted *ex-post facto* approval/NOC. There has been no allegation/suggestion of any *mala fide* intention.

h) Central Board of Excise and Customs (CBEC), now Central Board of Indirect Taxes and Customs (CBIC), issued Circular No. 21/2013 (page 1 of the Case Law Compilation titled VOLUME-I) wherein it has been clarified that imported goods

are allowed to be transferred from one eligible project to another project (paragraph 2.1 of the circular, at page 1). DGH in its affidavit has also confirmed that they routinely grant NOC.

i) Mentioning the block number is not a requirement of the said exemption notification. Such mentioning is a surplusage in terms of the ratio of the decision of the Supreme Court in **Auto Tractors Limited vs. Commissioner of Customs (Appeals)**⁶.

j) The fulcrum of the Principal Commissioner's order is that Essentiality Certificate is valid for 6 (six) months and, therefore, *ex-post facto* approval by the DGH is incorrect (page 79 of the WP, at paragraph 31.1). This is fundamentally wrong. First, the validity of six (6) months specified in the Essentiality Certificate is for the purpose of import, in order to avail benefit of the said exemption notification. This certainly does not mean that the Essentiality Certificate dated 4th November, 2013 is *non est* or invalid after six months as held by the Principal Commissioner in his order, especially when Aban-ICE was imported on 5th November, 2013, i.e., within six (6) months from the date of issue of the Essentiality Certificate, i.e., 4th November, 2013. Secondly, once the DGH has granted *ex-post facto* approval, it is beyond the competence/jurisdiction of the Principal Commissioner to question the approval given by the DGH. Reference is made to the decision in **Zuari Industries Ltd. vs. Commissioner of C. Ex. & Customs**⁷ and **ONGC Ltd. vs. Commissioner of Customs, Mumbai**⁸. In any case, the

⁶ 1989 (39) ELT 494 (SC)

⁷ 2007 (210) ELT 648 (SC)

⁸ 2006 (201) ELT 321 (SC)

DGH is the only competent administrative authority to certify whether the goods are required for petroleum operations or not, irrespective of block mentioned.

k) The issue as to whether the Director General of Foreign Trade has the power to amend a license retrospectively was referred by CESTAT to its larger Bench. In the referral order, this question is noted. The larger Bench of the CESTAT in **Bhilwara Spinners Ltd. vs. Commissioner of Customs (EP), Mumbai**⁹ held that the licensing authorities do not have the power to amend the license with retrospective effect from the date of granting the licence. However, the Bombay High Court in **Bhilwara Spinners Ltd. vs. Union of India**¹⁰ set aside the larger Bench CESTAT ruling.

l) In **Mangalore Chemicals and Fertilizers Ltd. vs. Deputy Commissioner of Commercial Taxes**¹¹, the Supreme Court at paragraph 20 has held that the consequence from the non-compliance of the condition would flow if the condition was a substantive one and one fundamental to the policy underlying the exemption. Its stringency and mandatory nature must be justified by the purpose intended to be served. The mere fact that it is statutory does not matter one way or the other. There are conditions and conditions. Some may be substantive, mandatory and based on considerations of policy, and some others may merely belong to the area of procedure. It will be erroneous to attach equal importance to the non-observance of all conditions irrespective of the purposes they

⁹ 2008 (223) ELT 172 (Tri. - LB)

¹⁰ 2011 (267) ELT 49 (Bom)

¹¹ 1992 Supp (1) SCC 21

were intended to serve. This proposition has been expressly approved by the Constitution Bench of the Supreme Court at paragraph 51 in **Commissioner of Customs (Import), Mumbai vs. Dilip Kumar and Company**¹².

m) It was, accordingly, submitted that the impugned order together with the show-cause notice be quashed and orders in terms of prayer (a) of the writ petition be granted by quashing the order-in-original dated 27th February, 2017.

ARGUMENTS ON BEHALF OF THE RESPONDENTS 1 & 2

8. Mr. Jetly, learned senior advocate appearing for the respondents 1 and 2, raised a preliminary objection to the maintainability of the writ petition. According to him, the order-in-original dated 27th February, 2017 passed by the Principal Commissioner of Customs (Import) is amenable to challenge in a statutory appeal under section 129A of the Customs Act, 1962. It is, therefore, his contention that the petitioner ought to be relegated to the appellate forum, notwithstanding that the writ petition was admitted and the pleadings exchanged.

9. In support of such contention, Mr. Jetly relied on the decision of the Supreme Court in **State of Uttar Pradesh & Anr. vs. Uttar Pradesh Rajya Khanij Vikas Nigam Sangharsh Samiti & Anr.**¹³

10. Next, Mr. Jetly placed reliance on our decision in **Hover Automotive India Pvt. Ltd. vs. Union of India & Ors.**¹⁴ where it was held that the bar to the entertainability of a writ

¹² (2018) 9 SCC 1

¹³ (2008) 12 SCC 675

¹⁴ OS Writ Petition No. 2223 of 2021, decided on 29th October, 2021.

petition under Article 226 of the Constitution, despite there being an alternative remedy, may not apply in exceptional circumstances where there is breach of Fundamental Rights, or an action is in violation of principles of natural justice, or an order is passed in excess of jurisdiction or challenge to the vires of a statute or delegated legislation is involved. He submitted that in the present case, none of these exceptional circumstances exists and, thus, invocation of the writ jurisdiction by the petitioner is inappropriate.

11. Relying on **Uttar Pradesh Rajya Khanij Vikas Nigam Sangharsh Samiti** (supra), he contended that though the petition was admitted by this Court vide order dated 6th October, 2020, the Rule Nisi may be discharged and the petitioners relegated to the alternative remedy of appeal available under section 129A of the Customs Act.

12. Mr. Jetly brought to our notice that the Rajasthan High Court has also taken a similar view in its judgment and order dated 5th November, 1999 in **Laxman Singh Verma vs. State of Rajasthan & Ors.**¹⁵

13. Moving on to address us on the merits of the challenge, Mr. Jetly contended that the petitioners intended to avail the benefit of the said exemption notification. One of the mandatory conditions thereof for availing the benefit of exemption is a valid Essentiality Certificate to be issued by the Directorate of Hydrocarbon. Admittedly, the petitioners were not having an Essentiality Certificate for the contract area, viz. block MB-OSN-2005/05, and the Essentiality Certificate issued

¹⁵ CDJ 1999 Raj HC 223

in respect of block MB-OSN-2005/06 did not entitle the petitioners to claim benefit of exemption. As the exemption sought by the petitioners is premised on the Essentiality Certificate dated 4th November, 2013, which was issued for block MB-OSN-2005/06 and not for block MB-OSN-2005/05, the petitioners are not entitled to claim benefit of the said exemption notification based on an Essentiality Certificate issued for another/other block.

14. On the question of applicability of the 'Doctrine of Curability' relied on by the Principal Commissioner in the impugned order, Mr. Jetly asserted that the adjudicating authority rightly held that the amendment (addition of block) to the Essentiality Certificate dated 4th November, 2013 by the DGH by issuing a NOC dated 6th July, 2015 was in contravention of such doctrine. According to him, it is the practice that once an Essentiality Certificate is issued for a particular block the same cannot be amended or modified. Paragraph 9 of the reply of the respondent no.3 dated 20th December, 2017 was referred to in this context, wherein it is stated that:

"The Essentiality Certificate once utilized cannot be amended or modified as its existence then, is null and void i.e. a EC once issued specifying a particular block".

15. Mr. Jetly stressed that the respondent no.3 has stated that it is necessary to indicate in the Essentiality Certificate the block or blocks wherein the imported goods are proposed to be deployed/utilized. In terms of the Essentiality Certificate dated 4th November, 2013, it was valid only for 6 (six) months and therefore any amendment made after expiry of such period is not legal in terms of the doctrine of curability. It was, thus,

asserted that the adjudicating authority rightly held the amendments (addition of blocks) to the Essentiality Certificate by later issuance of a NOC to be invalid and hit by the doctrine of curability.

16. It was further contended that the purpose of issuance of Essentiality Certificate is just to validate the conditions put forth by the importer to claim import of goods. However, it is the responsibility of customs to examine and investigate the same. The petitioners have willfully suppressed the fact that they have been doing petroleum operations in areas not mentioned under the contract and the same came to light only after the investigation by the DRI. The petitioners are, thus, liable under section 114A of Customs Act for misstatement and willful suppression of facts.

17. Mr. Jetly heavily relied on the Constitution Bench decision of the Supreme Court in **Dilip Kumar** (supra) in support of the contention that an exemption notification should be interpreted strictly and in case of any ambiguity in interpreting an exemption notification, the benefit of such ambiguity must go in favour of the revenue; also, the burden of proving applicability of the exemption notification would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.

18. Next, reliance was placed on paragraph 37 of the decision of the Supreme Court in **Sitaram vs. Radhey Shyam Vishnav & Ors.**¹⁶, where it has been held:

¹⁶ AIR 2018 SC 1298

“37.The discussion hereinabove can be categorized into three compartments. First, the deposit is mandatory and the mode of deposit is directory; second, the non-deposit will entail dismissal and irregular deposit is curable and third, in the other areas like verification, signature of parties, service copy, etc., the principle of substantial compliance or the doctrine of curability will apply”.

19. Based on the aforesaid submissions, Mr. Jetly contended that even on merits the petitioner has been unable to set up any case for interference and, thus, the Rule Nisi be discharged with costs.

ARGUMENTS ON BEHALF OF THE RESPONDENT NO.3

20. The respondent no.3, DGH, Ministry of Petroleum and Natural Gas, was represented by Mr. D. P. Singh. He referred to the affidavit of Sandeep Saksena dated 20th December, 2017 and argued on pleaded lines.

ISSUES

21. Having heard learned advocates for the parties, we are tasked to decide the following issues:

- a. Whether in view of an alternative statutory remedy available to them, the petitioners ought to be relegated to such remedy?
- b. Should the answer to the above be in the negative, whether the process of decision making leading to the order-in-original dated 27th February, 2017 suffers from any of the vices that could attract judicial review?
- c. What relief, if at all, the petitioners are entitled to?

DECISION WITH REASONS

22. The objection raised by Mr. Jetly that the petitioners should be relegated to the forum provided by section 129A of the Customs Act for availing the statutory appellate remedy has not really impressed us.

23. More often than not, the Supreme Court has held that the rule which requires the exhaustion of alternative remedies is a rule of convenience and discretion, rather than a rule of law. At any rate, it does not oust the jurisdiction of the Court. Despite an alternative remedy being available to the party invoking the writ jurisdiction and such remedy not having been pursued by it, the same does not make a writ petition not maintainable before the Court. A writ petition would well-nigh be maintainable but it is a question of its entertainability by the Court, i.e., whether, on facts and in the circumstances, the Court would entertain the writ petition in the exercise of its discretion.

24. In the present case much would depend on the order dated 6th October, 2020 passed by a coordinate bench of this Court while admitting the writ petition.

25. A bare reading of the aforesaid order would reveal that the writ petition was admitted without keeping the point of its entertainability, on the ground of non-exhaustion of the appellate remedy, open. Once the writ petition was admitted after considering and overruling the preliminary objection raised by Mr. Jetly, it stands to reason that the order dated 6th October, 2020 is a final order on the objection which has since attained finality by reason of no appeal being preferred

thereagainst by the respondents. The objection now raised is hit by *res judicata*. It is well-settled that the principle of *res judicata* applies at different stages of the same proceedings. If any authority is required, we may refer to the decision in **Bhanu Kumar Jain vs. Archana Kumar**¹⁷.

26. Thus, we have a case before us where the Court has by its order dated 6th October, 2020 admitted this writ petition. The stage of entertainment has been crossed with such order. What remains is the question of adjudication of the rival claims of the parties based on the authorities cited.

27. Relying on **Uttar Pradesh Rajya Khanij Vikas Nigam Sangharsh Samiti** (supra), Mr. Jetly has contended that even after issuance of Rule a writ petition could be dismissed on the ground that the petitioner has not availed the statutory remedy. We quote the relevant passage from the said decision, which is heavily relied on by Mr. Jetly, hereinbelow:

“38. *** True it is that issuance of rule nisi or passing of interim orders is a relevant consideration for not dismissing a petition if it appears to the High Court that the matter could be decided by a writ court. It has been so held even by this Court in several cases that even if alternative remedy is available, it cannot be held that a writ petition is not maintainable. In our judgment, however, it cannot be laid down as a *proposition of law* that once a petition is admitted, it could *never* be dismissed on the ground of alternative remedy. If such bald contention is upheld, even this Court cannot order dismissal of a writ petition which ought not to have been entertained by the High Court under Article 226 of the Constitution in view of availability of alternative and equally efficacious remedy to the aggrieved party, once

¹⁷ AIR 2005 SC 626

the High Court has entertained a writ petition albeit wrongly and granted the relief to the petitioner.”

(italics in original)

28. We are no doubt bound by the aforesaid declaration of law. However, we are equally bound by the declaration of law made by the Supreme Court in **L. Hirday Narain vs. ITO**¹⁸, where it was held that:

“13. *** An order under Section 35 of the Income Tax Act is not appealable. It is true that a petition to revise the order could be moved before the Commissioner of Income Tax. But Hirday Narain moved a petition in the High Court of Allahabad and the High Court entertained that petition. If the High Court had not entertained his petition, Hirday Narain could have moved the Commissioner in revision, because at the date on which the petition was moved the period prescribed by Section 33-A of the Act had not expired. We are unable to hold that because a revision application could have been moved for an order correcting the order of the Income Tax Officer under Section 35, but was not moved, the High Court would be justified in dismissing as not maintainable the petition, which was entertained and was heard on the merits.”

(emphasis ours)

29. Pertinently, the Bench of the Supreme Court that decided **Uttar Pradesh Rajya Khanij Vikas Nigam Sangharsh Samiti** (supra) did not have the benefit of considering its previous decision in **L. Hirday Narain** (supra). It is not open to the High Courts to hold a decision of the Supreme Court *per incuriam*. It has been held by the Supreme Court in **South Central Railway Employees Cooperative Credit Society**

¹⁸ (1970) 2 SCC 355

Employees Union vs. B. Yashodabai¹⁹ that if the litigants or lawyers are permitted to argue that something what was correct had not been argued earlier before the higher court and on that ground if the courts below are permitted to take a different view in a matter, possibly the entire law in relation to precedents and *ratio decidendi* would have to be rewritten which, in Their Lordships' opinion, cannot be done. Moreover, by not following the law laid down by the Supreme Court, the High Court or the subordinate courts would also be violating the provisions of Article 141 of the Constitution of India.

30. Thus, faced with two decisions of the Supreme Court of co-equal strength expressing inconsistent opinion, we have to prefer one between the two. Technically, we are bound by the *ratio decidendi* of both the decisions. Had **Uttar Pradesh Rajya Khanij Vikas Nigam Sangharsh Samiti** (supra) been decided taking **L. Hirday Narain** (supra) into consideration, we would certainly be bound to follow the former. However, Article 141 makes the law declared by the Supreme Court binding on all courts within the territory of India, meaning thereby that the law declared by the Bench in **L. Hirday Narain** (supra) was also binding on the Bench that decided **Uttar Pradesh Rajya Khanij Vikas Nigam Sangharsh Samiti** (supra). If, therefore, we prefer to be guided by **L. Hirday Narain** (supra), there could be no violation of Article 141. In any event, law seems to be well-settled that if two decisions of benches of co-equal strength are delivered containing seemingly inconsistent or even contradictory views, it would be

¹⁹ (2015) 2 SCC 727

open to the Court before which both such decisions are placed to attempt a reconciliation of the inconsistent/contradictory views and if any such reconciliation were not possible, to follow that decision which, according to it, is better in point of law. Reading of the law laid down in the decisions in **L. Hirday Narain** (supra) and **Uttar Pradesh Rajya Khanij Vikas Nigam Sangharsh Samiti** (supra), however, leads us to the view that despite the seeming inconsistency in the conclusions reached by the coordinate benches, read harmoniously such inconsistency is capable of being reconciled. Even though a writ petition may have been admitted and Rule Nisi issued perceiving that it involves a purely legal point which requires an adjudication on merits but at the time of final hearing it appears to the same Court that such legal point arising for determination would involve investigation of certain disputed questions of fact and which could well be agitated and appropriately decided by the statutory appellate forum, there is no reason as to why the writ petition can still not be disposed of by the Court expressing that the petitioner would have the liberty of raising all points in a statutory appeal against the order-in-original and obtain a determination both on factual and legal issues. In our considered opinion, having regard to **L. Hirday Narain** (supra), the Court may proceed to decide a writ petition finally after Rule Nisi is issued, if no disputed questions of fact were involved. Availability of the alternative statutory remedy which has not been pursued, in such a case, may not be an insurmountable bar for adjudicating the writ petition on its merits, if the same is possible on affidavit evidence. At the

same time, **Uttar Pradesh Rajya Khanij Vikas Nigam Sangharsh Samiti** (supra) could be followed in matters where it is not possible to decide the legal issue because of involvement of certain disputed questions of fact, investigation of which in writ proceedings on affidavit evidence may not be appropriate. This would certainly be a permissible course of action. It should, therefore, be the endeavor of the Court to decide the lis on factual issues on the basis of affidavit evidence, if possible; if not, the litigant could be relegated to the statutory forum that is available in judicious exercise of discretion.

31. However, in this case, there being a determination of the preliminary objection by the order dated 6th October, 2020, the law laid down in **Bhanu Kumar Jain** (supra) would clearly apply and hence we have no other option but to proceed to decide the next issue. In the process, we hold that the decisions in **Titaghur Paper Mills Co. Ltd.** (supra), **Hover Automotive India Pvt. Ltd.** (supra) and the other decisions on alternative remedy would have no application on facts and in the circumstances.

32. We, therefore, answer issue (a) in favour of the petitioners and against the respondents 1 and 2.

ISSUE (b)

33. Mr. Jetly has placed strong reliance on the decision in **Dilip Kumar** (supra) in support of his contention that if there be any ambiguity in an exemption notification, the benefit of such ambiguity must go to the taxing authority and not to the assessee.

34. We consider it proper to straightaway notice the law declared in **Dilip Kumar** (supra). The first paragraph captures the point that was referred to for a decision by the Constitution Bench second paragraph records how the matter came up before such bench, with the answers being traceable in paragraph 66. It would be useful to read paragraphs 1 and 66 together with some other paragraphs to understand what the Supreme Court has authoritatively laid down on whether an assessee can derive the benefit of a taxing statute as well as an exemption notification, if both such statute and the notification have terms which are ambiguous.

35. The relevant paragraphs from such decision read as follows:

"**1.** This Constitution Bench is set up to examine the correctness of the ratio in *Sun Export Corpn. v. Collector of Customs*, AIR 1997 SC 2658 (hereinafter referred to as '*Sun Export case*', for brevity), namely, the question is — What is the interpretative rule to be applied while interpreting a tax exemption provision/notification when there is an ambiguity as to its applicability with reference to the entitlement of the assessee or the rate of tax to be applied?

2. In *Sun Export case*, a three-Judge Bench ruled that an ambiguity in a tax exemption provision or notification must be interpreted so as to favour the assessee claiming the benefit of such exemption. Such a rule was doubted² when this appeal was placed before a Bench of two Judges. The matter then went before a three-Judge Bench consisting one of us (Ranjan Gogoi, J.). The three-Judge Bench having noticed the *unsatisfactory state of law* as it stands today, opined that the dicta in *Sun Export case*, requires reconsideration and that is how the matter has been placed before this Constitution Bench.

53. After thoroughly examining the various precedents some of which were cited before us and after giving our anxious consideration, we would be more than justified to conclude and also compelled to hold that every taxing statute including, charging, computation and exemption clause (at the threshold stage) should be interpreted strictly. Further, in case of ambiguity in charging provisions, the benefit must necessarily go in favour of subject/assessee, but the same is not true for an exemption notification wherein the benefit of ambiguity must be strictly interpreted in favour of the Revenue/State.

55. *** Thus, we may emphatically reiterate that if in the event of ambiguity in a taxation liability statute, the benefit should go to the subject/assessee. But, in a situation where the tax exemption has to be interpreted, the benefit of doubt should go in favour of the Revenue, the aforesaid conclusions are expounded only as a prelude to better understand jurisprudential basis for our conclusion. We may now consider the decisions which support our view.

64. In *Hari Chand case* [(2011) 1 SCC 236], as already discussed, the question was whether a person claiming exemption is required to comply with the procedure strictly to avail the benefit. The question posed and decided was indeed different. The said decision, which we have already discussed supra, however, indicates that while construing an exemption notification, the Court has to distinguish the conditions which require strict compliance, the non-compliance of which would render the assessee ineligible to claim exemption and those which require substantial compliance to be entitled for exemption. We are pointing out this aspect to dispel any doubt about the legal position as explored in this decision.

65. As already concluded in paras 53 to 55 and 63, above, we may reiterate that we are only concerned in this case with a situation where there is ambiguity in an exemption notification or exemption clause, in which event the benefit of such ambiguity cannot be extended to the

subject/assessee by applying the principle that an obscure and/or ambiguity or doubtful fiscal statute must receive a construction favouring the assessee. Both the situations are different and while considering an exemption notification, the distinction cannot be ignored.

66. To sum up, we answer the reference holding as under:

66.1. Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.

66.2. When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the Revenue.

66.3. The ratio in *Sun Export* case is not correct and all the decisions which took similar view as in *Sun Export* case stand overruled."

36. Law has been clearly laid down in **Dilip Kumar** (supra) that in case of ambiguity in an exemption notification, which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue. It also follows from the above excerpts that though **Sun Export** (supra) has been held not to lay down correct law and all decisions taking a view similar to **Sun Export** (supra) have been expressly overruled, the Constitution Bench in **Dilip Kumar** (supra) explained the other Constitution Bench decision in **CCE vs Hari Chand Shri Gopal**²⁰, by observing that the question there was different, i.e., whether, a person claiming exemption, is required to comply with the procedure strictly to avail the benefit. Indeed,

²⁰ (2011) 1 SCC 236

the question in **Hari Chand Shri Gopal** (supra) being different from the one which the Bench in **Dilip Kumar** (supra) was seized of, we find no dichotomy of views.

37. However, in order to apply the law as declared in either of the two decisions, it needs to be first ascertained by us whether the relevant condition of which there has been an alleged failure or omission on the part of AOL to abide by did justify the impugned order disentitling AOL to exemption in terms of the said exemption notification.

38. To ascertain the extent of failure or omission as well as to examine the legality and/or validity of the order-in-original dated 27th February, 2017, in the light of the attending facts and circumstances, as of necessity, we need to consider the exact infraction that the Principal Commissioner noticed leading to formation of an opinion that the petitioners are not entitled to the benefits of the said exemption notification. According to him, as per the contract dated 22nd December, 2008 and the Essentiality Certificate dated 4th November, 2013, Aban-ICE was required to be put to work for petroleum operations in the contract area, i.e., block MB-OSN-2005/**06**; instead, it was used in block MB-OSN-2005/**05** (the digits are given by us in bold font to appreciate the difference in the blocks) and this constituted violation of the mandatory condition of duty exemption. Although the Principal Commissioner has recorded in his order at paragraph 34(d) that Aban-ICE "*is being utilized for the other blocks which are not covered under the specific contract dated 22.12.2008 for which it was imported under duty free under the exemption notification*", it has not been

shown by referring to such order and the terms of the contracts dated 22nd December, 2008 or dated 19th September, 2013 by Mr. Jetly that Aban-ICE could not have been deployed in any block other than block MB-OSN-2005/06. It has also not been found by the Principal Commissioner that Aban-ICE was deployed for purposes alien to petroleum operations, or that it was not deployed in petroleum exploration works conducted by ONGC through the sub-contractor, i.e., AOL. If indeed such were his findings, the Principal Commissioner would have definitely been justified in reaching the conclusion he did as regards violation of certain mandatory conditions of the said exemption notification.

39. It seems to us that the Principal Commissioner confined his inquiry to the branches of the tree without taking the pains to find what was at its root. Clause 1.1.12(a) of the contract dated 19th September, 2013 by and between ONGC and AOL (referred to therein as 'operator' and 'contractor' respectively) required AOL to *"mobilize and deploy the drilling unit along with crew so as to commence the operations at the designated first drilling location nominated by the operator (ONGC) within a period of 180 days from the date of Letter of Award from the operator. The rig will be deployed by the operator anywhere in offshore Indian water. However, the 1st drilling location will be West Coast offshore Indian waters"*. Further, clause 3.8 thereof on *"Personnel Mobilisation"* provided that for the purposes of the said agreement *"the operating area shall be anywhere in offshore Indian waters. In the event there is a change of location from West Coast to East Coast or vice versa and the*

contractor shifts its office to the new location, the operator shall pay all reasonable expenses thereby incurred from the original location to the new location". Clause 15.6 dealing with "Customs Duty", *inter alia*, stipulated that:

"The drilling unit will be deployed in eligible PEL/ML areas issued or renewed after 1.4.1999 and NELP areas where presently exemption of customs duty is available as per Notification No. 12/2012 dated 17th March, 2012. Contractor confirms that after completion of three years (or any extension thereof) Agreement period, contractor accepts the responsibility for handling all customs related issues and Operator will be free from customs duty payment, if any.

For import of rigs/equipments/tools in these areas, operator will provide recommendatory letter to the contractor so that they obtain Essentiality Certificate from Director General of Hydrocarbon for availing concessional rates of customs duty for import of rigs/equipments/tools for deployment in PEL/ML/NELP areas where customs duty is not applicable. Accordingly, the customs duty for neither rigs/equipments/tools nor for spares, consumables and accessories required for operation and maintenance of the equipments/rigs is to be built in the quoted price. The rigs/equipments/tools imported by the contractor for deployment in PEL/ML/NELP shall not be used to deploy by the contractor for any purpose other than the jobs arising out of the agreement awarded by the operator and in the event of the rigs/equipments/tools being misused or put to use other than the specified use, the contractor shall be liable to pay fine, penalty and other action taken by the customs department and other authorities for violation of the customs rules and regulations and other allied rules. Contractor should also compensate the operator for the duty elements in such cases."

40. We have found from page 293 of the writ petition, marked Ext. EE, that it is titled as a "Joint Statement of Shri ..., Group General Manager, Head Planning & Contracting, ONGC, Mumbai

region, Drilling Services and Shri ..., Deputy General Manager (Drilling), Planning & Contracting, Drilling Services, ONGC...". Such statement was recorded in terms of section 108 of the Customs Act. At page 295, we find the following questions and answers:

"Q4) Please state whether in your view, there has been a violation of condition no.44 of Customs Notification No. 12/2012-Customs dated 01-03-2012 (Sr. No. 359) in the case of ABAN ICE imported by M/s. Aban Offshore Limited inasmuch as, the first deployment was in specified NELP area and it was shifted to non-specified area i.e. PEL/ML area.

A4) In our view there has been a violation of condition no.44 of Customs Notification No. 12/2012-Customs dated 01-03-2012 (Sr. No. 359) in the case of ABAN ICE by M/s. Aban Offshore Limited inasmuch as, in as much as (sic) the first deployment was in specified NELP area and it was shifted to non-specified area i.e. PEL/ML area.

Q5) If there is a violation as stated by you in your answer above, please state who is liable to pay customs duty as per condition 44(c)(iii) of Customs Notification No. 12/2012-Customs dated 01-03-2012 (Sr. No. 359) and in terms of the affidavit/undertaking furnished to Customs as per 44(c)(ii) & (iii) in case of ABAN ICE imported by M/s. Aban Offshore Limited?

A5) According to our understanding, as per condition 44(c)(iii) of Customs Notification No. 12/2012-Customs dated 17-03-2012 (Sr. No. 359) and in terms of the affidavit/undertaking furnished to Customs as per 44(c)(ii) & (iii) in the case of ABAN ICE imported by M/s Aban Offshore Limited, ONGC is liable to pay customs duty for the violation discussed above."

41. Even if the officials of ONGC were right in admitting that there has been a violation of condition no.44 of the said

exemption notification (Sr. No. 359) by reason of Aban-ICE being "*shifted to non-specified area i.e. PEL/ML area*", the Principal Commissioner failed to appreciate that in terms of clause 15.6 extracted supra, ONGC was justified in deploying Aban-ICE in eligible PEL/ML areas issued or renewed after 1st April, 1999 and NELP areas where presently exemption of customs duty was available as per the said exemption notification. If such admission were acted upon to hold that violation had been proved, the other part of the admission that "*ONGC is liable to pay customs duty for the violation*" could not have been brushed aside and the liability foisted on AOL.

42. Obviously, the purpose of working out a drill ship in oil exploration areas is of a definite character. ONGC having exclusive control over the off-shore areas, Aban-ICE could not have been removed at the whims and fancies of AOL and deployed for petroleum exploration in areas not within the control of ONGC or beyond the agreed area. It indeed ought to have been the endeavor of the Principal Commissioner to unearth whether Aban-ICE was used for the substantive purpose, i.e., petroleum exploration, for which exemption of duty was envisaged by the said exemption notification or whether it was put to use for purposes alien to the contract dated 19th September, 2013. Also, it does not seem to have exercised the consideration of the Principal Commissioner as to whether the purpose intended to be served for claiming exemption was justified or not.

43. What we observe on perusal of the said exemption notification is that it lays down essential conditions of eligibility

for claiming exemption. There is also a procedure for claiming such exemption. Clause 15.6 of the contract (supra) made it clear that customs duty for neither rigs/equipments/tools nor for spares, consumables and accessories required for operation and maintenance of the equipments/rigs are to be built in the quoted price. Conclusion that can be drawn from such a clause is that the contractor was not liable to bear customs duty.

44. It admits of no doubt, following **Mangalore Chemicals and Fertilizers** (supra), **Hari Chand** (supra) and **Dilip Kumar** (supra), that the essential conditions of an exemption notification have to be rigidly followed and should there be any ambiguity, the benefit thereof must be interpreted in favour of the revenue. The essential/substantive/mandatory condition embedded in the said exemption notification would imply that the drill ship had to be used for petroleum drilling operations and in off-shore waters on the West coast with ONGC as the operator to claim benefits of exemption and this condition has not been shown to have been breached. The breach here is of a technical nature with little or no significance *qua* working of the drill ship for petroleum exploration operations. It is not the law laid down in any of the aforesaid decisions that despite there being no breach of any essential condition, a technical breach of procedure in applying for exemption cannot be waived. Even otherwise, in case of a breach of any of the mandatory terms of the said exemption notification, the terms of the contract executed by and between ONGC and AOL made ONGC liable therefor and not AOL. We have, therefore, failed

to persuade ourselves to agree with Mr. Jetly that the liability was rightly foisted on AOL.

45. The entire controversy, as we find, has arisen because of the mistake committed by AOL in not correcting the application form dated 22nd October, 2013 addressed to ONGC or by submitting a fresh application form by mentioning the appropriate block where Aban-ICE was to be deployed for issuance of Essentiality Certificate by the DGH, after ONGC changed the location of deployment to MB-OSN-2005/**05** from MB-OSN-2005/**06** on 28th October, 2013. It was equally the duty of ONGC while recommending AOL's application on 1st November, 2013 to correct the particulars of the block which would be the first drilling location of Aban-ICE. By the time the application was recommended, ONGC itself had changed the location of deployment of Aban-ICE from block MB-OSN-2005/**06** to block MB-OSN-2005/**05**. DGH cannot be faulted either in issuing the Essentiality Certificate dated 4th November, 2013 or in issuing the NOC dated 6th July, 2015, whereby block MB-OSN-2005/**05** was added. The entire controversy could have been avoided if little more care and attention had been paid to the details of the block where Aban-ICE was required to be first deployed for drilling operations.

46. Be that as it may, we have not been shown with reference to the reply affidavit of the respondents 1 and 2 that Aban-ICE was deployed for petroleum exploration operations in block MB-OSN-2005/**05** dehors the contract dated 22nd December, 2008. According to clause 1.1.12(a) extracted supra, the drill ship could be deployed anywhere in off-shore Indian waters by

ONGC. There is no clear finding that Aban-ICE was deployed other than in off-shore Indian waters by ONGC or that its initial location was not the West coast. The said affidavit is also silent as to how the Principal Commissioner could have refuse to consider the NOC issued by the DGH in respect of Aban-ICE, particularly when the spares, accessories and other consumables in respect of the same vessel were covered by other Essentiality Certificates and exemption, which was claimed, had been allowed.

47. The existence of the NOC dated 6th July, 2015 issued by the DGH amending the Essentiality Certificate by including block MB-OSN-2005/**05** on record was negated by the Principal Commissioner by placing reliance on the 'Doctrine of Curability'. According to him, the Essentiality Certificate dated 4th November, 2013 was valid for 6 (six) months from the date of issue; hence, any amendment thereof to cure any apparent defect therein could be made within the period of its validity and not beyond. Once the validity expired, the Essentiality Certificate could not have been touched because it ceased to exist. In such circumstances, the NOC issued by the DGH on 6th July, 2015 effectively was of no worth insofar as the claim for exemption is concerned.

48. The 'Doctrine of Curability' has been noticed by the Supreme Court and applied in India in cases mainly arising out of election petitions under the Representation of People Act, 1951. We may in this connection refer to the decision of the Supreme Court in **G.M. Siddeshwar vs. Prasanna Kumar**²¹,

²¹ (2013) 4 SCC 776

where the Court upon consideration of various precedents answered the questions formulated in paragraphs 1 and 2. Certain paragraphs of such decision would seem to make the position clear as to what is curable and what is not. We quote such paragraphs below:

"What is an election petition

45. However, another aspect of this contention is that if the provisions of Section 83 of the Act are not complied with, then the election petition that has been filed cannot truly be described as an election petition.

46. In *Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore*, AIR 1964 SC 1545, the Constitution Bench dealt with the issue whether non-compliance with the proviso to Section 83(1) of the Act was fatal to the maintainability of an election petition wherein allegations of corrupt practices were made. It was urged that the affidavit in respect of corrupt practices which accompanied the election petition was neither properly made nor in the prescribed form. A different facet of this argument was that an election petition must comply with the provisions of Section 83 thereof and if it did not, then it could not be called an election petition.

47. The Constitution Bench agreed with the Election Tribunal that a defect in the verification of an affidavit

'cannot be a sufficient ground for dismissal of the petitioner's petition summarily, as the provisions of Section 83 are not necessarily to be complied with in order to make a petition valid and such affidavit can be allowed to be filed at a later stage also.' (*Murarka case*, AIR p. 1551, para 13)

In other words, non-compliance with the proviso to Section 83(1) of the Act was not 'fatal' to the maintainability of an election petition and the defect could be remedied. It would follow that if an election petition did not comply with the proviso to Section 83(1) of the Act, it would still be called an election petition.

48. The broad principle laid down in *Murarka* was somewhat restricted by another Constitution Bench decision rendered in *Subbarao v. Election Tribunal*, AIR 1964 SC 1027. In that

case, the Constitution Bench introduced two clear principles: firstly, that

'if there is a total and complete non-compliance with the provisions of Section 81(3), the election petition might not be an election petition presented in accordance with the provisions of this Part within Section 80 of the Act' (AIR p. 1031, para 14) and secondly, that

'if there is a substantial compliance with the requirement of Section 81(3), the election petition cannot be dismissed by the Tribunal under Section 90(3)'. (AIR p. 1033, para 25)

49. In *T.M. Jacob v. C. Poullose*, (1999) 4 SCC 274, this Court reiterated the doctrine of substantial compliance as mentioned in *Murarka Radhey Shyam Ram Kumar and Subbarao*, and also introduced the doctrine of curability on the principles contained in CPC. It was held that the defect in the affidavit in that case was curable and was not of such a fatal nature as to attract dismissal of the election petition at the threshold.

50. The doctrine of substantial compliance as well as the doctrine of curability were followed in *V. Narayanaswamy v. C.P. Thirunavukkarasu*, (2000) 2 SCC 294. This Court held that a defect in verification of an affidavit is not fatal to the election petition and it could be cured. Following *Moidutty*, (2000) 1 SCC 481, it was held that if the election petition falls foul of Order 6 Rule 16 and Order 7 Rule 11 CPC and does not disclose a cause of action then it has to be rejected at the threshold.

51. Somewhat more recently, in *Anil Vasudev Salgaonkar v. Naresh Kushali Shigaonkar*, (2009) 9 SCC 310, this Court reiterated this position in law and held: (SCC p. 324, para 50)

'50. The position is well settled that an election petition can be summarily dismissed if it does not furnish the cause of action in exercise of the power under the Code of Civil Procedure. Appropriate orders in exercise of powers under the Code can be passed if the mandatory requirements enjoined by Section 83 of the Act to incorporate the material facts in the election petition are not complied with.'

52. The principles emerging from these decisions are that although non-compliance with the provisions of Section 83

of the Act is a curable defect, yet there must be substantial compliance with the provisions thereof. However, if there is total and complete non-compliance with the provisions of Section 83 of the Act, then the petition cannot be described as an election petition and may be dismissed at the threshold.”

49. The decision in **Sitaram** (supra) relied on by Mr. Jetly also arises out of an election matter.

50. The Principal Commissioner, it seems, was of the perception that since the Essentiality Certificate had a life of 6 (six) months, it could not have been amended and no addition thereto could be effected after expiry of its life. We are inclined to the opinion that such a perception is not within legal parameters. The dominant purpose of the Essentiality Certificate is to obtain an imprimatur from the DGH that the good(s) sought to be imported are required for petroleum exploration operations. We agree with Mr. Sridharan that the validity period of 6 (six) months specified in the Essentiality Certificate was meant for the purpose of import to avail the benefit of the said exemption notification and also that the Commissioner was not right in perceiving that such certificate, after 6 (six) months, became *non est* or invalid, so much so that the particulars of the block even could not have been amended.

51. In our considered opinion, the DGH in issuing the Essentiality Certificate does not perform a quasi-judicial function. We have not been shown any statutory rule following which the Essentiality Certificate has to be issued; on the contrary, such certificate is issued in exercise of administrative

function and based on policy or expediency. It was, therefore, open to the DGH to issue the NOC. We do not see reason to say that this was an appropriate case where the Principal Commissioner, resting on the 'Doctrine of Curability', could have negated the effect of the NOC.

52. In **Supreme Castings** (supra), the Division Bench of the Punjab and Haryana High Court was considering a challenge to an appellate order dated 7th February 2006 passed by the Additional Director General of Foreign Trade whereby he upheld the order of the Joint Director General of Foreign Trade dated 30th November 2004 cancelling the Duty Entitlement Pass Book dated 25th August 2000 for Rs. 9,30,514/-. One of the contentions raised on behalf of the petitioner before the Court was that the validity period of the DEPB is only twelve months and no extension thereof is permissible. The Division Bench found upon consideration of various sections of the Foreign Trade (Development & Regulations) Act, 1992 that the same did not confer any power to cancel or suspend a license retrospectively. The Court also proceeded to consider an earlier Division Bench decision in **M/s. Stella Industries (P) Ltd. Vs. State of Haryana**²² where the point for consideration was whether an eligibility certificate granted under Rule 28A of the Haryana General Sales Tax Rules, 1975 could be withdrawn or cancelled after the benefit thereunder has been availed or the currency of the eligibility certificate had expired. The Court had observed that once the benefit available to the petitioner was availed of by it by 31st March 2002, meaning thereby that in

²² (2009) 20 VST 62 (P&H)

terms of the conditions of the eligibility certificate the same ceased to be operative thereafter, no action possibly could have been taken under sub-rule (8) of Rule 28A of the Haryana General Sales Tax Rules, 1975. It is based on such consideration that the Division Bench in **Supreme Castings** (supra) set aside the original order dated 30th November 2004 as well as the appellate order dated 7th February 2006. We have failed to comprehend how the decision in **Supreme Castings** (supra) could have been held to be squarely applicable to the present case on the ground that NOC to add more blocks to the essentiality certificate was issued well after expiry of its validity. The fact situation being completely different, the decisions are distinguishable. The Principal Commissioner failed to appreciate that a decision is an authority for what it decides and not what could logically follow therefrom. Despite the *ratio decidendi* of the decision in the **Supreme Castings** (supra) not being applicable in the present case, the Principal Commissioner appears to have been swayed by such decision leading to a miscarriage of justice.

53. In **S.J.S. Business Enterprises (P) Ltd. Vs. State of Bihar**²³ it has been held that the general rule of denial of relief owing to suppression applies only when the suppressed fact is a material one, i.e., one which would have an effect on the merits of the case.

54. In our view, to amount to suppression of a material fact there has to be something more than a mere non-disclosure. The objection of Mr. Jetly that AOL had willfully suppressed the

²³ (2004) 7 SCC 166

fact that Aban-ICE is being utilized for other blocks, which are not covered under the specific contract dated 22nd December 2008 for which it was imported, does not commend to us to be sound. It is obviously not a case disclosing an element of sharp practice adopted by AOL; rather, it was largely due to oversight that the particulars of block MB-OSN-2005/05 were not mentioned in the online application form by AOL as well as in the recommendation letter by ONGC. Mere indiscretion and/or inattentiveness cannot be equated with evil motive to conceal a relevant fact for obtaining undue benefits. We, therefore, overrule Mr Jetly's objection in this behalf.

55. The order-in-original dated 27th February, 2017 suffers from illegality as well as irrationality which constitute vices in the decision making process, attracting judicial review. Evaluation of facts by the Principal Commissioner, upon such review, leads us to the conclusion that the facts taken as a whole did not logically warrant the conclusion he did reach, for which the said order is liable to be invalidated.

56. Issue (b) is answered accordingly in favour of the petitioners.

Issue (c):

57. For the reasons aforesaid, the petitioners are entitled to an order in terms of prayer (a) of the writ petition. By a writ of Certiorari, we quash the order-in-original dated 27th February, 2017. The petitioners shall stand discharged of all undertakings.

58. The writ petition is allowed. Parties shall, however, bear their own costs.

59. In view of the above, Interim Application No. 1006 of 2021 does not survive and stands disposed of.

SALUNKE
J V

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SALUNKE J V
Date:
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(M. S. KARNIK, J.)

(CHIEF JUSTICE)