

(1987) 08 BOM CK 0017

In the Bombay High Court

Case No : Writ Petitions No"s. 66/87 and 67/87

Chowgule and Co. Pvt. Ltd.

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 13-08-1987

Acts Referred:

Customs Act, 1962 — Section 117, 12, 14, 15, 157(2)

Citation : (1987) 2 BomCR 691 : (1990) 27 ECC 203 : (1988) 38 ELT 401

Hon'ble Judges : G.F. Couto, J;G.D. Kamat, J

Bench : Division Bench

Judgement

Dr. Couto, J.—The facts and the issues that gave rise to these writ petitions are intimately connected and hence, this common judgment.

2. Petitioners, a Private Limited Company with registered office at Mormugao Harbour, challenge in these two writ petitions under Article 226 of the Constitution of India the validity of the directives given by the second respondent by his letters dated 26th March and 10th April, 1987, as well as the orders dated 26th, 31st March and 9th April, all of 1987. They further seek a Mandamus directing the second respondent to withdraw the said directives and orders, to assess the wreck of the "S. S. Maratha Transhipper" to duty on the assumption that the vessel is not exigible to duty and to forbear from levying any customs duty as well as additional or auxiliary duty, in respect of the import of the said vessel, giving them the benefit of the Exemption Notification No. 262 of 1958 or of the Notification No. 133 of 1987.

3. In October, 1969, the "S. S. Maratha Transhipper", a transhipping vessel acquired by the petitioners arrived at and entered the Mormugao port. Soon after, a dispute arose between the petitioners and the Customs Authorities as regards the need to file a Bill of Entry u/s 46 of the Customs Act, 1962, and after some correspondence exchanged, the Assistant Collector of Customs directed the petitioners by his order dated 22nd March, 1970, to file the Bill of Entry in respect of the said vessel as it was operating as a sea barge within the harbour

limits. Petitioners appealed against the said order to the Appellate Collector who, however, by his order dated 27th July, 1970, dismissed it and affirmed the impugned order of the Assistant Collector.

4. Dissatisfied, the petitioners successfully challenged the said order in a writ petition filed in this Court, for the learned Single Judge who dealt with it held that the "S. S. Maratha Transhipper", being an ocean-going vessel within the meaning of the expression in the Notification No. 262 of 1958 and thus wholly exempt from Customs duty, there was no purpose in filing a Bill of Entry. An appeal was filed against this judgment of the learned Single Judge and the Division Bench, allowing it, held that the Bill of Entry was required to be filed and further, that the question as to whether the "S. S. Maratha Transhipper" was or not an ocean-going vessel, and as such exempt from duty, was to be decided after the filing of the Bill of Entry.

5. Petitioners then filed an appeal against this judgment of the Division Bench, but while this appeal was pending, the "S. S. Maratha Transhipper" ran aground and was completely lost. Petitioners were subsequently ordered to remove the wreck of the said vessel by the Mormugao Port Trust Authorities as, in their opinion, the said wreck constituted a hazard to navigation. Pursuant to this direction of the Port Authorities, the petitioners attempted to comply with it by engaging a salvage contractor. The Customs Authorities however, objected to such removal on the ground that no Bill of Entry had been filed in respect of the said vessel. Petitioners therefore, moved an application before the Supreme Court in their above referred to appeal and sought some interim reliefs. By order dated 20th August, 1986, Their Lordships of the Supreme Court were pleased to give some directions, which were later modified by subsequent orders made on 24th November, 1986 and 6th January, 1987.

6. The removal of the said wreck was entrusted by the petitioners to the respondents M/s. Interdive (Goa) on the terms and conditions inserted in an agreement executed on 15th November, 1986, inter alia, it has been agreed that the salvage contractor would pay customs duty and/or excise duty to the maximum of Rs. 90 lakhs in case it was ultimately held that the said wreck was exigible to such duties.

7. On 19th February, 1987, the appeal filed by the petitioners challenging the above mentioned judgment of the Division Bench was dismissed by the Supreme Court. Their Lordships held that the "S.S. Maratha Transhipper" having been brought into India for use predominantly in Indian territorial waters, had been imported into India for "home consumption" within the meaning of Section 46 of the Customs Act and as such, a Bill of Entry was required to be filed in respect of the said vessel.

8. Petitioners therefore, filed on 12th March, 1987, a Bill of Entry as regards the said vessel, but contending that the vessel was exempt from duty under Notification No. 262 of 1958 being an ocean-going vessel and that the Bill of

Entry filed by them be treated as having been filed in 1969, utilized the form of Bill of Entry which was in force in the year 1969, which had already been replaced in the year 1976. However, by his letter dated 17th March, 1987, the second respondent drew the attention of the petitioners to the fact that the Bill of Entry filed by them on 12th March, 1987, was not in the proper format as provided in the Bills of Entry (Forms) Regulation, 1976 and further brought to the petitioners' notice the Public Notice No. 72/76 and advised them to file a Bill of Entry in the proper form with full information. He also acceded to the petitioners' request for a personal hearing and fixed it for the 6th April, 1987. Thereafter, on 19th March, 1987, the petitioners approached the second respondent and on being informed about the letter dated 17th March, 1987, copy of which was given to them, got the personal hearing fixed for 6th April preponed to 19th March, 1987. However by letter dated 19th March, 1987, the petitioners sought adjournment of the personal hearing to the 23rd March, on the ground that it would take some time to fill the Bill of Entry in the 1976 form. This request was granted and under letter dated 20th March, 1987, petitioners filed the Bill of Entry in the 1976 form, specifically contending however that the Bill of Entry in the form prevailing in the year 1969 had been correctly filed, but in view of the second respondent's directions and without prejudice to their contentions, they were sending the Bill of Entry in the form "currently in force which should be read in conjunction with our letter dated 11th March, 1987."

9. Petitioners were given a personal hearing on 23rd March, 1987 and then, on 26th March, 1987, the second respondent passed the impugned order. An extract of the said order with the operative part thereof was served on the same date on the petitioners and the full order was forwarded to them on 31st March, 1987.

10. However, before being served with the full text of the impugned order, the petitioners, by their letter dated 27th March, 1987, contended that the vessel "S. S. Maratha Transhipper" was exempt from duty in view of the Notification No. 133 of 1987 as the Bill of Entry had been filed on 20th March, 1987 and therefore, after the said Notification had become operative. By his letter dated 31st March, 1987, the second respondent informed that their letter dated 27th March, 1987, had been received after the passing of the impugned order and directed the petitioners to pay the due duty forthwith and on the petitioners' failure to make the payment, he passed the impugned order dated 9th April, 1987, purporting to detain all the goods belonging to them till the said duty was paid.

11. By another letter dated 11th March, 1987, on the subject of the removal of the wreck of the "S. S. Maratha Transhipper", petitioners had also contended that the directions given by the Supreme Court in its interim order dated 20th August, 1986 were operative till the question of the assessability was finally disposed of and therefore, it was incumbent upon the second respondent, even though the appeal had been decided to assess the wreck to duty. In reply, the second respondent informed the petitioners by his letter dated 26th March, 1987

that the "S. S. Maratha Transhipper" had already been assessed to duty and the work of clearance of the wreck could be undertaken after payment of the duty assessed under the respective Bill of Entry, and further that the Bill of Entry filed for clearance of the said wreck would be provisionally assessed to Nil duty on the petitioners furnishing a bond binding themselves to pay the duty leviable on the wreck, if any at the time of the final assessment.

12. Petitioners then filed the present writ petitions. Pending their disposal, this Court by two interim orders both dated 13th April, 1987, restrained the respondents from taking any steps pursuant to the orders dated 26th and 31st March, 1987, stayed the operation of the detention order dated 9th April, 1987, permitted the removal of the wreck without the demand of any customs duty, additional or auxiliary duty, and further directed the second respondent to assess the wreck to duty on the assumption that the vessel was not exigible for duty. Thereafter, petitioners moved this Court with an application, being the Miscellaneous Civil Application No. 167 of 1987, and obtained another interim order on 12th May, 1987, restraining the respondents from demanding the actual payment of any customs duty on the material of the wreck of the "S. S. Maratha Transhipper", and by another interim order dated 9th June, 1987, the respondents were further restrained, pending the hearing and final disposal of the petitions, from demanding the actual payment of customs duty on the material of the wreck of the vessel "S. S. Maratha Transhipper" but on the condition that the petitioners should furnish a bond for such duty if demanded by the Customs Authorities.

13. Petitioners contend that the basic question to be determined by the second respondent is whether the "S. S. Maratha Transhipper" was an ocean-going vessel within the meaning of the expression in the Notification No. 262 of 1958 and therefore, exempt from the payment of customs duty. But if this question is answered in the negative, then, questions related to the chargeability of the vessel to customs duty, special, regulatory, additional and auxiliary duties and to the rate of the duty applicable, viz. whether the rate of duty would be the one prevailing in the year 1969 when the vessel was imported into India or the new rate of duty by virtue of the Notification No. 133 of 1987, would also arise. Therefore, it is also the case of the petitioners that the second respondent was, in any event, bound to assess the wreck to duty on the basis that the "S. S. Maratha Transhipper" was not exigible for duty.

14. The question as to whether the vessel "S. S. Maratha Transhipper" was or not an ocean-going vessel within the meaning of the expression in the Notification No. 262 of 1958 should not detain us long, for it does not anymore survive. It certainly is no more *res integra*, the issue having been laid to rest by Their Lordships of the Supreme Court while disposing of the appeal filed by the petitioners against the judgment of the Division Bench of this Court above referred to. Undoubtedly, whether transshippers, in general, are ocean-going vessels may be a debatable question, but such controversy is no more alive and

cannot be raised as regards the transhippers "S. S. Maratha Transhipper" and "Pryamvada", for the question as to whether those particular vessels were or not ocean-going fell for determination of the Supreme Court in the aforesaid appeal and Their Lordships held that those transhippers were not ocean-going vessels for the purpose of the Customs Act, but instead were goods for home consumption. It was indeed observed in respect of those vessels that "there can be no doubt that the vessels are not only capable of being used but are used as cargo ships to carry cargo from one Indian port to another or sometimes to foreign ports, necessarily going out on the high seas. They are structurally and technically competent to go on the high seas and they have been certified to be so competent by appropriate maritime authorities. Instead of remaining idle and getting rusty, during off-season, that is when because of inclement monsoon weather topping up operations cannot be done in Mormugao Harbour, the vessels do go out into the open sea sometimes from one Indian port to another and at other times to foreign ports. Of course, even in the course of topping up operations during the fair season, it is necessary for the transhippers to go into the open sea to reach the bulk carriers. But, in our view, these operations do not make these vessels ocean-going vessels when their primary purpose and the purpose for which they were permitted to be purchased and brought to Indian waters, the primary purpose for which they were licensed and the primary purpose for which they are used is to conduct topping up operations in Indian territorial waters and not to serve as ocean-going vessels", and further that it is undisputable that those vessels were brought into India to be used primarily as transhippers at Mormugao, though used incidentally or occasionally to go to the open sea, they are "goods for home consumption" and not ocean-going vessels for the purpose of the Customs Act. Thus, the test laid down for deciding whether a vessel is for the purposes of the Customs Act an ocean-going vessel or "goods for home consumption" is the primary use of the vessel; if the predominant or the primary use of the vessel is to transverse the open seas, the vessel, will be an ocean-going vessel, but if it is brought into India primarily for use in India, then such vessel will be "goods for home consumption", notwithstanding that occasionally or incidentally they are used outside India.

15. The Notification No. 262-Customs, dated 11th October, 1958, exempts from payment of customs duty ocean-going vessels other than those imported to be broken up, but further provides that in the event of such vessels subsequently being broken up, it shall be chargeable with the duty which would be payable on her if she were imported to be broken up. Manifestly, in view of the above decision of the Supreme Court, the exemption from customs duty under this Notification is not available to the "S. S. Maratha Transhipper". The learned counsel for the petitioners most advisedly therefore, although the Writ Petition No. 67/87 by contending that the impugned orders of the second respondent are liable to be quashed, not only because the petitioners are entitled to the exemption under Notification No. 133 dated 19th March, 1987, as the only valid Bill of Entry filed by them is the one filed on 20th March, 1987, but also because

they are violative of Article 14 of the Constitution inasmuch as the petitioners were adversely discriminated vis-a-vis the respondents M/s. V. S. Dempo & Co. Pvt. Ltd., Panjim, apart from being perverse and mala fide; and as far as the Writ Petition No. 66/87 is concerned, the challenge of the petitioners is centered on the submission that if the "S. S. Maratha Transhipper" was exempt from customs duty, no customs duty would be payable in respect of the vessel but such duty would be payable on the material removed from the wreck and therefore, if the duty payable on the said wreck is not assessed, petitioners would suffer serious loss and prejudice.

16. As regards the first point, Mr. Setalvad, learned counsel appearing for the petitioners, urged that although the petitioners filed, pursuant to the decision of the Supreme Court in the above referred to Appeal, the Bill of Entry in respect of the "S. S. Maratha Transhipper" on 12th March, 1987, under their letter dated 11th March, 1987, the fact remains that the aforesaid Bill of Entry was held by the Customs Authorities to be invalid as not filed in the proper form prevailing in the year 1987, and therefore, petitioners were directed to file the Bill of Entry in the form prescribed in the Public Notice No. 72/76. Notwithstanding their disagreement with the view taken by the second respondent, for in their opinion, the Bill of Entry had been filed in the form prevailing in the year 1969, i.e. the year in which the "S. S. Maratha Transhipper" has been imported into India, and as such in the correct form, petitioners complied with the directions given by the second respondent and filed the Bill of Entry in the form which was in force on 20th March, 1987. The Customs Authorities, the learned counsel contended, did not at all consider the Bill of Entry filed on 12th March, 1987, for assessment of the duty and solely acted upon the Bill of Entry filed on 20th March, 1987, in the form prescribed in the year 1987. This according to him, becomes clear not only from the second respondent's letter dated 17th March, 1987, directing the petitioners to file the Bill of Entry in the prescribed format, after observing that the Bill of Entry filed on 12th March, 1987, was not in the prescribed form and after drawing the petitioners' attention to the Public Notice No. 72/76 dated 26th July, 1987, but also from the very fact that it was the Bill of Entry filed on 20th March, 1987, that apparently was assessed on 23rd March, 1987, and not the Bill of Entry filed on 12th March, 1987. Section 46 of the Customs Act mandatorily requires a Bill of Entry to be presented in the prescribed form. "Presented" means, as observed by the Madras High Court in *Queen-Empress v. Arlappa and Others* [I.L.R. 15Mad 137], "delivered" and hence, the argument proceeded, the presentation or delivery of the Bill of Entry to the Customs Officer has to be in the prescribed form, to be valid. The Bill of Entry filed on 12th March, 1987, was not filed in the prescribed form and is invalid. Thus, since the Bill of Entry filed on 20th March, 1987, is in the regular format, the same Bill of Entry is the one that is relevant and it is, therefore, to be held that the Bill of Entry as regards the "S. S. Maratha Transhipper" was presented only on 20th March, 1987. The learned counsel, then, submitting that Section 139 of the Income Tax Act is similar to Section 46 of the Customs Act, drew support to his above contentions in

Commissioner of Income Tax, Lucknow v. M. K. Gupta 1978 (113) ITR 473 and in Maya Debi Bansal Vs. Commissioner of Income Tax, .

17. It is not disputed that after the decision of the appeal filed by the petitioners in the Supreme Court against the above mentioned judgment of the Division Bench, they filed on 12th March 1987, under their letter dated 11th March, 1987, the Bill of Entry in respect of the "S. S. Maratha Transhipper" in the form of which was in force in the year 1969, contending that since the said vessel had been imported into India in that year, the Bill of Entry should be deemed to have been filed on the day her importation took place, and further, that she being an ocean-going vessel, was exempted from customs duty in view of the Notification No. 262 of 1958.

18. Common ground is also that by his letter dated 17th March, 1987, the second respondent after drawing the petitioners' attention to the Bills of Entry (Forms) Regulations, 1976 and to the Public Notice 72/76, stated that the Bill of Entry filed on 12th March, 1987, was not in the prescribed format and directed the petitioners to file the Bill of Entry in the correct form. He further, acceding to the request of the petitioners, fixed their personal hearing for 6th April, 1987, for the purpose of the assessment of the said vessel to duty. This personal hearing was preponed to 19th March, 1987, at the request of the petitioners, but nonetheless, by their letter dated 19th March, 1987, petitioners sought postponement of the said hearing and on 20th March, 1987, filed the Bill of Entry in the form prevailing in the year 1987 alongwith a covering letter whereby they continued to contend that the Bill of Entry filed by them on 12th March, 1987, was in the correct and proper form and stated that, without prejudice to their contention that the present form was not applicable to their case, they were also filing the Bill of Entry in the prevalent form as directed by the second respondent. Petitioners specifically stated in the Bill of Entry filed on 20th March, 1987, that the same was to be read in conjunction with their letter dated 11th March, 1987 under which the earlier Bill of Entry had been filed and unlike this earlier Bill of Entry which was dated 11th March, 1987, the Bill of Entry filed on 20th March, 1987, was not at all dated. Personal hearing sought by the petitioners was given on 23rd March, 1987, and as can be seen from the notes of the said hearing, they stuck to their contention that the vessel having been imported in 1969 and being an ocean-going vessel, it was covered by the exemption under Notification No. 262 of 1958 and at no time raised the question that the "S. S. Maratha Transhipper" was covered by the exemption to duty under Notification No. 133 of 1987 on the ground that the Bill of Entry was presented on the 20th March, 1987, when the latter Notification was already in force. On 26th March, 1987, the second respondent passed his assessment order and communicated the operative part thereof to the petitioners, the assessment having been made on the Bill of Entry in the correct format. On 27th March, 1987, petitioners by their letter of even date, alleging that they came to know about the exemption under the said Notification, for the first time, claimed its benefits. The second respondent however, informed in reply that he had already

passed the assessment order on 26th March, 1987 and further communicated to the petitioners the full assessment order on 31st March 1987.

19. The above facts may apparently lend some support to Mr. Setalvad's contention that the second respondent acted upon the Bill of Entry filed on 20th March, 1987, having discarded the earlier Bill of Entry filed on 12th March, 1987. The second respondent has certainly directed the petitioners to file the Bill of Entry in the form which was prevalent in the year 1987 and this directive was complied with by the petitioners by the filing of the Bill of Entry in the said format on 20th March, 1987. The assessment was done on this form of the Bill of Entry. It may, therefore, appear that the Bill of Entry filed on 12th March, 1987, was actually discarded and only the Bill of Entry filed on 20th March, 1987, was considered and acted upon. But it is not so. No doubt, after the petitioners presented on 12th March, 1987, under their letter dated 11th March, 1987, the Bill of Entry in respect of "S. S. Maratha Transhipper", the second respondent by his letter dated 17th March, 1987, directed them to file the Bill of Entry in the proper format, since the Bill of Entry presented on 12th March, 1987, was in the old format which was prevalent in the year 1969 and since, according to him, this form was not the prescribed one on 12th March, 1987, in view of the Bills of Entry (Forms) Regulation, 1976 and the Public Notice No. 72/76. But, as rightly pointed out by Mr. Khandeparcar and Mr. Andhyarujina, the learned counsel appearing for the second respondent and M/s. Interdive (Goa), the second respondent nowhere stated in the said letter that the entry of the "S. S. Maratha Transhipper" made by the petitioners by presenting on 12th March 1987, the Bill of Entry in the form prevalent in 1969, was invalid, nor did he reject the said Bill of Entry. He merely stated that the said Bill of Entry was not in the correct format and drawing the petitioners' attention to the relevant Rules and Regulations, directed them to file the Bill of Entry in the form prevalent at that time. He further, it is pertinent to note, acceding to the petitioners' request for a personal hearing on the matter, fixed it for 6th April, 1987. This firmly indicates that the second respondent had not rejected the entry of the "S. S. Maratha Transhipper" made by the Bill of Entry filed on 12th March, 1987 and had on the contrary, acted upon it initiating the assessment proceedings, asking however at the same time its correction. Mr. Setalvad, however, has contended that this inference is not sound, for it is clear that the Bill of Entry which was assessed is the one filed on 20th March, 1987, and not the one filed on 12th March, 1987. He pointed out specifically that in the assessed Bill of Entry, the date "16.10.1969" filled by the petitioners under the heading "Import Department S. No. and Date" was struck out and instead an entry was made by the Customs Officer which reads : "102/23.3/87". This entry is thus dated "23rd March, 1987". This, according to the learned counsel, clearly and decisively establishes that the Bill of Entry which is relevant was the one presented on 20th March, 1987. But Mr. Khandeparcar, while bitterly complaining, and perhaps justifiably, that these facts were never pleaded and therefore, the second respondent had no opportunity to clarify the matter in his affidavit-in-reply, explained the meaning of the said entry by saying

that it merely indicates the registration number of the said Bill of Entry and the date of its registration. It does not mean that the "entry of goods" was made on 23rd March, 1987. This is otherwise abundantly corroborated by the entry made just below the heading "Rotation No. and Date" which reads "S/99-32/83-AP dated 17.3.1987" for this is a reference to the relevant Department File and the date 17.3.1987 establishes that the second respondent had already acted upon the Bill of Entry filed on 12th March, 1987, the learned counsel added, placing before the Court the said file.

20. A perusal of the aforesaid file discloses that it relates to the subject of the "S. S. Maratha Transhipper". It further shows that on 17th March, 1987, a note was submitted to the Assistant Collector (Appraising) wherein it is recited that pursuant to the dismissal of their appeal by the Supreme Court, petitioners had filed under their letter dated 11th March, 1987, the Bill of Entry as regards the "S. S. Maratha Transhipper" in the old format and not in the format as prescribed in the Bills of Entry (Forms) Regulations, 1976, contending that the valuation and the rate of duty should be that prevailing on the date of the importation. It is then stated that, in the circumstances, the Department had three alternatives or courses of action, viz., (1) return the Bill of Entry to the importers, asking them to file it in the prescribed format; (2) accept the Bill of Entry giving number thereto and thereafter complete it by calling for necessary information from the petitioners; and (3) write a letter to the importers calling upon them to file the Bill of Entry in the proper format and to furnish information, such as regarding insurance policy, etc., for completing the assessment. It is finally suggested in the said note that the third alternative be followed; that a personal hearing could be given to the petitioners and that "the question of filing Bill of Entry in the proper format and submissions of further information should also be dealt with at the time of Personal hearing and the same may be made a part of Order in Original which may be passed by AC(A)". The proposal was accepted and hence, the letter dated 17th March, 1987 above referred to was addressed to the petitioners.

21. Although this note is not happily worded and therefore, may give cause to misinterpretation, nonetheless, the portion thereof, transcribed above, makes it clear that the Bill of Entry filed on 12th March, 1987, was not rejected and on the contrary, it was kept alive and was to be considered, not only at the time of the personal hearing, but also at the time of the passing of the assessment order. The adoption of the third alternative does not, thus, warrant the inference that the Bill of Entry filed on 12th March, 1987, was discarded and that the Bill of Entry filed on 20th March, 1987, is a completely new one which has no connection whatsoever with the entry of the "S. S. Maratha Transhipper" made u/s 46 of the Customs Act, on 12th March, 1987. The first alternative, i.e. to return the Bill of Entry filed on 12th March, 1987 with request to file a fresh one in the proper format was not adhered to and the course of action adopted was to get the format of the filed Bill of Entry corrected, alternatives (2) and (3) being merely two ways of getting or making such correction. The explanation given by

Mr. Khandeparcar in respect of the entry made in the Bill of Entry in the column "Import Department S. No. and Date" substituting the date "16.10.69", written by the petitioners, by the entry "102-23.3/87" seems thus to be correct and is as such to be accepted. It may also be pointed out that it is not denied that the 20th March, 1987, was a Friday, that the 21st and the 22nd were not working days and that hence, the 23rd March, 1987, was the first working day after the filing of the said Bill of Entry. The said entry was made in the box meant to record the serial number and date of the Bill of Entry in the Import Department, a circumstance that further corroborates the genuineness of Mr. Khandeparcar's explanation that the striking out of the date "16.10.1969", i.e., the date of importation of the vessel, and its substitution by the entry "102-23.3/87" merely indicates the number and date of registration of the Bill of Entry filed on 20th March, 1987, without, in any manner, indicating that the Bill of Entry presented on 12th March, 1987, was invalid and had been discarded.

22. It was already seen that the second respondent did not state at any time, and more particularly, in his letter dated 17th March, 1987, that the Bill of Entry filed by the petitioners on 12th March, 1987, was invalid nor has he rejected it. It was also seen that the said letter gives a clear indication that he, on the contrary, acted upon it by fixing a date for the personal hearing of the petitioners and initiating thereby the assessment proceedings, although he required the petitioners to file the Bill of Entry in the correct format as they had filed it in a form which was no more in force. This direction to the petitioners to file the Bill of Entry in the proper format amounts, in the circumstances, to a mere directive to correct the Bill of Entry already filed and nothing else, as otherwise the above referred to entry corroborates. That apart, the conduct of the petitioners is significant and it further corroborates that the Bill of Entry filed or presented on 12th March, 1987, was never discarded by the Customs Authorities and was on the contrary, considered and acted upon by them. In fact, when the petitioners presented on 12th March, 1987, the Bill of Entry in respect of "S. S. Maratha Transhipper", they did it under a covering letter dated 11th March, 1987 and specifically recorded in the said Bill of Entry that it should be read in conjunction with their covering letter. Several contentions were advanced in the said letter, inter alia, that the "S. S. Maratha Transhipper" was on ocean-going vessel within the meaning thereof in the Notification No. 262 of 1958 and therefore, exempt from duty; that the assessability had to be judged by the law prevailing in October, 1969, when she was imported and that the said Bill of Entry should be treated as filed in 1969, the appropriate rate of duty, if any, being the one applicable in that year. Then, in the letter dated 20th March, 1987, under which the Bill of Entry in the format required by the 1976 Regulations was filed, petitioners reiterated the stand taken by them in the letter dated 11th March, 1987 by stating :

"We affirm that the Bill of Entry in respect of the above vessel which was acquired by us and brought into India in 1969, has been correctly filed by us in the form then in force. However, in view of your directions and without prejudice

to our contentions in the matter as stated in the earlier Bill of Entry and our letter No. SEC/CCPL/356 dated 11th March, 1987, we are sending herewith the Bill of Entry in the form currently in force which should be read in conjunction with our letter dated 11th March, 1987."

Further, in the said Bill of Entry, once again, they recorded that the said Bill of Entry should be read in conjunction with their letter dated 11th March, 1987 and curiously, unlike they did in the Bill of Entry filed on 12th March, 1987, they did not date it. Again, by their letter dated 23rd March, 1987, petitioners stated :

"As mentioned in our earlier letters, the Bill of Entry in respect of the said vessel was required to be filed in the form applicable at the time of the import of the vessel into India i.e. October 1969. Upon your instructions however, we have also filed a Bill of Entry in the form which is prevalent toady. This has been done by us, without prejudice to our contentions that the present form is not applicable to this case."

and the same stand was also taken by them at the personal hearing held on 23rd March, 1987, as the notes of the said personal hearing disclose. This conduct of the petitioners unmistakably indicates that their case was never that the Bill of Entry filed on 12th March, 1987, was invalid, the only valid Bill of Entry being the one filed on 20th March, 1987, and further establishes that they consistently contended that the Bill of Entry presented on 12th March, 1987, was presented in the proper form. The word "also" used in the letter dated 23rd March, 1987 (portion quoted) makes it crystal clear that the petitioners never admitted that the Bill of Entry filed on 12th March, 1987, was not in the proper form and therefore, all the while, they acted upon it and caused the second respondent to do the same. Mr. Andhyarujina may have therefore been justifiably tempted to invoke the doctrine of approbation and reprobation and to contend that the petitioners cannot be allowed to blow hot and cold, to approbate and reprobate, by taking now the stand that the Bill of Entry to be considered is the one filed on 20th March, 1987, which is contrary to their consistent stand that the Bill of Entry presented on 12th March, 1987, was correct. But this doctrine does not appear to be attracted in this case, for it requires either benefit to one party or detriment to the other and no such benefit or detriment apparently has resulted to the petitioners or to the Customs Authorities.

23. In this background, there is no manner of doubt that the Bill of Entry filed on 12th March, 1987, was not discarded as invalid by the Customs Authorities, but was actually acted upon and that the Bill of Entry filed on 20th March, 1987 was considered and treated as a sort of correction of the Bill of Entry presented on 12th March, 1987. Mr. Setalvad, however, next contended that the Customs Act requires the importer of any goods, other than intended for transit or transshipment, to make entry thereof by presenting to the proper officer a Bill of Entry for home consumption or warehousing in the prescribed form. The requirement to make entry of the imported goods by presenting a Bill of Entry in the prescribed form is mandatory and its non-compliance by the importer makes

him liable to the penalty u/s 117 of the Customs Act. Therefore, the argument proceeded, a Bill of Entry in a form that is not prescribed is not at all a Bill of Entry as required by Section 46 and its presentation does not satisfy the commands of that provision of law, being as such invalid. The provision of Section 46 of the Customs Act is, the learned counsel urges, akin to the provision of Section 139 of the Income Tax Act which imposes the obligation to file a return of income in the prescribed form and verified in the prescribed manner. Therefore, he submitted, decisions in respect of the returns of Income Tax filed in forms not prescribed become relevant in the case at hand and the ratio thereof is attracted. Hence, reliance was placed in Commissioner of Income Tax, Lucknow v. M. K. Gupta and Maya Debi Bansal v. Commissioner of Income Tax, West Bengal-II (both supra).

24. Section 46 of the Customs Act provides that the importer of any goods, other than goods intended for transit or transshipment, shall make an entry thereof by presenting to the proper Officer a Bill of Entry for home consumption or warehousing, in the prescribed form. In exercise of the powers conferred by Section 157(2)(a) of the Customs Act, the Central Board of Excise and Customs made Regulations prescribing forms for the Bills of Entry, these Regulations being the Bills of Entry (Forms) Regulations, 1976, and by the Public Notice No. 72/76 it was notified that the new format of the Bills of Entry was to be effective from 1st August, 1976. The wording of Section 46 and in particular the expression "shall make entry thereof by presenting to the proper officer a bill of entry for home consumption or warehousing in the prescribed form", make it appear at the first glance that the filing of the Bill of Entry in the prescribed form is mandatory and that, therefore, the non-compliance thereof may make the importer liable to the penalty u/s 177 of the Customs Act. This view, however, was forcefully contested and opposed by Mr. Andhyarujina and Mr. Khandeparcar. They indeed contended that Section 46 is merely procedural. It does not levy a duty and is directory in nature as regards the requirement of presentation of a Bill of Entry in the prescribed form. The only mandate incorporated in it is that the importer of any goods "shall make entry thereof" and the requirement of making such entry by presenting a Bill of Entry in the prescribed form is merely procedural and directory. It was further urged that the non-compliance with the requirement of Section 46 does not make the importer liable to the penalty u/s 117 as the only consequence thereof is the sale of goods as provided in Section 48 and that, in any event, an irregularity in the matter of form does not vitiate the act and render it illegal and void unless there is a positive provision of law making it invalid. Support to the above submissions was sought in Murarilal Mahabir Prasad and Others Vs. Shri B.R. Vad and Others, . Municipal Corporation of Greater Bombay Vs. The B.R.S.T. Workers Union, , Abdul Gafoor Vs. The Additional Member, Board of Revenue and Others, , Hiralal Agrawal etc. Vs. Rampadarath Singh and Others, etc., , Raza Buland Sugar Co. Ltd. Vs. Municipal Board, Rampur, , Life Insurance Corporation of India Vs. Escorts Ltd. and Others, , Vasudev Ramchandra Shelat Vs. Pranlal Jayanand Thakar and Others,

And C. Buchivenkata Rao Vs. The Union of India (UOI) and Others, and it was submitted that the authorities in Commissioner of Income Tax, Lucknow v. M. K. Gupta and Maya Debi Bansal v. Commissioner of Income Tax, West Bengal-II are both distinguishable and not applicable, being a fact that as held by the Madras High Court in Commissioner of Income Tax Vs. Royal Textiles, , the return submitted even in a wrong form is not void and non est.

25. In Murarilal Mahabir Prasad and Others Vs. Shri B.R. Vad and Others, the Supreme Court observed that the true implication of the principle that a taxing statute must be construed strictly is often misunderstood and the principle is unjustifiably extended beyond the legitimate field of its operation and that there is no equity about a tax in the sense that a provision in which the tax is imposed has to be construed strictly, regardless of the hardship that such a construction may cause either to the Treasury or to the tax-payer. If the subject falls squarely within the letter of law he must be taxed, howsoever inequitable the consequences may appear to the judicial mind. If the Revenue seeking to tax cannot bring the subject within the letter of law, the subject is free no matter that such a construction may cause serious prejudice to the Revenue. In other words, Their Lordships further observed, what is called equitable construction may be admissible in relation to other statutes or other provisions of a taxing statute, but such a construction is not admissible in the interpretation of a charging or taxing provision of a taxing statute. Then, in paragraph 31 of the Report, it is further observed that in (1940) 8 ITR 442 (Privy Council) , it has been held that Section 34 of the Income Tax Act, although a part of a taxing Act, imposed no charge on the subject but dealt merely with the machinery of assessment. Then, quoting the observations of Lord Normand to the effect that in interpreting provisions of this kind, the rule is that the construction should be preferred which makes the machinery workable, the Court approved this view holding that the machinery section should be so construed as to effectuate the charging sections.

26. In Municipal Corporation of Greater Bombay Vs. The B.R.S.T. Workers Union, it has been observed that in The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya, , the principles which are to be borne in mind in deciding whether the word "shall" used in a statute makes the provision mandatory or directory, had been expounded. It has been further held that, for ascertaining the real intention of Legislature, the Court, among other things, may consider the nature and the design of the statute, the consequences which would follow from construing it one way or the other and whether the object of the legislature will be defeated or furthered by a particular construction.

27. Similarly, in Raza Buland Sugar Co. Ltd. Vs. Municipal Board, Rampur, , it has been held that the question whether a particular provision of a statute which on the face of it appears mandatory inasmuch as it uses the word "shall" or is merely directory cannot be resolved by laying down any general rule and depends upon the facts of each case and for that purpose the object of the

statute in making the provision is the determining factor. The purpose for which the provision has been made and its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory.

28. In *Hiralal Agrawal etc. Vs. Rampadarath Singh and Others, etc.*, , it was observed that when a statute requires that something shall be done or done in a particular manner or form without expressly declaring what shall be the consequence of non-compliance, the question often arises what intention is to be attributed by inference to the legislature. Further, that it has been said that no rule can be laid down for determining whether the requirement is to be considered as a mere direction or instruction involving no invalid consequence for its disregard or as imperative with an implied nullification for disobedience beyond the rule as it depends on the scope and object of the enactment.

29. In *Life Insurance Corporation of India Vs. Escorts Ltd. and Others*, , considering the submission made that paragraph 24-A.1 was a statutory direction issued u/s 73(3) of the Foreign Exchange Regulation Act and, therefore, had the force of law and required to be obeyed, the Supreme Court negating the said submission for several reasons, inter alia, observed, that "surely, the Form cannot control the Act, the Rules or the directions".

30. In *Abdul Gafoor Vs. The Additional Member, Board of Revenue and Others*, , the Patna High Court held that an application for preemption u/s 16(3) cannot be rejected on the ground that information as required by Form LC 13 as to the description of land transferred was not fully but substantially furnished in the application.

31. In *Vasudev Ramchandra Shelat Vs. Pranal Jayanand Thakar and Others*, , Their Lordships of the Supreme Court noted that after all, the observance of a form, whether found in the Transfer of Property Act or in the Companies Act, is meant to serve the needs of the substance of the transaction which, in that particular case, were, undoubtedly, shown to have been completely fulfilled. Therefore, Their Lordships of the Supreme Court made it clear that what matters is not much the form but the substance.

32. In *C. Buchivenkata Rao Vs. The Union of India (UOI) and Others*, a case regarding a mining lease, a question arose about the validity of an application for such lease. Their Lordships, after mentioning that the details mentioned in Rule 27 of the Mining Rules, 1960 are intended for correct identification of the individual to whom the lease is to be granted, the minerals which are to be mined, the area in respect of which the lease was to be granted and the qualifications of the applicant, observed, while considering the import of the word

"shall" occurring in Rule 32 that the said Rule does not strictly affect the question whether an application for lease could be considered as proper application for lease or not by the authorities concerned. It was also observed that the form of the application appears to be subordinate to the essential facts to be taken into account before granting the lease and, as such, if not all the details are furnished the application does not become invalid.

33. In *Commissioner of Income Tax, Lucknow v. M. K. Gupta*, the Division Bench of the Allahabad High Court held that the return filed by the assessee was not a return in accordance with the provisions of the Income Tax Act and the Rules and, therefore, the Income Tax Officer should not have persisted in computing the total income of the assessee on the basis of that return. It was further held that, in the circumstances, the Tribunal was right in holding that the earlier return filed by the assessee was liable to be ignored and hence, the penalty could not be imposed. That was a case where the assessee was a physician employed in a hospital. For the assessment of the year 1962-63, he filed a return in Form No. 4, disclosing his total income as Rs. 21,680/- out of which Rs. 18,000/- was shown as income from profession. In answer to a notice u/s 274(1) of the Income Tax Act, the assessee filed return in Form No. 2 disclosing a total income of Rs. 43,930/- out of which Rs. 40,000/- was declared as income from private practice. The Income Tax Officer computed the total income of the assessee at Rs. 67,944/- which included a sum of Rs. 64,014 as income from private practice which was reduced to Rs. 40,000/- by the Appellate Tribunal on second appeal. The Inspecting Assistant Commissioner levied a penalty of Rs. 10,000/- and, on appeal, the Tribunal held that the original return filed by the assessee was not in the prescribed form and was an invalid return and, as such, no valid proceedings could be taken on the basis of the return and that the imposition of penalty was consequently illegal. The matter was referred to the High Court and it was in that reference that the High Court held as above.

34. In *Maya Debi Bansal Vs. Commissioner of Income Tax*, , the question as to whether the Tribunal had been justified in that case in setting aside the order of AAC and restoring back the order of the Income Tax Officer with modification that the assessment in question should be treated u/s 144 of the Income Tax Act, 1961, was referred to the High Court. The assessee in that case was an individual and she was required to file her return of income in pursuance of a notice u/s 148 of the 1961 Act as she had not filed her return of income in the usual course under the provisions of the Income Tax Act, 1922. The Income Tax Officer enclosed a blank return in Form No. 2 prescribed under Rule 2 of the Income Tax Rules, 1962. The assessee submitted her return in the said form and the Income Tax Officer completed the assessment u/s 143(3) of the 1961 Act. Then, the assessee filed an appeal against the order of assessment and contended before the AAC, inter alia, that her return having been filed in the new form, the entire proceedings were illegal and ab initio void because the assessee was required in law to file her return of income in the form as prescribed in Rule 19 of the Income Tax Rules, 1922. The AAC held the view that the impugned

assessment u/s 143(3) on the basis of a return not filed in the proper form was invalid and the assessment made thereof void ab initio. Accordingly, he allowed the appeal and cancelled the assessment made by the Income Tax Officer. However, he further directed the Income Tax Officer to proceed on the basis of the facts that the assessee had not filed return in response to the notice u/s 148. An appeal was filed against this order by the Revenue. It was contended before the Tribunal that it was the duty of the assessee to submit her return in the correct form and to bring to the notice of the Income Tax Officer mistakes in her return, if any. It was also contended that the assessment should be treated as made u/s 144 of the Act. The Tribunal held that the fact that a wrong return form was forwarded to the assessee would not absolve her from filing her return in the correct form and also that the Income Tax Officer had no legal obligation to issue any form and then, held that as the assessee had not filed her return in the correct form, that would amount to not having filed that return at all and the assessment made by the Income Tax Officer had to be treated as one made u/s 144 of the 1961 Act. In the reference, the Division Bench of the Calcutta High Court held that the forms prescribed under the Income Tax Act and the Rules are mandatory as mandatory is that the returns were to be filed in proper forms. On the basis of this, the Division Bench held that view that the assessment could not be held as "best judgment assessment".

35. In Commissioner of Income Tax Vs. Royal Textiles, , a reference has been made to the High Court to determine the question whether it was open to that Department to treat the return filed by assessee as invalid for the purpose of charging interest u/s 139(1) of the Income Tax Act, 1961, after having made a provisional assessment thereon, despite the fact that the said return was not in the prescribed form and was not accompanied by the prescribed statements. To answer this reference, inter alia, the Division Bench of the Madras High Court dealt with the question as to whether the return filed by the assessee in that case under Form No. 3 could be treated to be non est or invalid so that the return filed later on in Form No. 2 could alone be taken as the proper or appropriate return. Relying in the decision of the Privy Council in Malik Damsaz Khan v. Commissioner of Income Tax 1947 (15) ITR 445 and of the Supreme Court in The Commissioner of Income Tax, Bombay Vs. Ranchhoddas Karsondas, Bombay, , the Division Bench observed that though the assessee in that case had used a wrong form, it did not mean that the return was non est so that the return which was filed on October 15, 1970, could be treated as the only return filed by the assessee. It was further observed that "In the plethora of forms that are prescribed, sometimes the assessee makes mistakes. We would be under a tyranny of the rules, if we subscribe to the view that an innocuous mistake on the part of the assessee in choosing a wrong form is so serious as result in the return being treated as a mere scrap of paper and to visit him with a penalty of a substantial amount on the basis that this return solemnly filed is "non-existent." In the facts of that case where the Income Tax Officer has accepted the return filed in a form which was not prescribed, the Division Bench held that the said

return could not have been discarded as a mere scrap of paper.

36. Before returning to the question as to whether Section 46 is mandatory or directory, it is pertinent to note that the decisions in Commissioner of Income Tax, Lucknow v. M. K. Gupta 1978 (113) ITR 473 and Maya Debi Bansal Vs. Commissioner of Income Tax, do not seem to be of much assistance. These decisions are on one hand, under the Income Tax law which permits the Income Tax Officer to ignore a return which is not filed in the prescribed form and to make a best judgment assessment, and on the other because of the particular facts of the case. No doubt, it has been held that the requirement to file the return in the prescribed form is mandatory and that the Income Tax authorities cannot treat a return filed in a wrong form to either make a best judgment assessment or to impose a penalty but that was observed in the particular facts of the case before that Court. Nowhere, law was laid down to the effect that a return which is not in the prescribed form is always invalid and non est. The said two cases are not, therefore, authority for such propositions. More to the point in this respect is the decision of the Madras High Court in Commissioner of Income Tax Vs. Royal Textiles, wherein it has been held following the decisions of the Privy Council and of the Supreme Court in the cases cited therein, that a return in a wrong form cannot be said to be non est. The learned Judges rightly observed that such return cannot be held to be a mere scrap of paper. These observations are most relevant in the case before us where, as already seen, the second respondent has actually acted upon the Bill of Entry filed on 12th March, 1987. The existence of a return, though in a wrong form, cannot be ignored, as observed by the Supreme Court in The Commissioner of Income Tax, Bombay Vs. Ranchhoddas Karsondas, Bombay, and hence, in the circumstances, it cannot be held that the Bill of Entry presented by the petitioners on 12th March, 1987, is invalid or non est.

37. Whether the word "shall" in a particular provision of law makes it mandatory or directory depends on the facts of each case, the Supreme Court observed in Raza Buland Sugar Co. Ltd. Vs. Municipal Board, Rampur, . It will be, therefore, pertinent and necessary to advert to the said Section 46. This provision of law clearly requires the importer of any goods, other than those in transit or for transshipment, to make an entry thereof before the competent Customs Officer and further prescribes that such an entry is to be made by presenting a Bill of Entry for home consumption or warehousing in the prescribed form. It was already seen that the use of the word "shall" may at the first glance make it appear that Section 46 is mandatory in nature and that, as such, the importer of such goods, is bound to make entry thereof by presenting a Bill of Entry in the prescribed form. This, however, does not seem to be correct when the said provision of the Customs Act is read in conjunction with others, particularly with Section 48. This Section deals with the consequences of the non-compliance with what is laid down in Section 46 and provides that if any goods brought into India from a place outside India are not cleared for home consumption or warehoused or transshipped within 45 days from the date of unloading thereof at a customs

station or within such further time as the proper Officer may allow or if the title to any imported goods is relinquished, such goods may, after notice to the importer, and with the permission of the proper Officer be sold by the person having the custody thereof. This provision indicates that the Legislature by using the word "shall" in Section 46 did not intend to make it mandatory and that the said Section is merely directory. That apart, a careful reading of Section 46 shows that the essence of the provision is the making of the entry of the imported goods, the manner in which the entry is made being merely a question of procedure. The presentation of the Bill of Entry in the prescribed form is thus a pure procedural aspect of the making of the entry of the imported goods, a matter of form. For these reasons, the intention of the Legislature appears clear and, therefore, on the strength of the above mentioned rulings of the Supreme Court, it follows that Section 46 is merely directory and not mandatory. It may also be pointed out at this stage that it can be inferred from the observations made by the Supreme Court in C. Buchivenkata Rao's case that an irregularity in matters relating to form does not vitiate the act or render it void unless there is a positive provision of law making it invalid. There is no such provision in the Customs Act making the Bill of Entry filed in a wrong form invalid and hence, it is obvious that, in the circumstances, the Bill of Entry filed on 12th March, 1987, cannot be held to be invalid.

38. Having already held that the Bill of Entry presented on 12th March, 1987, is not void and non est and that it has been acted upon although a Bill of Entry in the correct prescribed form was directed to be filed and was actually filed as an additional Bill of Entry, it necessarily follows that the question as to whether the petitioners are or not entitled to the exemption under Notification No. 133 of 1987 does not strictly arise. The said Notification came into force on 19th March, 1987 and the petitioners had before such date, i.e. on 12th March, 1987, already filed the Bill of Entry in respect of the "S. S. Maratha Transhipper" and, therefore, the quantification of duty was to be made with reference to the date of the filing of the Bill of Entry as provided in Section 15 of the Customs Act. This position of law has been followed in several cases decided by this Court, viz., in Mahindra Ugine Steel Co. Limited Vs. Union of India and others, and in unreported judgment of this Division Bench in Vishal Gomantak's case. Otherwise, that position of law has been made clear by the Full Bench of this Court in Apar Private Ltd. and others Vs. Union of India and others, and hence, the above question would have been ordinarily answered in the negative without dilating on it at length. But such course of action cannot be adopted in the present case, as Mr. Setalvad with great ingenuity argued that since petitioners had advanced a case that the "S. S. Maratha Transhipper", being an ocean-going vessel, was exempt from Customs Duty under Notification No. 262 of 1958 and since the Notification No. 133 of 1987 was issued by the Government of India in exercise of the powers conferred by Section 25(1) of the Customs Act and in supersession of the Notification No. 262 of 1958, Notification No. 133 of 1987 has to be held as invoked by the petitioners by virtue of Section B of the General

Clauses Act. Elaborating the above contention, the learned counsel submitted that the said Notification No. 133 of 1987 was issued in supersession of the Notification No. 262 of 1958 and exempts the goods falling under several Items of the First Schedule of the Customs Tariff Act, inter alia, Item No. 8901.90 from whole of the customs duty, as well as the whole of additional duty, subject, however, to the condition that the exemption is not available when the vessel is imported for the purposes of being broken up or if it is subsequently broken up. The "S. S. Maratha Transhipper" was classified under Item No. 8901.90 and as such, being well within the range of the said Notification, was entitled to the exemption from the customs duty and also the additional duty. It is true that the said Notification was not specifically invoked by the petitioners but having it been issued in supersession of Notification No. 262 of 1958, benefit of which has been claimed by them, the Notification No. 133 of 1987 has to be read in the petitioners' claim instead of Notification No. 262 of 1958 in view of Section 8 of the General Clauses Act. This provision lays down a rule of general application, he further argued placing reliance in *National Sewing Thread Co. Ltd. Vs. James Chadwick and Bros. Ltd. (J. and P. Coats Ltd., Assignee)*, and in *Mistra Nand Kaushik Vs. State of Uttar Pradesh and Another*, and it fully applies to the Bill of Entry which, undoubtedly, is an "instrument", as the observations of the Supreme Court in *Sree Mohan Chowdhury Vs. The Chief Commissioner, Union Territory of Tripura*, make clear.

39. No doubt, it is common ground that the petitioners had, right from the beginning, consistently claimed the benefit of the exemption under Notification No. 262 of 1958 and that the Notification No. 133 of 1987 was issued in supersession of the Notification No. 262 of 1958. But does it mean that reference to this Notification No. 262 of 1958 made by the petitioners in the Bill of Entry as well as in the covering letter should be read as reference to the Notification No. 133 of 1987? Manifestly, no. Indeed, as rightly pointed out by Mr. Andhyarujina and by Mr. Khandeparcar, petitioners at no stage upto the passing of the impugned order dated 26th March, 1987, claimed the benefit of the exemption under the Notification No. 133 of 1987, their case having been always and till the last moment that the "S. S. Maratha Transhipper" was exempted from customs duty under Notification No. 262 of 1958 as she was an ocean-going vessel. It was only by their letter dated 27th March, 1987, that petitioners, for the first time, claimed the exemption under Notification No. 133 of 1987 but that too, apparently, on the ground that they had filed the Bill of Entry in the proper form on the 20th March, 1987, when the Notification No. 133 of 1987 was already operative. This otherwise is also the stand taken while filing the petition, the question of the Notification No. 133 of 1987 to be read in place of Notification No. 262 of 1958 in the Bill of Entry having been raised for the first time by Mr. Setalvad in his rejoinder arguments. In this background, Mr. Khandeparcar is quite right in contending that this new ground is not available to the petitioners to challenge the order of assessment passed on 26th March, 1987. The matter was not at all raised before the second respondent and certainly, as such, the

issue did not fall for his determination. That apart, the contention that the Notification No. 133 of 1987 has to be read in the Bill of Entry in all places where the Notification No. 262 of 1958 was invoked has no merit.

40. Section 8 of the General Clauses Act deals with the construction of references to repealed enactments. Its sub-section (1) provides : "Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted." It does not require great effort to see that the above provision cannot, and in fact does not, apply to private documents. Its wording is clear and does not permit any other view. To begin with, the very heading of Section 8 "Construction of references to repealed enactments" constitutes a clue therefor, indicating what is the scope and the ambit of that provision of law. Secondly, the words "any other enactment or in any instrument to the provision so repealed" make it abundantly clear that it does not apply to private documents. A Bill of Entry can hardly be said to come within the meaning of "any instrument to the provision so repealed" and therefore, the authorities cited by Mr. Setalvad have no relevance in this case. Indeed, in *National Sewing Thread Co. Ltd. Vs. James Chadwick and Bros. Ltd. (J. and P. Coats Ltd., Assignee)*, , Their Lordships of the Supreme Court held that Section 8 of the General Clauses Act embodies a principle of general application but added that this is so when a Statute or Act have to be considered. Similarly, in *Mistra Nand Kaushik Vs. State of Uttar Pradesh and Another*, , the learned Single Judge of the Allahabad High Court clearly held that even though Section 8 in its terms may not apply to a statutory notification, since it enacts a general principle of interpretation, the principle would nonetheless also apply to such notifications. These two authorities do not, as such, advance the petitioners' case. It may also be pointed out that the observations made by the Supreme Court in *Sree Mohan Chowdhury Vs. The Chief Commissioner, Union Territory of Tripura*, as regards the meaning of an "instrument" do not help the petitioners, for, in any event, such observations will not bring a Bill of Entry within the meaning of the expression "any instrument to the provision so repealed" as it connotes that such instrument should be a part of the repealed provision. In fact, in paragraph 11 of the Report, while dealing with the question whether the provision of Section 8(1) of the General Clauses Act was applicable to one order dated 3rd November, 1962 passed by the President, Their Lordships of the Supreme Court observed as under :-

"Is the President's Order in question an "instrument" within the meaning of the section ? The General Clauses Act does not define the expression "instrument". Therefore, the expression must be taken to have been used in the sense in which it is generally understood in legal parlance. In *Stroud's Judicial Dictionary of Words and Phrases* (Third Edition, Volume 2, page 1472) "instrument" is described as follows :-

"An "instrument" is a writing, and generally imports a document of a formal legal kind. Semble, the word may include an Act Parliament..... (11) Conveyancing Act, 1881 (44 and 45 Vict v. 41) S. 2(xiii), "instrument" includes deed, will, inclosure, award and Act of Parliament....." The expression is also used to signify a deed inter partes or a charter or a record or other writing of a formal nature. But in the context of the General Clauses Act, it has to be understood as including reference to a formal legal writing like an order made under a statute or subordinate legislation or any document of a formal character made under constitutional or statutory authority."

So also, what was held in Paper Products Limited Vs. Union of India, , namely, that a Notification issued u/s 25 of the Customs Act granting exemption becomes part of the Act, is not material or relevant to the case at hand as such issue does not at all arise.

41. However, the other limb of Mr. Setalvad's arguments, according to which, be that as it may, once the Notification No. 133 of 1987 was in force and operative on the date of the passing of the impugned order, the second respondent was dutybound to give suo moto to the petitioners the benefit of the exemption under the said Notification since the levying of the duty in the circumstances would be without authority of law, requires consideration. Notification No. 133 of 1987 reads as under :-

"In exercise of the powers conferred by sub-section (1) of Section 25 of the Customs Act, 1962 (52 of 1962), and in supersession of the Notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 262/58-Customs, dated the 11th October, 1958, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods falling under sub-heading Nos. 8901.10, 8901.20, 8901.30, 8901.90, 8902.00, 8904.00, 8905.10, 8905.90 and 8906.00 of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), when imported into India, from, -

(i) the whole of the duty of customs leviable thereon, which is specified in the said First Schedule; and

(ii) the whole of the additional duty leviable thereon u/s 3 of the said Customs Tariff Act.

subject to the conditions that -

(a) the exemption under this notification shall not be available to such goods (that is to say, vessels and other floating structures) as are imported for the purposes of breaking up; and

(b) any such goods (that is to say vessels and other floating structures), if subsequently are intended to be broken, the importer shall present a fresh bill of entry to the Collector of Customs, and thereupon such goods shall be chargeable with the duty which would be payable on such goods as if such goods were entered for home consumption u/s 46 of the Customs Act, 1962 (52 of 1962) on

the date of the presentation of such fresh bill of entry to the Collector of Customs for the purposes of break-up such goods."

42. It crystal clearly follows from the above Notification that the exemption granted is not absolute but is conditional. It indeed exempts from the whole duty of customs and additional duty only those goods which fall under the tariff items mentioned therein, but makes the exemption subject to the conditions referred to in its clauses (a) and (b). This being the nature of the Notification, it would appear that the benefit of the exemption has to be claimed by the concerned party who has to satisfy that he is entitled to it and not excluded from the same by virtue of the occurrence of any of the said two conditions. Tax certainly is a compulsory exaction and unless it is established that it is not payable, it is to be paid. The necessary corollary, therefore, is that he who thinks to be exempt from the payment of a tax, has to claim such exemption. This view gets otherwise support in *Commissioner of Income Tax Bombay Vs. Chugandas and Co., Bombay*, . It was indeed observed by Their Lordships of the Supreme Court while dealing with a submission made before them that it was for the respondent to prove that the income sought to be taxed is exempt from taxation, and unless he discharges that burden, the claim of the respondent must fail; that "Undoubtedly where a doubt arises on the facts placed before the taxing authority whether the tax-player is entitled to exemption from taxation under a certain statutory provision, the burden lies upon him to establish that exemption". It can, therefore, safely be held that in a case which is not benefit of doubts, the benefit of the exemption cannot be given suo motu and has to be claimed by the concerned party. In the present case, Mr. Khandeparcar contended, it is rather doubtful whether at all the petitioners would have been, in any event, entitled to the exemption under Notification No. 133 of 1987 since, admittedly, the "S. S. Maratha Transhipper" is being broken up. The learned counsel is right in his submission, as it is an admitted fact that the said vessel, having sunk, steps were being taken by the petitioners for the removal of her wreck. The removal would obviously involve breaking-up of the vessel and, accordingly, it would, prima facie, seem that, in any event, benefit of the exemption under Notification No. 133 of 1987 will not be available to the said vessel. Whether it is so or not is a question to be determined and, manifestly, requires examination by the competent Authority. The submission of Mr. Setalvad that the second respondent ought to have given the benefit of the exemption to the petitioners suo motu has thus, in the circumstances, no force and fails.

43. The next grievance of the petitioners is that the impugned order of the second respondent is violative of Article 14 of the Constitution inasmuch as they had been adversely discriminated vis-a-vis the respondent M/s. V. S. Dempo & Co. Pvt. Ltd. It is, in fact, the case of the petitioners that M/s. Dempo & Co. Pvt. Ltd. imported the transhipper "Pryamvada" and did not, at the material time of the importation, file a Bill of Entry in respect of the said vessel. However, in view of the judgment of the Supreme Court passed on 19th February, 1987, jointly deciding the appeals filed by the petitioners against the judgment of the Division

Bench and by M/s. Dempo & Co. Pvt. Ltd., a Bill of Entry was filed by M/s. Dempo Pvt. Ltd., in respect of the said vessel "Pryamvada". The respondent No. 2 while passing the assessment order, held that "Pryamvada" was exempt from duty in view of the Notification No. 133 of 1987. In the circumstances, petitioners contend that they and M/s. Dempo & Co. Pvt. Ltd., are in all aspects equals and as such, ought to have been treated equally and granted the benefit of the said exemption. In his affidavit-in-reply, this factual background is challenged by the second respondent. He indeed states that petitioners and M/s. Dempo & Co. Pvt. Ltd., are not equally situated, for, on one hand, M/s. Dempo & Co. Pvt. Ltd., unlike the petitioners, filed the Bill of Entry much after the Notification No. 133 of 1987 became operative, i.e. somewhere on 20th April, 1987, and on the other, they specifically, claimed such exemption. That apart, the "S. S. Maratha Transhipper" was already being broker up at the time of the making of the assessment order.

44. It was already seen that the petitioners filed the Bill of Entry in respect of the "S. S. Maratha Transhipper" on the 12th day of March, 1987, and that although another Bill of Entry was filed on 20th March, 1987, the Bill of Entry filed on 12th March, 1987, was acted upon and was never discarded by the second respondent. The Bill of Entry as regards the "S. S. Maratha Transhipper" was thus presented before the coming into force of the Notification No. 133 of 1987 which took place on 19th March, 1987. Further, it is not disputed that M/s. Dempo & Co. Pvt. Ltd. filed the Bill of Entry in respect of their transhipper "Pryamvda" on 20th April, 1987, specifically claiming the benefit of the exemption under Notification No. 133 of 1987, and that, at the time of the passing of the order dated 26th March, 1987, the wreck of the sunk "S. S. Maratha Transhipper" was being removed. These bare facts negative the contention of the petitioners that they and M/s. Dempo & Co. Pvt. Ltd. were equals and were equally situated and, therefore, on this ground alone, the grievance of discrimination fails, being pertinent to note that the Notification No. 262 of 1958 had to be applied as a whole. Support to this view is found in *Union of India and Others Vs. Shri Ramniwas Chaudhury*, and in *Ram Niwas Chaudhary Vs. Metal Scrap Trade Corporation Ltd., and Others*, *Mr. Andhyarujina*, however, further contended that even if that is not so, in any event, a wrong committed does not warrant another on the ground of discrimination committed and in this connection placed reliance in *Union of India and others Vs. Chowgule and Co. Pvt. Ltd.*, . The learned counsel contended that exemption from duty was erroneously given to M/s. Dempo & Co. Pvt. Ltd., for chargeability and quantification of duty are different things and occur at different points of time. Chargeability is fixed or attached to the goods when the taxable event occurs, i.e. when the goods cross the territorial waters, whereas the quantification takes place when the Bill of Entry is presented. Therefore, he urged, a charge that is attached to the goods at the point of import does not cease to operate when the Bill of Entry is presented for quantification of the rate of duty u/s 15 of the Customs Act. He further contended that though in *Apar's case (supra)*, it has

been held that if the goods were not chargeable at all by virtue of an exemption when the import took place, the goods cannot be liable to any duty when the Bill of Entry is presented later, the converse is not true, for goods which were chargeable at the point of import do not become non-chargeable by reason of an exemption Notification at the time of the quantification of the rate of duty.

45. Undoubtedly, chargeability to duty is to be determined at the point of time the import of goods takes place, i.e. when the goods cross the territorial waters, but the quantification of the rate of duty is fixed by the date of presentation of the Bill of Entry. Therefore, if the goods are not chargeable to duty at the time of import by virtue of an exemption, no duty can be charged at the time of the quantification of the rate of duty when the Bill of Entry is presented. This is the necessary corollary of the exemption, for, if at the time of the import, the goods were not chargeable to duty, there is, in fact, no duty to be quantified. This position of law is now well settled after the decision of the Full Bench of this Court in Apar's case (supra). It is true that the Full Bench did not address itself to the question posed by Mr. Andhyarujina and as such, nothing was said in Apar's case in that connection. But is the learned counsel correct in his submission that the converse is not true and as such, goods which were chargeable at the time of the import do not become non-chargeable by reason of an exemption Notification at the time of the quantification of the rate of duty ? Mr. Diwan, the learned counsel appearing for M/s. Dempo & Co. Pvt. Ltd., joined issue and contended that Mr. Andhyarujina's reading of Apar's case is not correct. He submitted, quoting extensively from Apar's case, that exemption was rightly granted to M/s. Dempo & Co. Pvt. Ltd. He further contended that, in an event, an exemption from duty granted by the Government in exercise of the powers u/s 25 of the Customs Act is given in the public interest and therefore, the question as to whether or not in the present case exemption was not properly granted, cannot be subject to judicial appreciation. The learned counsel appears to be correct in his submissions and gets full support in the decision of the Full Bench in Apar's case. In fact, among others, the question of determination at what point of time or date the rate of customs duty to which imported goods are liable under the Customs Act fell for determination of the Court. The Full Bench, after quoting from several decisions and in particular from *Shawhney v. Sylvania & Laxman* (77 Bom. L.R. 380), observed as under :-

"What follows from the above discussion is that when goods from a place outside India are brought to India as defined u/s 2(27) of the Customs Act, that is, into the territorial waters of India, they become "imported goods". They continue to be imported goods until cleared for home consumption. The taxable event occurs upon the goods entering the territorial waters of India. If at that point of time, the imported goods are chargeable to duty, then the duty has to be assessed as per the valuation made u/s 14 and at rates specified u/s 15. Except as otherwise provided in the Customs Act or other law in force for the time being, all such goods would be chargeable to customs duty as laid down u/s 12 of the Customs Act. But by virtue of some of the provisions referred to above, duty may not be

leviable or remission or abatement of duty may be granted on these imported goods either because they are damaged, pilfered or not unloaded at the port or cleared for home consumption but transitted. The goods may not chargeable to customs duty also because the Central Government chooses to exempt from duty by issuing a notification u/s 25 of the Customs Act. In this context, it is necessary to note the distinction between the notification under sub-section (1) of Section 25 of the Customs Act and exemption notification issued under sub-section (2) of Section 25 thereof. Under sub-section (1) the Government may exempt absolutely or subject to conditions goods of any specified description from the whole or any part of duty of customs leviable thereon. Duty is leviable u/s 12 of the Customs Act and not under the Schedules of the Tariff Act."

and further that

"If the goods are not chargeable to customs duty in view of any of the provisions of the Customs Act or the provisions of any other law, then neither their valuation u/s 14 nor calculation of the duty payable at the rates as mentioned in Section 15 of the Customs Act would be required. Same would be the position when a notification wholly exempting the goods from levy of customs duty is issued under sub-section (1) of Section 25 of the Act."

The contentions of Mr. Diwan are, therefore, to be fully accepted, being pertinent to note that an exemption granted by the Central Government in exercise of the powers u/s 25 of the Customs Act is in the public interest.

46. Mr. Andhyarujina may be correct when he contends that as chargeability arises at the time of the import, the charge is attached to the imported goods and accompanies them and, therefore, they do not cease to be chargeable when the Bill of Entry is presented. The question, however, becomes purely academic, for, if at the time of the filing of the Bill of Entry, the Government exempts some imported goods from duty, then, the quantification of the rate of duty will necessarily be nil. Therefore, the question of quantifying the rate of duty will not in such an event arise. In any case, it may be pointed out that the Customs Authorities granted the benefit of the exemption under Notification No. 133 of 1987 to M/s. Dempo & Co. Pvt. Ltd. and the question as to whether or not such action is correct is not before this Court in the present Writ Petitions.

47. Mr. Setalvad next contended that no additional or auxiliary duty could have been levied since at the time of the importing of "S. S. Maratha Transhipper" such duties were not levied. In Apar's case, the Full Bench of this Court held in unmistakable terms that if goods were not chargeable to duty at the time of the import, no duty can be levied on such goods when the Bill of Entry is filed. The learned counsel appears, therefore, to be correct in submitting that, in any event, the only duty that can be quantified on the "S. S. Maratha Transhipper" is the duty that was chargeable on her at the time of import. In all fairness, Mr. Khandeparcar conceded that since the assessment done is provisional, petitioners may raise the question as regards the liability to pay the additional or

auxiliary duty before the final assessment order is passed. The issue is thus open and requires no determination by us, as such.

48. In view of the above, it is obvious that the Writ Petition No. 67 of 1987 is liable to be dismissed. Accordingly, it follows that the "S. S. Maratha Transhipper" was chargeable to duty and such duty is to be quantified at the rate prevailing on the date of the presentation of the Bill of Entry, i.e. on the 12th March, 1987, and there is, as such, no question to assess to duty her wreck. The Writ Petition No. 66 of 1987 is, therefore, liable to be dismissed on this ground alone. Nonetheless, it may be proper to record that on merits also that Writ Petition fails. The basis of the Petition, as rightly pointed out by Mr. Andhyarujina, is the averment made in paragraph 22 of the Petition which reads :-

"If the S. S. Maratha Transhipper was exempt from Customs Duty no Customs Duty would be payable in respect of the vessel but duty would be payable on the material removed from the wreck. If, on the other hand, the vessel was exigible to duty as a vessel no customs duty would be payable on the wreck."

Then, in paragraph 26, it is stated that the second respondent decided to provisionally assess the wreck to nil rate of duty and in paragraph 29 that, if the second respondent had complied with the orders of the Supreme Court and assessed the wreck at the appropriate rate, petitioners' interest under the agreement entered by them with M/s. Interdive (Goa) would have been fully safeguarded. In paragraph 16, Clauses 7 and 11 of the said agreement are quoted. These clauses show that M/s. Interdive (Goa) are liable to pay customs duty and/or excise duty upto the maximum of Rupees 90 lakhs in the event the wreck is held exigible to such duty. A reference is also made in paragraph 28 to the interim orders made by the Supreme Court on 20th August, 1986, 2nd November, 1986 and 6th January, 1987, pending the disposal of the appeal filed by the petitioners against the abovementioned judgment of the Division Bench. These averments lend strong support to the contention of Mr. Andhyarujina that the Writ Petition No. 66 of 1987 was filed with the sole purpose of securing the implementation of the agreement entered into by the petitioners with M/s. Interdive (Goa), specially as regards the payment of customs and/or excise duty, if any. This contention is further corroborated by the conduct of the petitioners in the writing to the second respondent the letter dated 11th March, 1987, wrongly stating that it was incumbent upon him to carry out the directions given by the Supreme Court in the interim order dated 20th August, 1986, and to assess, therefore, the wreck of the "S. S. Maratha Transhipper" to duty even though the appeal had already been disposed of, and, on the second respondent assessing the said wreck to Nil duty pursuant to this letter, in moving this Court for an interim order to assess the wreck to duty assuming that no duty was payable on the "S. S. Maratha Transhipper". It may be noted at this stage that Their Lordships of the Supreme Court had not directed in their order dated 20th August, 1986 or in any of the two subsequent interim orders that assessment of

the wreck to duty was to be made. In any event, it may also be noted, the above interim orders of the Supreme Court had obviously come to an end with the final disposal of the appeal. There is, as such, no manner of doubt that the Writ Petition No. 66 of 1987 was solely filed for the purpose of securing the payment of customs duty or excise duty, if any, by M/s. Interdive (Goa) in terms of the agreement entered by them with the petitioners. As observed by the Supreme Court in *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, , a writ petition is not an appropriate remedy for impeaching validity of contractual obligations. Equally, it may be said a writ petition is not also the proper means to secure the implementation of contractual obligations. Therefore, the Writ Petition No. 66 of 1987 fails also for this reason. That apart, as rightly pointed out by Mr. Andhyarujina, no assessment to duty can be made of the "materials removed from the wreck", for the assessment has, undoubtedly, to be made on the vessel herself. It is true that Mr. Setalvad joined issue by submitting that such assessment on the wreck can be made u/s 21 of the Customs Act. Section 21 provides that all goods, derelict, jotsam, flotsam and wreck brought or coming into India, shall be dealt with as if they were imported into India, unless it be shown to the satisfaction of the proper officer that they are entitled to be admitted duty-free under this Act. It requires no effort to see that the above provision is not at all applicable, for, by no means, it can be said that the "S. S. Maratha Transhipper" comes within the said Section. The said vessel was not a derelict, jotsam, flotsam or wreck when it was brought into India and, obviously, therefore, the Section is not attracted. The basis of the petition, being thus unsound, make it liable to be dismissed.

49. By an interim order dated 13th April, 1987, made at the time the Writ Petition No. 66 of 1987 was admitted, the second respondent was directed to assess the wreck of the "S. S. Maratha Transhipper" to customs duty on the assumption that the said vessel is not exigible to duty. Mr. Andhyarujina submitted that this interim order has, undoubtedly, caused injustice to M/s. Interdive (Goa), for, taking advantage of the clauses of the agreement entered into with M/s. Interdive (Goa), petitioners already detained some amounts of money in their possession towards payments of duty. That some amounts belonging to M/s. Interdive (Goa) were in possession of the petitioners and that such amounts were detained by them towards the payment of customs duty on the wreck was not disputed, and, therefore, the abovementioned interim order may have caused injustice to M/s. Interdive (Goa). It will be, in the circumstances, the duty of this Court to undo that injustice at this stage. Indeed, as observed by the Supreme Court in *Prabodh Verma and Others Vs. State of Uttar Pradesh and Others*, "Where a court has passed an interim order which has resulted in an injustice, it is bound at the time of the passing of the final order, if it takes a different view at that time, to undo that injustice as far as it lies within its power. Similarly, where an injustice has been done by the final order of a court, the superior court, if it takes a different view, must, as far as lies within its power, seek to undo that injustice." It was already seen that the Writ Petition No.

66 of 1987 was filed with the sale purpose of implementing the purported liabilities of M/s. Interdive (Goa) under the agreement entered into by them with the petitioners and further, that it is not disputed that after the interim orders passed by this Court on 13th April, 1987, the petitioners, taking advantage of the said interim orders and the assessment of the wreck done by the second respondent, detained towards the payment of duty, some amounts belonging to M/s. Interdive (Goa) which were in their possession. Hence, some prejudice apparently was caused to M/s. Interdive (Goa) by the said interim order dated 13th April, 1987.

50. The result, therefore, is that both the petitions fail and are, accordingly, dismissed with costs. The rule in both the petitions is discharged. The interim order dated 13th April, 1987, is vacated and, consequently, the assessment, if any, made pursuant to that order should not be acted upon.

51. The learned counsel appearing for the petitioners orally applies for leave to appeal to the Supreme Court and further prays that the operation of the judgment just delivered be stayed for a period of four weeks in order to enable the petitioners to approach the Supreme Court. Mr. Khandeparcar, however, states that no questions of law of general importance are given rise to by the judgment and, therefore, leave should not be granted.

52. We have disposed of the Writ Petitions relying in the law laid down by the Supreme Court itself and by several High Courts, including our own High Court. In our view, no substantial questions of law of general interest arise and, as such, leave is not to be granted. Accordingly, we reject the application for leave. However, the operation of the judgment just delivered is stayed for four weeks, subject to the petitioners depositing in this Court the amount of Rs. 25,69,822.19 (Rupees Twenty-Five Lakhs Sixty-nine thousand Eight Hundred and Twenty-two and Paise Nineteen only) i.e. the difference between Rs. 1,17,10,522.19 (Rupees One Crore Seventeen Lakhs Ten Thousand Five Hundred and Twenty-two and Paise Nineteen only) and the sum of Rs. 91,40,700.00 (Rupees Ninety-one Lakhs Forty Thousand and Seven Hundred only) which was already paid by the petitioners. Petitioners to give a Bank guarantee as regards the remainder of the assessed duty, within four weeks. The petitioners are at liberty to adjust this Bank guarantee with the Bank guarantee already given by them in the Writ Petition No. 66 of 1987.