

BOMBAY HIGH COURT

Jalyan Udyog Calcutta

Vs

Union of India

(M Pendse C.J. M Kenia , J.)

01.01.1800

JUDGMENT

M. Pendse, J.

1. On April 24, 1968 the Chairman of Shipping Corporation of India addressed a letter to Government of India, Ministry of Transport and Shipping, seeking permission for purchase of secondhand ships for operating between Bombay and Persian Gulf, Calcutta and Atriotic and Calcutta and United Arab Republic. On June 1, 1968, the Minisgtry of Transport and Shipping informed the Chairman that the Government of India has no objection to the proposal to purchase and conditions. In pursuance of the permission, Shipping Corporation purchased two secondhand ships m.v. Vijay Jivan and m.v. Vijay Vaibhav. Vijay Jiwan arrived in Bombay Port on August 14, 1968, while Vijay Vaibhav on September 9, 1968. The Import General Manifest filed in respect of the two vessels referred to only the cargo on the board and not the vessels. The two vessels imported by shipping Corporation were registered under the Merchant shipping Act on August 23, 1968 and September 17, 1968, respectively. The two vessels were used by the Shipping Corporation from the year 1968 onwards as ocean going vessels. On October 11, 1958, the Customs Authorities had issued an exemption notification bearing No. 262-Cus. and it reads as under:Exemption to ocean going vessels other than vessels imported to be broken up:Ocean going vessels other than vessels imported to be broken up, are exempt from the payment of Customs duty leviabale thereon.Provided that any such vessel subsequently broken up shall be chargeable with the duty which would be payable on her if she were imported to be broken up."

2. In the year 1980 the Shipping Corporation sold both the vessels to Vijaya Lines Private Limited and the purchaser also used the ships as ocean going vessels. In the year 1982 the ships were purchased by petitioner No. 2. The last overseas voyage of Vijaya Jiwan wan in February 1982, while that of Vijay Vaibhav in April 1982. The petitioner No. 2 used the vessels for plying between coast to coast and the last coastal voyage of Vijay Jiwan was undertaken in April 1983, while that of Vijay Vaibhav in May 1983. Both the ships thereafter were laid up in Bombay

Harbour as it was realised that they had become petitioner No. 2 decided to scrap the vessels and there upon permission was sought from the Directorate General of Shipping, Bombay, respondent No. 5 to the petition. Respondent No. 5 granted permission on October 1, 1983 subject to three conditions, (a) formal sanction will be issued on receipt of communication indicating the name of the buyer and the sale price, (b) the vessel should be free from all encumbrances and necessary documents furnished, and (c) all outstanding dues of any seamen are settled. The permission also recites that petitioner No. 2 should approach the Metal Scrap Trade Corporation (M.S.T.C.) Calcutta for getting clearance in the matter. Respondent No. 4 Corporation was constituted in the year 1978 as a canalizing agency for import of ships for the purpose of breaking. Petitioner No. 2 thereafter entered into tow agreements, both dated October 12, 1984, with petitioner No. 1 for sale of both the vessels for a consideration of Rs. 3 lakhs. The petitioners thereafter informed respondent No. 5 about the name of the purchaser and claimed that it is not necessary to seek clearance from M.S.T.C. as the ships were imported in India in the year 1968, that is prior to the constitution of M.S.T.C. as canalizing agency. In the meanwhile on March 1, 1984, Collector of Customs had issued a Public Notice in regard to the assessment of Indian Flag vessels for Scrapping/breaking purposes and the procedure in regard to the assessment. The Public Notice recites that the valuation of Indian Flag Vessels cleared for breaking will be on the basis of current import price of similar vessels imported by M.S.T.C. for scrapping during the period of sale. The notice further recites that the ship owners will have to approach the M.S.T.C. and obtain a certificate regarding the current import price of similar vessels imported by M.S.T.C. The ship owners were also required to secure a no objection certificate from the M.S.T.C. for sale of Indian Flag vessels. The no objection certificate would be granted on the conditions (a) the ship owners shall be deemed to be the importers and the entire liability to pay Customs duty shall rest on them. The ship owners shall also file the bills of entry and undertake to collect the sum representing the estimated amount of duty determined by the Customs, (b) the ship owners shall deposit the sum collected from the buyer with the Customs House on account of the ship sold, (c) M.S.T.C. will issue to objection certificate only after the evidence reflecting the payment of deposit of the amount with the Customs House is produced, and (d) the Customs House would then assess the bill of entry and adjust the deposit already available with them towards the duty chargeable on vessel and then permit clearance.

3. The petitioners repeatedly informed respondent No. 5 that the procedure prescribed under the Public Notice dated March 1, 1984 cannot be applied in respect of sale of two vessels imported in the year 1968, but respondent No. 5 did not send any reply and that led the petitioners to file the present petition under Article 226 of the India in this Court on November 13, 1984. The petitioners sought several reliefs, but it is not necessary to set them out in detail in view of the fact that because of the subsequent events many of the reliefs no longer survive. The petitioners

had sought interim relief of direction to the respondents to clear the ships for scrapping and also a direction to allow the petitioners the beaching of the ships and taking the ships to breaking yard. The learned Single Judge admitted the petition on November 29, 1984 but granted interim relief on condition that the petitioners should secure prior approval of M.S.T.C. Against the conditional interim relief, the petitioners preferred Appeal No. 1195 of 1984 before Division Bench of this Court, and the appeal was allowed by judgment dated June 27, 1985 and the interim reliefs sought by the petitioners were granted without any condition but on the petitioner's furnishing the bank guarantee to the satisfaction of the Prothonotary and Senior Master. The Division Bench made it clear that the condition imposed by the learned Single Judge of obtaining the prior approval of M.S.T.C. was one which cannot be imposed in law. In pursuance of the interim order passed by the Appeal Court, both the vessels were scrapped.

4. Shri Dalal, learned counsel appearing on behalf of the petitioner, submitted that both the ships were imported in India in the year 1968 and Customs duty was not paid at the relevant time because of the exemption notification dated October 11, 1958. The learned counsel urged that in accordance with the existing practice prevailing in Bombay Port, it was not necessary to file bill of entries in respect of import of ocean going vessels and therefore no such entries were filed by the Shipping Corporation. The learned counsel further contended that in accordance with the exemption notification when the two vessels are to be broken up the duty would be payable only on the basis that the ships were imported for the purpose of breaking up in the year 1968. For the purpose be ascertained on the basis of the international price of the ships imported for scrapping in August and September 1968. Shri Dalal submitted that it is now well settled by the decision of the Full Bench of this Court reported in *Apar Private Ltd. v. Union of India*¹, that the event of import takes place when the goods enter the territorial waters of India, and the event of import of the two ships took place in the year 1968. The learned counsel further urged that the duty leviable should be at the rate prevalent on the date of the import and on the value which was prevalent in August and September 1968. Shri Dalal also submitted that as both the ships were imported in the year 1968 and that is long prior to the constitution of respondent No. 4, it is not necessary to secure prior permission of M.S.T.C. and the requirement of the Public Notice dated March 1, 1984 can have no application to the ships of the petitioners. In support of the submission, reliance was placed on the decision of the Division Bench of the Calcutta High Court reported in *Ram Niwas Chardhary v. Metal Scrap Trade Corporation Ltd*². and Other and the decision of the Division Bench in the present petition granting interim relief and reported in 1986 (7) Excise Customs Cases page 90.

5. The issues raised in this petition are no longer res integra, because the Division Bench of this Court sitting at Panjim (Goa) considered identical issues in Writ Petition No. 14 of 1985 Vishal Gomantak Shipping Co. Pvt. Ltd. and Others v. Union of India and Another and by judgment

dated April 22, 1987 held that in view of the decision of the Full Bench of this Court in Apar Pvt. Ltd (1985 (22) ELT 644) the date of import must be the date on which the ship entered the territorial waters of India and the duty payable would be one prevailing at that particular point of time. The Division Bench exhaustively dealt with the Full Bench decision and also decision of the Calcutta High Court in the case of Ram Niwas Chaudhary (supra) where it was held that M.S.T.C. not being the canalising agency in regard to the ships imported prior to 1978 cannot insist on the production of no objection certificate for the purpose of grant of approval for disposal of the ships for scrapping under Section 42(1) of the Merchant shipping Act. In view of the decision of the Division Bench of this Court, which is of a coordinate jurisdiction, we are bound to grant relief to the petitioners in the present case.

6. Shri Bhaoha, learned counsel appearing on behalf of the Union of India and the Collector of Customs, submitted that the decision of the Full Bench in Apar's case does not lay down the correct law. The learned counsel urged that the Full Bench has differed from the view taken by several High Courts, including Gujarat, Delhi, Kerala and Madras. Shri Bhabha urged that the conclusion of the Full Bench that the import takes place when the goods enter into the territorial waters of India is not correct and the correct position is that the import takes place when the bills of entries are filed for home consumption. It is not possible to accede to the submission of Shri bhabha, because the decision of the Full Bench is binding on us. The specific question referred to the Full Bench was when can an event of importation be said to occur under the Customs Act, 1962. The Full Bench after examining the decisions of the other High Courts, held that the decision in Apar's case lays down correct law, still the two ships in question after entering the territorial waters in the year 1968 were used as ocean going vessels till the year 1982 and therefore should be considered as being exported from time to time and the time of import should be fixed with reference to the date of last entry in the territorial water. It was also contended by the learned counsel that Import General Manifest filed in the year 1968 was only for the cargo on the ship and not for the ship itself and therefore the import should be held as one having taken place in the year 1982. It is not possible to accept the submission of the learned counsel, because identical contentions urged before the Division Bench at Panjim were turned down. Shri Bhabha also urged that the decision of the Division Bench of the Calcutta High court should be ignored as it does not refer to the definitions of Sections 2(9) and 2(22) of the Customs Act. it is not possible to accept the submission of the learned counsel. The Calcutta High Court was specifically concerned with the question as to whether the permission of M.S.T.C. is required in respect of scrapping of ships imported prior to the year 1978 and Mr. Justice M.M. Dutt, as he then was, speaking for the Bench observed that the contention is absurd on the fact of the definition of the word import as given in Clause 23 of Section 2 of the Customs Act, 1962. the learned Judge observed that in view of the definition of the word import read with the definition

of the word India there cannot be any doubt whatsoever that the ships were imported in India there cannot be any doubt whatsoever that the ships were imported in India in the year 1968 when M.S.T.C. was not the canalizing agency and therefore permission was not necessary. We are in respectful agreement with the view taken by the Division Bench of the Calcutta High Court. Shri Bhabha also referred us to the Notification No. 163-Cus., dated October 16, 1965 where the earlier notification of October 11, 1958 was slightly modified. The earlier notification recited that the ocean going vessels, if subsequently broken up, shall be chargeable with the duty which would be payable on such vessel if it was imported to be broken up, while the later intification recites Provided that the duty of customs shall be levied on the vessel if it is borken up as if it were then imported to be broken up." Relying on these notifications, it was contended by Shri Bhabha that the view taken by the Goa Bench and the Division Bench of the Calcutta High Court as well as the Division Bench of this Court while passing interim order in this petition should be ignored. It is not possible to accede to the submission of the learned counsel. In our judgment, the modification of the clause in the subsequent notification does not in any manner alter the position as is existed at the time of import of the two ships and the liability to pay the duty.

7. Shri Cooper, learned counsel appearing on behalf of the M.S.T.C. adopted different line of arguments to claim that the decision of the Division Bench of Goa Bench is not correct. The learned counsel contended that the view taken by the Full Bench in Apar's case is limited to ascertain the date of import for the purpose of Customs Act, 1962, and that judgment can have no bearing while ascertaining whether the ships were imported in accordance with provisions of the Impors and Exports (Control) Act, 1947. To appreciate the submission of the learned counsel, it is necessary to refer to the expression Import and Export defined under Section 2(9) of the Imports Act. The Expression Import and Export mean, respectively, bringing into, and taking out of, India by sea, land or air. The expression India has not been defined under the Act and reference was made to Clause 28 of Section 3 of the General Clauses Act, where expression India has been defined as:

"Indian" shall mean -

- (a) as respects any period before the establishment of the Dominion of India, British India together with all territories of Indian Rulers then under the suzerainty of His Majesty, all territories under the suzerainty of such a Indian Ruler, and the tribal areas;
- (b) as respects any period after the establishment of the Dominion of India and before the commencement of the Constitution, all territories for the time being included in that Dominion; and
- (c) as respects any period after the commencement of the Constitution, all territories for

the time being comprised in the territory of India." Shri Cooper referred to Article 1(3) of the Constitution of India which prescribes that the territory of India shall comprise (a) the territories of the States, (b) the Union territories specified in the First Schedule, and (c) such other territories as may be acquired. Relying on these provisions it was contended by the learned counsel that under the provisions of the Imports Control Act import takes place only when the goods reach case was considering the question as to when import takes place in accordance with provisions of the Customs Act, and the conclusion that the import takes place when the goods enter territorial waters is based upon specific provisions of Sections 2(23) and 2(27) of the Customs Act. Section 2(23) prescribes that Import, with its grammatical variations and cognate expressions, means bringing into Indian from a place outside India, and section 2(27) provided that expression India includes the territorial water of India. Shri Cooper submitted that the Full Bench while examining as to the time when import takes place for the purpose of chargeability under Section 12 of the Customs Act relied upon the fact that the expression India includes territorial waters of India. The submission is that the decision of the Full Bench is a good law as far as ascertaining the time of import for the purpose of levy of duty under the Customs Act, but that decision is of no assistance while determining when the goods were imported under the provisions of the Import Control Act. It is not possible to accede to the submission of the learned counsel. It is undoubtedly true that the expression India is not defined under the Imports Control Act and examining the General Clauses Act and the provisions of the Constitution of India it is possible to suggest that the import under the Imports Control Act takes place only when goods reach Indian land mass, but it would be improper to fix different period for determining the time of import in respect of the same goods for the purpose of Customs duty and the imports control Act. Both the statutes deal with the import of the goods, the Import Control Act prescribes restrictions and regulations in respect of import, while the Customs Act provides for payment of duties in respect of imported goods. Once it is held by the full bench departing from the decisions of the other High courts that import takes place for the purpose of Customs duty when the imported good enter the territorial waters, then it would not be proper to conclude that the import for the purpose of Imports Control Act takes place only when the goods reach Indian land mass. It is necessary and desirable that the same point of the time is fixed for ascertaining the fact of import of goods and fixing different times would lead to anomalous results and several complications. Shri Dalal in this connection submitted that the contention that territorial waters of Indian does not form part of Indian territory is not correct. The learned counsel referred to provisions of Section 3 of the Territorial Water, Continental Shelf, Exclusive Economic Zone and Other Maritime Areas act, 1976 in support of his submission. Section 3(1) provides that the sovereignty of India extends and

has always extended to the territorial waters of India and to the seabed and subsoil underlying, and the air space over such water. Sub-section (2) provides that the limit of the territorial waters is the line every point of which is at a distance of twelve nautical miles from the nearest point of the appropriate baseline. Shri Dalal also invited our attention to Article 297 of the Constitution which provides that all lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf, or the exclusive economic zone of India shall be such as may be specified, from time to time, by or under any law made by the Parliament. Shri Dalal also referred us to the observations of Oppenheim in Paragraph 172 of Volume 1, 8th Edition, to submit that the territorial waters also form part of the territory of the country. It was also submitted that under Article 1(3) of the Constitution the territory of India shall include any territory that may be acquired by the Government and reference was made in this connection to the decision of the Supreme Court in *N. Masthan Sahib and Others v. Chief Commissioner, Pondicherry and Another*. The Supreme Court was considering the ambit of the expression "territory as may be acquired" while determining whether Pondicherry is a territory of India. We find considerable merit in the submission of the learned counsel. Article 297 does indicate that the lands, minerals and other things underlying the ocean within the territorial waters shall vest in the Union, and if the constitution makers desired to vest in the Union, and if the Constitution makers desired to vest the lands under the territorial waters in the Union Government, then it is difficult to appreciate how the territorial waters would not be the submission of Shri Cooper that whatever may be the date of import for the purpose of Customs Act, the goods can be said to be imported under the Imports Control Act only when it reaches Indian land mass.

8. We inquired from the learned counsel as when according to him the vessels could be said to be imported under the Imports control Act, and the learned counsel submitted that the vessels can be held to be imported only when the vessels cease to be ocean going vessels and only used for the purpose other than ocean going. The learned counsel argued that ocean going vessels enter the territorial waters or even reach the Indian land mass, but that fact cannot lead to the conclusion that the vessels are imported because ocean going vessels are only in transit. It was also urged that the vessels which enter the territorial waters or reaches the land mass only as conveyance carrying on the cargo cannot be said to be imported. The expression ocean going vessel is not defined either under the Merchant Shipping Act or under the customs Act, but the expression sea going in relation to a vessel means, as per Section 2(41) of the Merchant Shipping Act, a vessel proceeding to sea beyond inland waters or beyond waters declared to be smooth or partially smooth waters by the Central Government by notification in the Official Gazette. The expression foreign going vessel under Section 2(21) of the Customs Act means any vessel or aircraft for the

time being engaged in the carriage of goods or passengers between any port in India and any port outside India. It is not in dispute that the two vessels were ocean going vessels when purchased by the Shipping Corporation and used for that purpose from 1968 onwards. The question which requires determination is whether the two vessels were bought by the Shipping Corporation merely as a conveyance and not as goods. To understand the question, it is necessary to make reference to the definition conveyance and goods occurring under the Customs Act. Section 2(9) of the Customs Act prescribes that conveyance includes a vessel, and aircraft and a vehicle. The expression goods under Section 2(22) includes vessels, aircraft and vehicles. Shri Cooper submitted that if the vessel enters the territorial waters merely as a conveyance or as carrier of the goods, then it cannot be suggested that the vessel was imported. The learned counsel urged that the vessel could come within the definition of goods but not if used as conveyance. The submission is correct, because if the vessel enters the territorial waters for the purpose of unloading the cargo then the import is of cargo and not of the vessel. It was urged by Shri Cooper that the two vessels purchased by the Shipping Corporation entered the territorial waters in the 1968 only as conveyance and not as goods. In support of the submission, reliance was placed on the fact that the Import General Manifest lodged in the year 1968 was only in respect of the cargo and not the vessels. The fact that bills of entries were not filed in respect of the two vessels, says Shri Cooper, is indicative of the fact that the vessels were not imported as goods but were mere conveyances. It is not possible to accept the submission of the learned counsel that the two vessels were merely conveyance and were not goods when entered to territorial waters in the year 1968. The Shipping Corporation had requested the Ministry of Shipping to grant permission to purchase secondhand vessels for being brought to India. After the vessels reached Bombay, both the vessels were registered under the provisions of the Merchant Shipping Act and rules framed there under and were used as Indian flag carriers. Reference was made to the decision of the Supreme Court *Chowgule and Co. Pvt. Ltd. v. Union of India and Others* where Mr. Justice Chinnappa Reddy, speaking for the Bench, observed that in order to determine whether any imported goods are goods for home consumption, it is necessary to find out the primary intended use of the goods when the goods are brought into Indian territorial water. It was further observed that if the goods are intended to be primarily used in India, they are goods for home consumption notwithstanding that they may also be used for the same or other purpose outside India. The Supreme Court made it clear that the converse may not be true. From the observations of the Supreme Court, the intention at the time of import of goods is necessary to determine whether the goods were imported for home consumption. It is necessary therefore to ascertain what was the intention of shipping corporation in purchasing the vessels. Shri Cooper and Shri Bhabha urged that the fact that the vessels were used as ocean going vessels for over twelve years clearly indicates what was the intention of the Shipping Corporation. the fact that

bills of entries were not filed for home consumption was also a factor, says the counsel, to hold that the intention was not to import the vessels as goods but merely as a conveyance. It is not possible to accede to the submission. It is not possible to hold that all ocean going vessels on their entering into the territorial waters cannot be said to be imported into India. The fact that exemption notification issued on October 11, 1958 provides that ocean going vessels other than vessels imported to be broken up are exempted from payment of Customs duty is a telltale circumstance to establish that even ocean going vessels were considered and treated as imported by the respondents. If ocean going vessels are not to be considered as imported, then there was no occasion to issue the exemption notification exempting such vessel from payment of Customs duty. The submission that the bills of entries were not filed in the year 1968 is of no assistance to the respondents to claim that the ships were not imported because it was the practice of the respondents in Bombay Port not to ask for submission of bills of entries in respect of ocean going vessels because they were exempted from payment of Customs duty under the notification. The Division Bench at Goa accepted the existence of this practice and we do not see any reason to hold otherwise. The contention that Import General Manifests were filed in respect of the cargo brought by the vessels and therefore the vessels were merely conveyances and not goods is not also of any substance. It is possible that when a vessel is imported as goods, then the importer may in addition import cargo loaded on the vessel and that fact would not automatically lead to the conclusion that the vessel was used merely as a conveyance and not as goods. In our judgment, on the facts and circumstances of the case, the conclusion is inescapable that both the vessels were imported in India in the year 1968 and the import was as goods and not merely as conveyance.

A faint submission was advanced by Shri Cooper that the vessels could not be said to have been imported, because Shipping Corporation did not possess an import licence and any import made without a licence was illegal and invalid. The learned counsel urged that in case the finding is recorded that the vessels were imported, then the action of the Shipping Corporation would amount to breach of import law. The submission does not impress us because while determining the question as to whether the vessels were imported or not, the question as to whether the vessels were imported without authority of law or in contravention of any rules is of no relevance. The Division Bench while hearing appeal against refusal of grant of interim relief in the present petition, considered this aspect and Acting Chief Justice Kania, as he then was, observed that were brought into India or whether any licence was taken for importing them into India were questions which were not germane to the central question as to when the said ships were imported. We are in respectful agreement with the observations of the Division Bench. We may also point out that the Division Bench, which delivered judgment in the case of Vishal Gomantak Shipping Co. also took the same view.

9. Shri Cooper then submitted that if it is held that the two vessels were imported into India in the Year 1968, then the conclusion would lead to various anomalies. It was suggested that every time the vessel went beyond the territorial waters of India then it will have to be held that the vessels were exported and when again return back to the Indian Port they were imported. Shri Cooper submitted that this import and export over and over again could not have been contemplated by the legislature and if it is held that the vessels were imported in 1968 but were subsequently exported, then the last date on which the ships entered the territorial waters of India before being used for the purpose of coast voyage should be considered as the date of import. The ships were used for coast voyage in the year 1982 and, says Shri Cooper, that 1982 should be considered as a date of import. It is not possible to accept the submission of the learned counsel. The ships were imported in the year 1968 and merely because the ships thereafter left the territorial waters of India, the ships were exported. The predominant intention of Shipping Corporation of India was to use the ships as ocean going vessels and not to export them. It is therefore not possible to accept the contention that the vessels on every occasion when left the territorial waters of India should be treated as having been exported. We cannot overlook the fact that both the vessels were registered under the provisions of the Merchant Shipping Act, 1958 and were Indian flag carriers. In our judgment, both the vessels were imported in the year 1968 and when the vessels were to be used for the purpose of scrapping, then the vessel would be chargeable with duty which will be payable in the year 1968 on the basis that it was imported for the purpose of breaking up. As the import has taken place long prior to the constitution of M.S.T.C. the respondents cannot compel the petitioners to comply with the requirement of public notice dated March 1, 1984 and the petitioners were not required to obtain a prior no objection certificate before scrapping the vessels. In view of the fact that vessels were beached and ultimately broken up in pursuance of the interim order passed by this court in Appeal No. 1195 of 1984, it is not necessary to consider and grant various reliefs sought by the petitioners save and except relief sought in prayers (b) (c) and (d).

10. Accordingly, petition succeeds and respondents Nos. 2 and 3 are directed to levy, assess and recover only those duties which were payable in the year 1968 in respect of two vessels on the basis that both the vessels were imported in the year 1968. The value of the ships would be assessed on the basis that the ships were imported for the purpose of breaking up in the year 1968 and the value should be ascertained by taking into consideration the value of the ships in accordance with the provisions of Section 14(1)(a) of the Customs Act, 1962. The petitioners are entitled to the reliefs in terms of prayers (c) and (d) also. In the circumstances of the case, there will be no order as to costs. The bank guarantees furnished by the petitioners in pursuance of the interim order passed in Appeal No. 1195 of 1984 to stand discharged.

11. At this stage, Shri Chinoy, counsel for respondent No. 4, orally applies for leave to file appeal

to the Supreme Court. Certificate refused. The counsel then applies for continuation of bank guarantee for a period of four weeks. Prayer refused.

Cases Referred.

188 B.L.R. Page 355 = 1985 (22) ELT 644
21986 (23) ELT 321