2026 INSC 919

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.4477 OF 2010

UNION OF INDIA & OTHERS ... APPELLANTS

VERSUS

THE BOARD OF TRUSTEES OF THE PORT OF BOMBAY ... RESPONDENT

J U D G M E N T

NAGARATHNA, J.

Being aggrieved by the order dated 28.07.2009 passed by the Division Bench of the Bombay High Court allowing the Writ Petition No.1278 of 2003 filed by the respondent-Port of Bombay Trust, the Union of India and Others have preferred this appeal.

Brief Facts:

2. The respondent herein is a Major Port Trust, constituted under the Major Port Trusts Act, 1963 (for short, "Major Port Trusts Act"). The Assistant Commissioner of Customs issued show cause-

cum-demand notices dated 18.06.1996, 02.04.1997, 28.04.1997, and 24.05.2000 to the respondent as to why customs duty should not be recovered from the respondent in terms of Section 45(3) of the Customs Act, 1962 (for short, “the Customs Act”) in respect of goods which were pilfered whilst in its custody during the years 1996-2000. Each of the said notices related to different events of pilferage during the years 1996-2000. The said show cause-cum-demand notices were adjudicated upon and orders dated 06.11.1997, 02.10.1997, 06.10.1997, and 17.05.2001 (for short, “orders-in-original”) were passed confirming the duty demanded in terms of the show cause-cum-demand notices.

2.1 In the interregnum, a Notification dated 11.10.2000 and a Public Notice dated 11.10.2000 were also issued, by which the Commissioner of Customs (Import) in exercise of powers conferred on him under section 45(1) of the Customs Act declared the Mumbai Port Trust (“MbPT”) as a “custodian” of the area notified under Section 8 of the Customs Act for statutory duties and responsibility prescribed, *inter alia*, under Section 45 of the Customs Act.

2.2 Aggrieved by the aforesaid orders-in-original, the respondent preferred appeals before the Commissioner of Customs (Appeals). By common order dated 30.07.2002, the Commissioner of Customs (Appeals) dismissed the appeals and affirmed the orders-in-original.

2.3 Aggrieved, the respondent-Port Trust filed Writ Petition No. 1278/2003 before the Bombay High Court challenging the common order dated 30.07.2002 passed by the Commissioner of Customs (Appeals) as also the Notification dated 11.10.2000. By order dated 28.07.2009, the Bombay High Court allowed the said writ petition by holding that under Section 45(1) of the Customs Act, the recovery of duty in respect of pilfered goods is only from the person approved by the Commissioner of Customs and not from a body of persons constituted under law and entrusted with the custody of goods, namely, the Mumbai Port Trust incorporated under the Major Port Trusts Act. Accordingly, the orders confirming duty dated 06.11.1997, 02.10.1997, 06.10.1997, and 17.5.2001 were set aside and the Notification dated 11.10.2000 was also held to be without jurisdiction and *ultra vires* Section 45(1) of the

Customs Act. The Union of India and others are in appeal before us against the said order.

Contentions:

Appellants

3. Learned counsel Sri V. Chandrashekara Bharati appearing for the appellants submitted as follows:

3.1.1 The saving words in Section 45(1) of the Customs Act, "*save as otherwise provided in any law for the time being in force*", do not exclude the Customs Commissioner from approving a person in whose custody imported goods are to remain and who shall, for that reason, be liable to pay duty in respect of them under Section 45(3), merely because another statute, namely the Major Port Trusts Act, also places imported goods in the custody of that person.

3.1.2 The fact that the respondent-Port Trust derives custody from the Major Port Trusts Act does not make it immune from payment of import duty under the Customs Act.

3.1.3 In fact, the purpose of the saving clause is to ensure that, once a person is approved under Section 45(1), that person bears the liability for customs duty on pilfered goods while in its custody, irrespective of any other statutory arrangement governing custody.

3.1.4 The notification dated 11.10.2000 was merely an exercise of power expressly conferred by Section 45(1), approving Mumbai Port Trust as the custodian of the notified customs area. It was, therefore, not without jurisdiction.

3.1.5. The impugned judgment, to the extent it holds otherwise, is liable to be set aside.

Respondent

3.2. *Per contra*, learned Senior Counsel Sri Rakesh Khanna and Counsel for the respondents submitted as follows:

3.2.1 The respondent-Port Trust's custody of imported goods flows from the Major Port Trusts Act.

3.2.2 The liability to pay duty on pilfered goods under Section 45(3) of the Customs Act falls upon the person referred to in sub-section (1), i.e. the person approved under Section 45(1).

3.2.3 However, the Commissioner had no power to approve the respondent-Port Trust in the first place because its custody was governed by the Major Port Trusts Act. Therefore, Section 45(3) cannot independently create liability against it. In other words, the Custom Commissioner's power under Section 45(1) is said to be confined to cases where custody is not already prescribed by another law.

3.2.4 Since the Commissioner exceeded his jurisdiction under Section 45(1) in declaring the respondent-Port Trust a custodian for the purposes of payment of duty in terms of Section 45(3), the High Court was correct in holding the notification dated 11.10.2000 to be without jurisdiction and *ultra vires*.

3.2.5 Alternatively, it was submitted that the notification is dated 11.10.2000 whereas the claim for import duty in respect of pilfered goods is prior to the said date. Therefore, the notification does not apply to the period prior to its date. Hence, no customs duty on the pilfered goods for the period prior to 11.10.2000 can be collected from the respondent-Port Trust. Hence, there is no merit in this appeal.

3.3 As is clear, the show cause-cum-demand notices in the present case pertain to instances of pilferage which occurred prior to the issuance of the Notification dated 11.10.2000. Since the respondent had not been approved as a custodian under Section 45(1) of the Customs Act during that period, the liability contemplated under Section 45(3) could not have been fastened upon it in respect of those demands. Learned Counsel for the appellants fairly submitted that, in the absence of such approval, the demands raised for the pre-notification period cannot be sustained. Consequently, the controversy in the present appeal is confined to the correctness of the High Court's declaration that the Notification dated 11.10.2000 issued under Section 45(1) of the Customs Act is without jurisdiction and *ultra vires* the said provision.

Question for consideration:

3.4 The question which, therefore, falls for our consideration is, whether, the Notification dated 11.10.2000 approving the respondent-Port Trust as the custodian of the notified customs area under Section 45(1) of the Customs Act is valid and consequently liability for pilfered goods could be fastened on the respondent in terms of the impugned Notification dated 11.10.2000 as per Section 45(3) of the Customs Act.

Statutory Framework:

4. Having noticed the controversy which arises in the present appeal, it is necessary to examine the statutory framework governing the custody of imported goods under the Customs Act and the Major Port Trusts Act.

(a) Customs Act:

4.1 The Customs Act was enacted to consolidate and amend the law relating to customs by replacing the Sea Customs Act, 1878, which had governed the field for over eight decades. Several provisions of the earlier enactment had become obsolete, difficulties had arisen in its implementation, trade had sought procedural reforms and greater facilitation and the increasing incidence of smuggling had necessitated a comprehensive revision of the customs law. It was also considered necessary to consolidate within a single enactment the law relating to sea, land and air customs which had until then been governed by different statutes and rules. Accordingly, Parliament enacted the Customs Act as a comprehensive code regulating the levy and collection of customs duties, the import and export of goods, and the custody and control of imported goods until their lawful clearance. The Customs Act came into effect from 01.02.1963.

4.2 The relevant provisions of the Customs Act for the purpose of this case are extracted as under:

> **"2. Definitions.—**In this Act, unless the context otherwise requires,—
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> (11) "customs area" means the area of a customs station or a warehouse and includes any area in which imported goods or exported goods are ordinarily kept before clearance by Customs Authorities;
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> (12) "customs port" means any port appointed under clause (a) of section 7 to be a customs port, and includes a place appointed under clause (aa) of that section to be an inland container depot;

(13) “customs station” means any customs port, customs airport, international courier terminal, foreign post office or land customs station;

(14) “dutiable goods” means any goods which are chargeable to duty and on which duty has not been paid;

(15) “duty" means a duty of customs leviable under this Act;

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(25) “imported goods” means any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption;

(26) “importer”, in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner, beneficial owner or any person holding himself out to be the importer;

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(34) “proper officer”, in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Principal Commissioner of Customs or Commissioner of Customs under section 5.

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(43) “warehouse” means a public warehouse appointed under section 57 or a private warehouse licensed under section 58;

(44) “warehoused goods” means goods deposited in a warehouse;

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8. Power to approve landing places and specify limits of customs area.— The Principal Commissioner of Customs or Commissioner of Customs may,—

(a) approve proper places in any customs port or customs airport or coastal port for the unloading and loading of goods or for any class of goods;

(b) specify the limits of any customs area.

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12. Dutiable goods.— (1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, on goods imported into, or exported from, India.

(2) The provisions of sub-section (1) shall apply in respect of all goods belonging to Government as they apply in respect of goods not belonging to Government.

13. Duty on pilfered goods.— If any imported goods are pilferred after the unloading thereof and before the proper officer has made an order for clearance for home consumption or deposit in a warehouse, the importer shall not be liable to pay the duty leviable on such goods except where such goods are restored to the importer after pilferage.

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23. Remission of duty on lost, destroyed or abandoned goods.— (1) Without prejudice to the provisions of section 13, where it is shown to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs that any imported goods have been lost (otherwise than as a result of pilferage) or destroyed, at any time before clearance for home consumption, the Assistant Commissioner of Customs or Deputy Commissioner of Customs shall remit the duty on such goods.

(2) The owner of any imported goods may, at any time before an order for clearance of goods for home consumption under section 47 or an order for permitting the deposit of goods in a warehouse under section 60 has been made, relinquish his title to the goods and thereupon he shall not be liable to pay the duty thereon:

Provided that the owner of any such imported goods shall not be allowed to relinquish his title to such goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force.

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45. Restrictions on custody and removal of imported goods.— (1) Save as otherwise provided in any law for the time being in force, all imported goods unloaded in a customs area shall remain in the custody of such person as may be approved by the Principal Commissioner of Customs or Commissioner of Customs until they are cleared for home consumption or are warehoused or are transhipped in accordance with the provisions of Chapter VIII.

(2) The person having custody of any imported goods in a customs area, whether under the provisions of sub-section (1) or under any law for the time being in force,—

(a) shall keep a record of such goods and send a copy thereof to the proper officer;

(b) shall not permit such goods to be removed from the customs area or otherwise dealt with, except under and in accordance with the permission in writing of the proper officer or in such manner as may be prescribed.

(3) Notwithstanding anything contained in any law for the time being in force, if any imported goods are pilferred after unloading thereof in a customs area while in the custody

of a person referred to in sub-section (1), that person shall be liable to pay duty on such goods at the rate prevailing on the date of delivery of an arrival manifest or import manifest or, as the case may be, an import report to the proper officer under section 30 for the arrival of the conveyance in which the said goods were carried.

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47. Clearance of goods for home consumption.— (1) Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption:

Provided that such order may also be made electronically through the customs automated system on the basis of risk evaluation through appropriate selection criteria:

Provided further that the Central Government may, by notification in the Official Gazette, permit certain class of importers to make deferred payment of said duty or any charges in such manner as may be provided by rules.

(2) The importer shall pay the import duty—

(a) on the date of presentation of the bill of entry in the case of self assessment; or

(b) within one day (excluding holidays) from the date on which the bill of entry is returned to him by the proper officer for payment of duty in the case of assessment, reassessment or provisional assessment; or

(c) in the case of deferred payment under the proviso to sub-section (1), from such due date as may be specified by rules made in this behalf, and if he fails to pay the duty within the time so specified, he shall pay interest on the duty not paid or short-paid till the date of its payment, at such rate, not less than ten per cent. but not exceeding thirty-six per cent. per annum, as may be fixed by the Central Government, by notification in the Official Gazette.

Provided that the Central Government may, by notification in the Official Gazette, specify the class or classes of importers who shall pay such duty electronically:

Provided further that where the bill of entry is returned for payment of duty before the commencement of the Customs (Amendment) Act, 1991 and the importer has not paid such duty before such commencement, the date of return of such bill of entry to him shall be deemed to be the date of such commencement for the purpose of this section:

Provided also that if the Board is satisfied that it is necessary in the public interest so to do, it may, by order for reasons to be recorded, waive the whole or part of any interest payable under this section.

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141. Conveyances and goods in a customs area subject to control of officers of customs.— (1) All the conveyances and goods in a customs area shall, for the purpose of enforcing the provisions of this Act, be subject to the control of officers of customs.

(2) The imported or export goods may be received, stored, delivered, despatched or otherwise handled in a customs area in such manner as may be prescribed and the responsibilities of persons engaged in the aforesaid activities shall be such as may be prescribed.

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160. Repeal and savings.—

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> (9) Nothing in this Act shall affect any law for the time being in force relating to the constitution and powers of any Port authority in a major port as defined in the Indian Ports Act, 1908 (15 of 1908)."

(b) Major Port Trusts Act:

4.3 Earlier there were six major ports in the country, namely, Calcutta, Bombay, Madras, Visakhapatnam, Cochin and Kandla. The first three were administered by Port Trusts while the latter three were administered by the Government of India. The Port Trusts at the three ports of Calcutta, Bombay and Madras were statutory bodies. The remaining three ports of Visakhapatnam, Cochin and Kandla were under the immediate charge of a Port Administrative Officer appointed by the Central Government who had been vested with powers similar to those of a Head of a Department. These powers were limited in nature and the Port Administrative Officer had to obtain the orders of the Central Government on many matters, which could normally be disposed of at local level in the Port Trusts. Commercial and trade interests, especially at Visakhapatnam and Cochin had also been agitating that they should have a direct voice in the administration of those ports. Keeping in view that statutory Port Trusts were successfully administered, it was proposed to constitute Port Trusts at Visakhapatnam, Cochin and Kandla also. Accordingly, the Major Port Trusts Bill was introduced in the Parliament. The Major Port Trusts Bill having been passed by both the Houses of Parliament, received the assent of the President on 16.10.1963. It was brought on the Statute Book as the Major Port Trusts Act, 1963 (38 of 1963) with effect from 29.02.1964.

4.4 The relevant provisions of the Major Port Trusts Act, 1963 are extracted as under:

> "**2. Definitions.-** In this Act, unless the context otherwise requires,-
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> (b) "Board", in relation to a port, means the Board of Trustees constituted under this Act for that port;
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> (d) "Collector of Customs" has the same meaning as in the Customs Act, 1962;
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> (j) "Indian Ports Act" means the Indian Ports Act, 1908 (15 of 1908);
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> xxx
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> (m) "major port" has the same meaning as in the Indian Ports Act;
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> xxx

(o) "owner", (i) in relation to goods, includes any consignor, consignee, shipper or agent for the sale, custody, loading or unloading of such goods; and (ii) in relation to any vessel or any aircraft making use of any port, includes any part-owner, charterer, consignee, or mortgagee in possession thereof,

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(q) "port" means any major port to which this Act applies within such limits as may, from time to time, be defined by the Central Government for the purposes of this Act by notification in the Official Gazette, and, until a notification is so issued, within such limits as may have been defined by the Central Government under the provisions of the Indian Ports Act;

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(y) "Trustee", in relation to a port, means a member of the Board constituted for the port;

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42. Performance of services by Board or other person.- (1) A Board shall have power to undertake the following services:-

(a) landing, shipping or transhipping passengers and goods between vessels in the port and the wharves, piers, quays or docks belonging to or in the possession of the Board;

(b) receiving, removing, shifting, transporting, storing or delivering goods brought within the Board's premises;

(c) carrying passengers by rail or by other means within the limits of the port or port approaches, subject to such restrictions and conditions as the Central Government may think fit to impose;

(d) receiving and delivering, transporting and booking and despatching goods originating in the vessels in the port and intended for carriage by the neighbouring railways, or vice versa, as a railway administration under the Indian Railways Act, 1890 (9 of 1890);

(e) piloting, hauling, mooring, remooring, hooking, or measuring of vessels or any other service in respect of vessels; and

(f) developing and providing, subject to the previous approval of the Central Government, infrastructure facilities for ports.

(2) A Board may, if so requested by the owner, take charge of the goods for the purpose of performing the service or services and shall give a receipt in such form as the Board may specify.

(3) Notwithstanding anything contained in this section, the Board may, with the previous sanction of the Central Government, authorise any person to perform any of the services mentioned in sub-section (1) on such terms and conditions as may be agreed upon.

(3A) Without prejudice to the provisions of sub-section (3), a Board may, with the previous approval of the Central Government, enter into any agreement or other arrangement, (whether by way of partnership, joint venture or in any other manner) with, any body corporate or any other person to perform any of the services and functions assigned to the Board under this Act on such terms and conditions as may be agreed upon.

(4) No person authorised under sub-section (3) shall charge or recover for such service any sum in excess of the amount specified by the Authority, by notification in the Official Gazette.

(5) Any such person shall, if so required by the owner, perform in respect of goods any of the said services and for that purpose take charge of the goods and give a receipt in such form as the Board may specify.

(6) The responsibility of any such person for the loss, destruction or deterioration of goods of which he has taken charge shall, subject to the other provisions of this Act, be that of a bailee under sections 151, 152 and 161 of the Indian Contract Act, 1872 (9 of 1872).

(7) After any goods have been taken charge of and a receipt given for them under this section, no liability for any loss or damage which may occur to them shall attach to any person to whom a receipt has been given or to the master or owner of the vessel from which the goods have been landed or transhipped.

43. Responsibility of Board for loss, etc., of goods.- (1) Subject to the provisions of this Act, the responsibility of any Board for the loss, destruction or deterioration of goods of which it has taken charge shall,-

(i) in the case of goods received for carriage by railway, be governed by the provisions of the Indian Railways Act, 1890 (9 of 1890); and

(ii) in other cases, be that of a bailee under sections 151, 152 and 161 of the Indian Contract Act, 1872 (9 of 1872), omitting the words "in the absence of any special contract" in section 152 of that Act :

Provided that no responsibility under this section shall attach to the Board-

(a) until a receipt mentioned in sub-section (2) of section 42 is given by the Board; and

(b) after the expiry of such period as may be prescribed by regulations from the date of taking charge of such goods by the Board.

(2) A Board shall not be in the way responsible for the loss, destruction or deterioration of, or damage to, goods of which it has taken charge, unless notice of such loss or damage has been given within such period as may be prescribed by regulations made in this behalf from the date of taking charge of such goods by the Board under sub-section (2) of section 42.

44. Accommodation to be provided for customs officers in wharves, etc., appointed under Customs Act.—Where the Collector of Customs has, under the provisions of any Act for the levy of duties of customs, appointed any dock, berth, wharf, quay, stage, jetty, pier, warehouse or shed or a portion of any warehouse or shed provided. at any port under the provisions of this Act for the use of sea-going vessels to be an approved place for the landing or shipping of goods or a warehouse for the storing of dutiable goods on the first importation thereof without payment of duty, within the meaning of the first-mentioned Act, the Board shall set apart and maintain such place on or adjoining such dock, wharf, quay, stage, jetty or pier, or in such warehouse or shed or portion thereof, for the use of officers of customs as may be necessary.

45. Dues at customs wharves, etc.—Notwithstanding that any dock, berth, wharf, quay, stage, jetty, pier, warehouse or shed or portion thereof at any port has, under the provisions of section 44, been set apart for the use of the officers of customs at the port, all rates and other charges payable under this Act in respect thereof, or for the storage of goods therein, shall be payable to the Board, or to such person or persons as may be appointed by the Board to receive the same.

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128. Saving of right of Central Government and municipalities to use wharves, etc., for collecting duties and of power of Customs Officers.- Nothing in this Act shall affect-

(1) the right of the Central Government to collect customs duties or of any municipality to collect town duties at any dock, berth, wharf, quay, stage, jetty or pier in the possession of a Board, or

(2) any power or authority vested in the customs authorities under any law for the time being in force.

(c) Notification:

4.5 The Notification dated 11.10.2000 which was quashed by the High Court reads as under:

"Appraising (General)
New Custom House.
Ballard Estate,
Mumbai-400 038.

Date: 11.10.2000

NOTIFICATION

Sub: Declaration of area known as Mumbai Docks at Mumbai as customs area

Notwithstanding anything contained in the any Notification/ Public Notice/ Orders issued under the Sea Customs Act, 1879, relating to the declaration of various land packets as a "customs area" in the Mumbai Docks which are operational at present as a combined effect of section 6 and section 24 of General Clauses Act 1897, and deemed to have been issue under Customs Act, 1962;

Also, notwithstanding anything contained in any Notification/Public Notice Orders, issued under the Sea Customs Act, 1878, which are operational, at present by virtue of section 160 of Customs Act. 1962 and deemed to have been issued under Customs Act 1962;

And also notwithstanding anything contained in any Notification/Public Notice/orders, issued under the Sea Customs Act, 1878, appointing MbPT, as a custodian under the Sea Customs Act, 1878, which are operational at present by verger of the combined effect of section 6 and section 24 of General Clauses Act, 1897, which are deemed to have been appointed as custodian of imported goods under section 45(l) of Customs Act. 1962.

I, K.P Singh, Commissioner of Customs (Import), New Custom House, Mumbai, In exercise of the powers conferred on me by section 8 of Customs Act. 1962, hereby notify that the area known a “India Docks" Princess Docks". "Victoria Docks'' of the Sea, Mumbai, mentioned in the schedule below, as a "Customs area' for the purposes of handling import and export charge and facilitating movement of container traffic from within the Docks to outlying CFS. ICD areas: subject to the following conditions:-

(1) The said customs area shall remain under the custody of MbPT;

(2) The MbPT shall make adequate arrangements for loading/unloading storage, movement, safety and security of the imported and export charge.

(3) The MbPT shall provide proper and adequate infrastructure facilities for the customs offices and customs officers within the 'foreside areas at appropriate plea and at the entry and exit gives of the aforesaid area.

(4) The MbPT should ensure adequate lighting & fire-fighting equipments within and/or in the vicinity of area referred.

(5) The MbPT shall follow the directions issued by Commissioner of Customs from time to time u/s. 45 of Customs Act. 1962.

SCHEDULE

NAME OF THE PORT	**PLACE**	**LIMITS**
Mumbai Sea Port	Places and areas of MbPT known as Indira Docks Vicrotia Docks Princess Docks	Area enclosed by the Mumbai Port Trust, Docks boundary walls (old as well as new) connecting Naval Dock Yard. Green Gate, Grey, Blue Gate, Purple Gate, White Gate, Orange Gate, Yellow Gage extended upto Mallet Basin.

Further, in exercise of the powers conferred on me by section 45(1) of Customs Act, 1962, I approve MbPT as a custodian of the aforesaid customs area in respect of all imported goods and order that the custodian shall be responsible for the statutory duties and responsibilities prescribed under Section 45(2) and 45(3) of Customs Act, 1962.

This Notification is issued in order to consolidate and integrate the various "Customs areas" notified from time to time under the Sea Customs Act, 1878 and Customs Act, 1962.

Sd/-
(K. P.SINGH)
COMMISSIONER OF CUSTOMS (IMPORT)
NEW CUSTOM HOUSE
MUMBAI.

Issued from F.No.S/26-238/2000 A(G)"

Conundrum:

5. As is evident from a plain reading of the above, Section 45 of the Customs Act regulates the custody of imported goods unloaded in a customs area until they are cleared for home consumption, warehoused or transhipped. While sub-section (1) empowers the Principal Commissioner of Customs or Commissioner of Customs to approve the person in whose custody such goods shall remain, subject to the saving clause, "*save as otherwise provided in any law for the time being in force*", sub-section (3), inserted by Act 22 of 1995, fastens liability to pay customs duty on pilfered goods upon the person so approved and commences with the *non obstante clause*, "*notwithstanding anything contained in any law for the time being in force*".

5.1 The controversy in the present case arises as the respondent-Port Trust contends that its custody of imported goods is derived directly from the Major Port Trusts Act. Consequently, according to the respondent, the saving clause in sub-section (1) precluded the Commissioner from approving the respondent-Port Trust as a custodian under the Notification dated 11.10.2000 and from fastening upon it the liability contemplated under Section 45(3). The appellants, on the other hand, contend that the very purpose of introducing sub-section (3) with a *non obstante clause* was to ensure that, notwithstanding any other law governing the custody of imported goods, the person approved under Section 45(1) would be liable to pay customs duty on pilfered goods as provided under Section 45(3). The question, therefore, is whether the statutory scheme under the Major Port Trusts Act excludes the exercise of the Commissioner's power under Section 45(1), or whether the liability created by Section 45(3) nevertheless attaches to the respondent upon such approval.

Analysis:

6. We propose to examine the controversy from first principles. Accordingly, we shall first discuss the rival meanings and implications of a *saving clause* versus a *non obstante clause*.

6.1 The expression "*notwithstanding anything in any other law*" occurring in a Section of an Act cannot be construed to take away the effect of any provision of the Act in which that Section occurs.

Patanjali Shashtri, CJ in ***Aswini Kumar Ghosh vs. Arabinda Bose, AIR 1952 SC 369,*** observed that "*it should first be ascertained what the enacting part of the section provides on a fair construction of the words used according to their natural and ordinary meaning, and the non obstante clause is to be understood as operating to set aside as no longer valid anything contained in relevant existing laws which is inconsistent with the new enactment.*"

In ***Dominion of India vs. Shrinbai A. Irani, AIR 1954 SC 596***, it was observed as under:

> "…the non obstante clause need not necessarily and always be co-extensive with the operative part, so as to have the effect of cutting down the clear terms of an enactment. If the words of the enactment are clear and are capable of only one interpretation on a plain and grammatical construction of the words thereof, a non obstante clause cannot cut down that construction and restrict the scope of its operation. In such cases the non obstante clause has to be read as clarifying the whole position and must be understood to have been incorporated in the enactment by the legislature by way of abundant caution and not by way of limiting the ambit and scope of the operative part of the enactment. …"

6.2 The words, "*any other law*" will necessarily refer to any law other than the Act in which that Section occurs. By contrast, "*any* *law for the time being in force*" also includes anything provided in the enactment in which those words occur.

6.3 Applying the above principles to the provisions under consideration, it is noted that in sub-section (1) of Section 45 of the Customs Act, what is envisaged is that the Principal Commissioner of Customs or Commissioner of Customs shall approve the person in whose custody all imported goods unloaded in a customs area shall remain until they are cleared for home consumption or are warehoused or are transhipped in accordance with the provisions of Chapter VIII. The object of the said sub-section is to fix the responsibility on such person as may be notified in that behalf by the Principal Commissioner of Customs or Commissioner of Customs. In the instant case, the Notification dated 11.10.2000 has, in fact, been issued approving Mumbai Port Trust as such a person. Mumbai Port Trust, being such juristic person, so approved by the Principal Commissioner of Customs or Commissioner of Customs under sub-section (1) of Section 45, having custody of any imported goods in a customs area, is, therefore, obligated to do certain things and prevent certain other things from happening as per sub-section (2) of Section 45 of the Customs Act.

6.4 Sub-section (3), which is added to Section 45 of the Customs Act by an amendment w.e.f. 26.05.1995 states that if any goods are pilfered after unloading in a customs area while in the custody of a person referred to in sub-section (1) of Section 45 of the said Act, that person shall be liable to pay duty on such pilfered goods at the rate prevailing on the date of delivery of an arrival manifest or import manifest or, as the case may be, an import report to the proper officer under Section 30 for the arrival of the conveyances in which the said goods were carried. Sub-section (3) of Section 45 of the said Act aims to levy customs duty *vis-à-vis* pilfered goods. At this point, we may also mention that Section 13 of the same Act states that if any imported goods are pilfered after the unloading thereof but before the proper officer has made an order for clearance for home consumption or deposit in a warehouse, the importer shall not be liable to pay the duty leviable on such goods except where such goods are restored to the importer after pilferage. Since the importer of the goods is not liable to pay the duty leviable on pilfered goods except when such goods are restored to the importer, the obligation is cast on the person approved by the Principal Commissioner of Customs or Commissioner of Customs as notified under sub-section (1) of Section 45 of the Customs Act to pay the duty on such pilfered goods.

6.5 What is important to note is that sub-section (3) of Section 45 was inserted w.e.f. 26.05.1995 and it begins with a *non obstante clause*. Prior to the insertion of the said sub-section, no duty as such was liable to be paid on pilfered goods under the Customs Act. Consequently, an obligation to pay customs duty on such goods has been cast upon the person referred to in sub-section (1) of Section 45. In order to fasten such an obligation on a person, a notification under sub-section (1) of Section 45 is a necessary concomitant. At the same time, the approval contemplated under sub-section (1) operates only by way of an exception, that is, where there is "*nothing otherwise contained in any other law for the time being in force*". In other words, sub-section (1) enacts a saving clause. Thus, if any other enactment prescribes that a particular person shall remain in custody of the imported goods unloaded in a customs area and also fastens custom duty for pilfered goods on them, then the Principal Commissioner of Customs or Commissioner of Customs has no powers to approve any other person for the purpose of payment of customs duty under Section 45(3) of the Act and thus cannot issue a notification under Section 45(1). It is only when under any other law for the time being in force, no person has been fastened with a liability to pay customs duty in respect of pilfered goods that the Principal Commissioner of Customs or the Commissioner of Customs can approve, by notification, a person under sub-section (1) of Section 45 of the Customs Act, to assume the obligation contemplated under sub-sections (2) and (3) of the Section 45 of the Customs Act.

6.6 It is, therefore, necessary to ascertain whether any other law for the time being in force prescribes the responsibility of the custodian of imported goods unloaded in a customs area in respect of pilfered goods. If no such provision exists, the Principal Commissioner of Customs or Commissioner of Customs may approve a person under sub-section (1), who would thereafter discharge the duties under sub-section (2) and incur the liability under sub-section (3) of Section 45. It thus becomes necessary to examine the provisions of the Major Port Trusts Act, under which the respondent-Bombay Port Trust is constituted, to ascertain whether that enactment provides such a statutory scheme.

6.7 The Major Port Trusts Act, was enacted to make provision for the constitution of port authorities for certain major ports in India and to vest the administration, control and management of such ports in such authorities and for matters connected therewith. Bombay Port is a major port within the meaning of Section 2(m) of the Major Port Trusts Act read with Indian Ports Act. Section 2(o) thereof defines "owner" as under:

> "(o) "owner", (i) in relation to goods, includes any consignor, consignee, shipper or agent for the sale, custody, loading or unloading of such goods; and (ii) in relation to any vessel or any aircraft making use of any port, includes any part-owner, charterer, consignee, or mortgagee in possession thereof."

6.8 Chapter V of the Major Port Trusts Act deals with works and services to be provided at Ports. Section 35 deals with the power of the Board to execute works and provide appliances while Section 42 deals with performance of services by the Board or other person. Section 42 of the Major Port Trusts Act is extracted above.

6.9 As is evident, clauses (a) and (b) of sub-section (1) of Section 42 of the Major Port Trusts Act, *inter alia,* deal with goods brought within the Board premises. Sub-section (2) of Section 42 states that a Board may, if so requested by the owner, take charge of the goods for the purpose of performing the service or services and shall give a receipt in such form as the Board may specify. The Board can also authorise any person to perform any of the services mentioned in sub-section (1) of Section 42 of the said Act on such terms and conditions as may be agreed upon with the previous sanction of the Central Government. Similarly, a Board may, with the previous approval of the Central Government, enter into any agreement or other arrangement with anybody, corporate or any other person, to perform any of the services and functions assigned to the Board under the said Act on such terms and conditions as may be agreed upon. Any such person shall, if so required by the owner, perform in respect of goods any of the said services and for that purpose take charge of the goods and give a receipt in such form as the Board may specify. The responsibility of any such person for the loss, destruction or deterioration of goods of which he has taken charge shall, subject to the other provisions of the said Act, be that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act, 1872 (for short, “Contract Act”). Once the Board has taken charge of the goods and issued the prescribed receipt, the master or owner of the vessel is discharged from any liability for loss or damage to such goods thereafter. Therefore, Section 42 of the Major Port Trusts Act fastens the liability in respect of the goods received, either on the Board which has taken charge of the goods as requested by the owner thereof or a person authorised by the Board on the terms and conditions agreed upon with the previous sanction of the Central Government. Any loss caused to the goods is as that of a bailee under sections 151, 152 and 161 of the Indian Contract Act, 1872.

6.10 Section 43 of the Major Port Trusts Act provides that, subject to the provisions of that Act, the responsibility of the Board for the loss, destruction or deterioration of goods of which it has taken charge shall, *inter alia*, be that of a bailee under Sections 151, 152 and 161 of the Contract Act omitting the words “*in the absence of any special contract*” occurring in Section 152 thereof.

Such responsibility, however, is subject to the conditions stipulated in Section 43 itself, namely:

(i) that a receipt referred to in sub-section (2) of Section 42 of the Major Port Trusts Act has been issued by the Board; and

(ii) that such responsibility ceases upon the expiry of the period prescribed by the regulations from the date on which the Board took charge of the goods.

(iii) Further, under sub-section (2) of Section 43, the Board shall not be responsible for the loss, destruction, deterioration or damage to goods of which it has taken charge unless notice of such loss or damage is given within the period prescribed by the regulations from the date of taking charge of the goods under Section 42(2).

6.11 Section 44 of the Major Port Trusts Act, in turn, requires the Board to provide and maintain accommodation for customs officers at docks, wharves, warehouses and other approved places used for the landing, shipping or storage of dutiable goods.

Correspondingly, Section 45 provides that the rates and other charges in respect of such accommodation or the storage of goods shall be payable to the Board or to such person as may be appointed by the Board.

6.12 On a conspectus reading of Sections 42 to 45 of the Major Port Trusts Act, it becomes clear that only if a receipt in terms of sub-section (2) of Section 42 is issued by the Board to the owner of the goods, the Board is responsible for the loss, destruction or deterioration of the goods of which it has taken charge. In such a case the Board becomes a bailee within the meaning of Section 148 of the Contract Act, which reads as under:

> **"148. 'Bailment', 'bailor' and 'bailee' defined.—**
>
> A 'bailment' is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the 'bailor'. The person to whom they are delivered is called the 'bailee'.
>
> Explanation.—If a person is already in possession of the goods of other contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor of such goods, although they may not have been delivered by way of bailment."

6.13 The duty to take care by the bailee of the goods i.e. the Board in the instant case under Sections 151, 152 and 161 of the Contract Act would apply in terms of Section 43(1)(ii) of the Major Port Trusts Act. For ease of reference, the said Sections are extracted as under:

> **"151. Care to be taken by bailee. —**
>
> In all cases of bailment, the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.
>
> **152. Bailee when not liable for loss, etc., of thing bailed. —**
>
> The bailee, (in the absence of any special contract), is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151.
>
> xxx
>
> **161. Bailee's responsibility when goods are not duly returned.—**
>
> If by the fault of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time."

6.14 Section 161 of the Contract Act deals with loss, destruction or deterioration of the goods by the fault of the bailee resulting in the non-return of the goods, tendered or delivered at the proper time by fastening the liability on the bailee. The Board of a Major Port, as a bailee, is responsible under Section 43 of the Major Port Trusts Act read with Sections 151, 152 and 161 of the Contract Act. Now, this responsibility is subject to the conditions precedent, which have been extracted above.

6.15 If the conditions precedent do not apply, then the Board as a bailee would have no responsibility under Sections 151, 152 and 161 of the Contract Act.

6.16 A case of loss of goods owing to pilferage of the goods is a case covered under Section 13 of the Customs Act, as stated earlier, which for ease of reference reads as under:

> **“13. Duty on pilfered goods.**—If any imported goods are pilfered after the unloading thereof and before the proper officer has made an order for clearance for home consumption or deposit in a warehouse, the importer shall not be liable to pay the duty leviable on such goods except where such goods are restored to the importer after pilferage.”

If imported goods are pilfered after unloading and before the proper officer has made an order for clearance for home consumption or deposit in a warehouse, the importer is not liable to pay the duty leviable on such goods except where such goods are restored to the importer after the pilferage. Section 13, read with Section 45(3) of the Customs Act, contemplates that the Board shall be liable to pay duty on such goods at the rate prevailing on the date of delivery of the arrival manifest or import manifest, as the case may be. Such liability arises only where a notification has been issued under sub-section (1) of Section 45 of the Customs Act approving the person having custody of the goods. A person who has been notified could be a natural person notified in terms of designation or an office held by a person. A person could also mean a juristic person such as a body incorporated or a statutory body such as the Board of Trustees of a Port Trust, as the respondent in the instant case.

6.17 However, sub-section (1) of Section 45 of the Customs Act opens with a saving clause, *"save as otherwise provided in any law for the time being in force."* Therefore, the liability of the person referred to in sub-section (1) is subject to the operation of that saving clause. Thus, if any other law for the time being in force itself fastens liability in respect of pilfered goods upon the custodian, such law would prevail. However, where no such liability is provided under any other law, or where such liability is conditional, as under Section 43 of the Major Port Trusts Act insofar as the Board as a custodian of the goods is concerned, the consequence would be that no customs duty would be recoverable on pilfered goods. This is because Section 13 of the Customs Act absolves the importer from such liability. Such an interpretation would inevitably result in a loss of revenue through the non-collection of customs duty on pilfered goods. It is to address this lacuna that Parliament introduced sub-section (3) of Section 45 with effect from 26.05.1995, thereby fastening the liability to pay duty on the person approved under sub-section (1) of Section 45, "*notwithstanding anything contained in any other law for the time being in force*".

6.18 The liability contemplated under Section 43 of the Major Port Trusts Act is fundamentally different from the liability created under Section 45(3) of the Customs Act. The former regulates the civil responsibility of the Board, as a bailee, towards the owner of the goods in accordance with the principles embodied in Sections 151, 152 and 161 of the Indian Contract Act. Such liability is compensatory in nature and governs the *inter se* rights and obligations between the Board and the owner of the goods.

6.19 The liability under Section 45(3) of the Customs Act, on the other hand, is not one of indemnification or compensation to the owner of the goods. It is a statutory liability to pay customs duty to the Revenue in respect of imported goods which have been pilfered while in the custody of the approved custodian.

6.20 The source, nature and object of the two liabilities are, clearly, distinct. While the Board may remain liable as a bailee to compensate the owner for the loss occasioned by its negligence, Section 45(3) independently fastens upon the approved custodian the obligation to make good the customs duty which, by virtue of Section 13, cannot be recovered from the importer.

6.21 Viewed in this light, there is no inconsistency between the two enactments needing to be resolved by the Court. The Major

Port Trusts Act regulates the Board's civil liability in respect of the goods entrusted to it, whereas Section 45(3) of the Customs Act safeguards the Revenue by ensuring that customs duty on pilfered goods does not go unrealised merely because the importer stands absolved under Section 13. The fact that the Board may have contractual or statutory rights of indemnity or recovery against another person responsible for the loss does not detract from its primary statutory liability under Section 45(3) of the Customs Act to discharge the customs duty payable to the revenue.

6.22 Sub-section (3) of Section 45 was inserted into the Customs Act by Act 22 of 1995 with effect from 26.05.1995. Parliament simultaneously employed a *non obstante* clause so as to give it an overriding effect to the liability created thereunder. This is notwithstanding the fact that, by virtue of the saving clause contained in sub-section (1), the liability of the Board as custodian in respect of the loss of goods was otherwise governed by Section 43 of the Major Port Trusts Act. Since the said liability is conditional inasmuch as if no receipt has been issued by the Board under sub-section (2) of Section 42 of the said Act, the liability is not assumed by the Board and in a case of pilferage the customs duty would then not be collected under the Customs Act. Sub-section (3) of Section 45 of the Customs Act has therefore, deliberately used a legislative device in the form of a *non obstante* clause. The *non obstante clause* in sub-section (3) of Section 45 of the Customs Act provides that it shall operate *"notwithstanding anything contained in any law for the time being in force."* The expression necessarily includes the Customs Act and the Major Port Trusts Act, notwithstanding the saving clause contained in sub-section (1) of Section 45, which uses the expression *"save as otherwise provided in any law for the time being in force."* Thus, where the conditions of sub-section (3) are satisfied, the liability created thereunder would prevail notwithstanding the provisions of the Major Port Trusts Act as the latter does not provide for any tax liability in the event of pilferage of goods. The only precondition for the applicability of sub-section (3) is that the person concerned has been approved as the custodian under sub-section (1) of Section 45.

6.23 It is, no doubt, true that sub-section (1) of Section 45 of the Customs Act contains a saving clause. Therefore, if any other law for the time being in force creates a corresponding liability upon the custodian in respect of pilfered goods, such provision would ordinarily prevail. However, that is only where the liability under the two enactments operates on the same footing. In the present case, they do not, for two reasons. *Firstly*, on a comparative reading of Section 13 read with Section 45(3) of the Customs Act and Sections 42 and 43 of the Major Port Trusts Act, it is evident that the liability of the Board under the latter enactment is not absolute but is conditional, being subject to the fulfilment of the statutory conditions prescribed therein. By contrast, once a person has been approved as a custodian under Section 45(1), sub-section (3) of the Customs Act imposes an independent and absolute statutory liability to pay customs duty on pilfered goods. *Secondly*, as already noticed, the liability under the Major Port Trusts Act is in the nature of a bailee's civil liability towards the owner of the goods, whereas the liability created under Section 45(3) of the Customs Act is a distinct statutory liability owed to the revenue. The source, nature and object of the two liabilities are, therefore, fundamentally different. It is precisely for this reason that Parliament employed the *non obstante* clause in sub-section (3) of Section 45 of the Customs Act.

6.24 As already noted, Section 43 of the Major Port Trusts Act casts responsibility on the Board for the loss, destruction or deterioration of goods, which would also include loss occasioned by pilferage. However, such responsibility is conditional and arises only upon the fulfilment of the statutory requirements prescribed therein. If those conditions are not satisfied, no liability can be fastened upon the Board even in a case of loss of goods by pilferage.

6.25 It is in this context that sub-section (2) of Section 45 of the Customs Act assumes significance. The said provision imposes statutory duties upon the person having custody of imported goods in a customs area, whether such custody is under sub-section (1) of Section 45 thereof or under any other law for the time being in force, which would include the Major Port Trusts Act. The duties prescribed under Section 45(2) of the Customs Act are noted below:

"**45.** (2)…

(a) shall keep a record of such goods and send a copy thereof to the proper officer;

(b) shall not permit such goods to be removed from the customs area or otherwise dealt with, except under and in accordance with the permission in writing of the proper officer or in such manner as may be prescribed"

6.26 Thus, irrespective of the legal source of custody, the custodian is under a statutory obligation to maintain proper records of the goods and to ensure that they are neither removed nor otherwise dealt with except with the permission of the proper officer. Pilferage of imported goods in the customs area is a consequence of a breach of these statutory obligations by the person entrusted with their custody. As noticed in *P. Ramanatha Aiyar's Law Lexicon*, "pilferage" means "loss or damage to stock in a warehouse or to cargo in transit. In the case of loss it is usually because of theft."

6.27 It is for this reason that Parliament, while introducing sub-section (3) of Section 45 of the Customs Act, fastened the liability to pay customs duty upon the approved custodian on pilfered goods. The liability is attracted because the pilferage occurs while the goods remain in the custody of the person entrusted with the statutory duties under Section 45 of the Customs Act.

6.28 Consequently, on a juxtaposition of sub-sections (1), (2) and (3) of Section 45 of the Customs Act with the provisions of the Major Port Trusts Act, we are of the view that the Commissioner of Customs (Import) was fully justified in issuing the Notification dated 11.10.2000 approving the Mumbai Port Trust as the custodian under Section 45(1) of the Customs Act. The High Court, therefore, was not justified in holding that the Commissioner lacked the jurisdiction to issue the said Notification and in quashing the same.

6.29 We do not find any conflict between Section 45 of the Customs Act and Sections 42 and 43 of the Major Port Trusts Act. In fact, Section 23 of the Customs Act, which deals with remission of duty on lost, destroyed or abandoned goods, expressly provides that it operates without prejudice to Section 13 of the Customs Act which deals with pilferage, which deals with liability in respect of pilfered goods.

6.30 Thus, under the Customs Act, the expression loss or destruction of goods is treated as being distinct from pilferage, the latter being specifically governed by Section 13 thereof. Thus, as discussed above, the saving clause contained in sub-section (1) of Section 45 of the Customs Act, namely, *"save as otherwise provided in any law for the time being in force"*, can be construed to exclude the operation of the Major Port Trusts Act which deals with loss or destruction of goods. On a reading of Section 23 of the Customs Act, pilferage of goods in a customs area is not loss of goods simpliciter. If it is a case of loss of goods simpliciter then the provisions of the Major Port Trusts Act would apply having regard to the saving clause under sub-section (1) of Section 45 of the Act. But, as pilferage is not specifically dealt with under the provisions of the Major Port Trusts Act and is dealt with only under the Customs Act and duty is imposed under sub-section (3) of Section 45 of the said Act, then, the savings clause under sub-section (1) of Section 45 would not apply. Consequently, the *non obstante* clause under sub-section (3) of Section 45 is used as a legislative device to meet such a circumstance. Therefore, any loss of goods other than pilferage is not a subject matter of payment of customs duty under Section 45 of the Customs Act. However, if it is a case of pilferage of goods, then under sub-section (3) read with sub-section (1) of the Customs Act, duty is indeed payable by the person approved in terms of sub-section (1) of the Section 45 of the said Act.

6.31 In the instant case, since Notification dated 11.10.2000 was issued by the Commissioner of Customs precisely for the purpose of collection of customs duty in respect of pilfered goods as stipulated under sub-section (3), it cannot be found fault with merely because the custody of the goods is otherwise governed by the Major Port Trusts Act.

7. For the foregoing reasons, we hold that:

a. The Notification dated 11.10.2000 issued by the Commissioner of Customs (Import) in exercise of the powers conferred under Section 45(1) of the Customs Act is valid.

b. The impugned judgment dated 28.07.2009 to the extent it held otherwise and quashed the said Notification is, therefore, set aside.

c. The challenge to the quashing of the show cause-cum-demand notices dated 18.06.1996, 02.04.1997, 28.04.1997, and 24.05.2000, pertaining to period prior to the date of the Notification dated 11.10.2000, is not pressed by appellants' counsel, since no liability under Section 45(3) could have arisen in the absence of an approval under Section 45(1). Accordingly, the impugned judgment to the extent of quashing the show cause-cum-demand notices prior to 11.10.2000 is not interfered with.

The appeal is accordingly disposed in the above terms. There shall be no order as to costs.

..J.
(B.V. NAGARATHNA)

..J.
(MANMOHAN)

NEW DELHI;
AUGUST 25, 2026