

(1981) 05 DEL CK 0026

In the Delhi High Court

Case No : Civil Writ No. 1255 of 1972

Great Eastern Shipping Co. Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 13-05-1981

Acts Referred:

Citation : (1985) 4 ECC 303 : (1986) 25 ELT 171

Hon'ble Judges : S. Ranganathan, J;Prakash Narain, J

Bench : Division Bench

Judgement

Ranganathan, J.—The petitioner is a company carrying on the business, inter alia, of carriage of goods by sea. At the material time, it owned five vessels, chartered two vessels and plied them on "coasting trade", i.e., the ships carried goods from one Indian port to another. During the years 1952, 1953 and 1954 these vessels arrived at, and then sailed from, Tuticorin on various dates the details of which are not material for our present purpose. It is common ground that, before arriving at Tuticorin, the ships had called at Colombo (Ceylon) where they took on board fuel oil, which is described as "bunkers". Thereafter the vessels called at Tuticorin and discharged/loaded some cargo at the said port. They then left the port of Tuticorin after obtaining clearance under the provisions of the Sea Customs Act, 1878 (hereinafter referred to as "the Act").

2. Under the Act, a ship was required, while calling at a port, to declare a list of all the stores on board the vessel : this was described as an "import manifest of stores" and was in a proforma containing full details of all the stores aboard the vessel (including, under the appropriate head, the quantity of diesel oil and furnace oil-bunkers-in tonnes) giving the quantity in stock on arrival and the quantity issued for consumption in port. The vessels of the petitioner-company filed the above stores lists with the Customs Authorities at Tuticorin port. According to the company (vide paragraph 4 of the petition) :

"On a bare perusal of the said store lists the Customs authorities could immediately learn that the said ships had called at Colombo, and that they had

taken bunkers on board for their own use."

When the ships called at Tuticorin and got clearance there from, the customs authorities did not demand any customs duty in respect of the bunkers on board.

3. Sometime on 1962, the Superintendent of Central Excise, Customs Circle, Tuticorin called for details from the petitioner regarding the exact quantities of bunkers lifted by the said vessels at Colombo. There was subsequent correspondence between the parties. The petitioner-company does not appear to have furnished the particulars called for on the ground that the subject matter involved looking into very old records. On 5th August, 1964, the Superintendent issued notices to the petitioner calling upon it to furnish within 7 days the exact quantity of bunkers on-loaded at Colombo and stating that if the information was not furnished as required, the entire quantity of bunkers shown in the list of stores filed at Tuticorin would be considered as having been lifted at Colombo and demands issued on that footing. The petitioner filed a reply on 22nd August, 1964 expressing surprise at the receipt of the notices. Thereafter, the Superintendent passed as many as eight orders and a supplemental order on 30th September, 1964, 1st July, 1965 and 24th January, 1966 calling upon the petitioner to pay, within fifteen days of the receipt of the said orders, import duty aggregating to Rs. 2,59,692.35 in respect of the quantity of bunkers lifted at Colombo.

4. All the orders were couched in similar terms and it will be sufficient to set out the terms of one by way of illustration. An order dated 30th September, 1964 referred to the fact that S.S. Jag Ganga, a vessel on voyage of coasting trade, had arrived at Tuticorin port on 24th December, 1952 via Colombo and then obtained clearance to Cochin. It was seen from the declaration filed by the ship's master, obtained through the ship's agent, that she had, during her call en route at the intermediate foreign port (Colombo), bunkered 26,417 tonnes of fuel oil as ship stores. It was pointed out that the ship was engaged in coastal run only and not on foreign trade though she had called at Colombo. It was stated that, since the vessel, in the course of her coastal voyage, had taken on board dutiable ship stores en route at the foreign port as stated above, the ship stores mentioned, namely, the fuel oil was liable for payment of import duty u/s 20(a) of the Act. The duty payable was computed at Rs. 1,483.31. The other orders were similar and the result of all the orders was the demand for the huge sum mentioned earlier that the duty was calculated on the entire quantity of bunkers shown in the manifests of stores filed by the vessels at the rates of duty prevalent on the dates of demand/payment.

5. Aggrieved by the said orders, the petitioner-company filed appeals to the Appellate Collector of Customs, Madras after depositing the amount of duty demanded. The Appellate Collector, by orders dated 10th October, 1966, virtually rejected the appeals. He, however, granted relief to the petitioner by restricting the duty payable to the quantity of bunkers taken on board at Colombo.

6. The petitioner preferred revision applications to the Union of India (through the Secretary, Government of India, Ministry of Finance), the respondent to this writ petition. All the revision applications were disposed of by the Central Government by a consolidated order dated 16th June, 1972. The revisional authority also gave only partial relief to the petitioner. He accepted the petitioner's alternative contention that the amount of duty would be payable if at all, only at the rates prevailing on the dates of the importation and that too only on such part of the bunkers lifted at Colombo as remained on board at Tuticorin.

7. The petitioner contends that the order and decision of the respondent dated 16th June, 1972 is illegal, unauthorised, invalid and inoperative in law. It is, Therefore, prayed that this Court should issue a writ of certiorari quashing the said order dated 16th June, 1972, and, consequently, directing the respondent to refund to the petitioner the entire amount of Rs. 2,59,692.35 which, according to the petitioner, had been collected from it illegally. Shri A.J. Rana, learned counsel for the petitioner, put forward the following contentions :

(1) On a true and proper construction of the various provisions of the Act, an import takes place only when goods are unloaded and delivered at a port for home-consumption or warehousing; so there was no "import" of bunkers into the customs port at Tuticorin at all so as to attract duty u/s 20(1)(a) of the Act;

(2) Even assuming that there was an import of bunkers, no customs duty was payable by a coasting vessel. For, under the scheme of the Act, customs duty becomes payable only when a ship filed a bill of entry. Where no bill of entry is either filed or required to be filed, as in the case of coasting vessels, no customs duty becomes payable;

(3) Assuming again that there had been an import of bunkers by the vessels in question and that customs duty had become payable thereon, such duty was livable before the ships left the port. The grant of port clearances to all the vessels involved a determination that no import duty was payable by the ships and that determination had become final;

(4) The Act did not confer a power of review, except u/s 190A, and it was not open to the Superintendent of Central Excise to review the order of clearance granted earlier and to demand import duty from the petitioner in respect of any goods or stores; and

(5) If at all the respondent could claim any right to demand the duty in question, it could only be under the provisions of section 39 of the Act. The present demands for duty had become time-barred under the provisions of the section, as they stood at the relevant time.

8. Before proceeding to discuss these contentions it is necessary to clarify the factual position on one aspect. It has been stated by the petitioner in paragraph 4 of the writ petition that the store lists filed at Tuticorin, when the ship called there, showed that bunkers had been lifted by the vessels at Colombo for their

own use. This statement was apparently made because the petitioner-company did not have available with it a copy of the manifest filed by the various ships several years ago. It has been pointed out in the counter affidavit (paragraph 4) that the above statement is not correct. Learned counsel for the respondent has also produced before us the original records and we have looked at the store lists filed in one of the cases. We find that the manifest only indicated the quantity of bunkers in store at the time when the ship called at Tuticorin port and did not contain any reference to bunkers taken by the ship on board at Colombo. While this was the position in the case of five of the ships, it appears that the list of stores filed by one of the ships and that filed by another ship on one of its calls at Tuticorin did not even contain the details of the fuel oil and board (vide paragraph 11 of the order in revision). But it is quite clear that the port authorities at Tuticorin were fully aware when the ships called at Tuticorin that earlier to coming to Tuticorin they had called at Colombo. Further, from the orders of the Superintendent, Central Excise, it is clear that when the ships called at Tuticorin the ship's masters had filed, through the local agents, declarations which gave details of the fuel oil bunkered at Colombo. The order passed in revision by the Government of India also makes it clear that the details were available in the records, that the liability of the stores to customs import duty in respect of these trips escaped the attention of the customs officials at Tuticorin and that the fact that duty had not been paid on the stores lifted the foreign port had come to light during the audit of the ships' files. It is in fact conceded in paragraph 7 of the said order that there had been an error on the part of the Tuticorin authorities in not raising the demands of duty at the relevant time and that such a lapse had occurred during the relevant period not only in the case of this petitioner but also in the case of a large number of such vessels similarly placed. We have, Therefore, to proceed on the footing that, while it is no doubt true that the manifests did not declare the quantity of fuel oil bunkered at Colombo when the ships called at Tuticorin, the customs authorities were fully aware that the vessels had called at Colombo before coming at Tuticorin and that they had taken certain amounts of fuel oil on board at Colombo. Notwithstanding the knowledge of this material fact, the authorities chose to levy no customs duty. It is this omission, inadvertence or error on their part that is sought to be set right by raising demands after the lapse of about eight years and the question for consideration is whether this can be legally done within the framework of the Sea Customs Act, 1878.

9. It is necessary at this stage to refer to the scheme of the relevant provisions of the Act which was passed in 1878 to consolidate and amend the law relating to levy of sea customs duties. This may be done conveniently in three parts : (a) the charging section which imposes a charge of customs-duties; (b) the machinery provisions of the Act which provide for the mode of assessment of the duty payable; and (c) the procedural sections which lay down the rules and regulations to be followed by ships when they wish to enter into, or depart from, any port.

10. Chapter V starts with section 20, which is the charging section. It enacts that customs duties shall be levied at such rates as may be prescribed by or under any law for the time being in force, inter alia, on "(a) goods imported or exported by sea into or from any customs-port to any or to any foreign port" and (c) goods brought from any foreign-port to any customs-port and without payment of duty, are transhipped for, or thence carried to, and imported at any other customs-port". Likewise section 14 enables the same authority to declare by notification that any customs-port shall be a warehousing port for the purposes of the Act. "Customs-port" means "any place declared u/s 11 to be a port for the shipment and landing of goods" and "foreign port" means any place not within the territory of India - Sections 3(d) and 3(e). Section 11 enables the Chief Customs-authority, by Gazette notifications issued from time to time, to "(a) declare the place which alone shall be ports for the shipment and landing of goods; (b) declare the limits of such ports; (c) appoint proper places therein to be wharves for the landing and shipping of goods ...; (d) declare the limits of any such wharf; (e) alter the name of any such port or wharf; and (f) declare what shall for the purposes of this Act, be deemed to be a custom house and the limits thereof." In short, the places to be called port, wharf and custom-house and the limits thereof will be declared by the above authority. It may be mentioned here that Tuticorin had been declared as a "customs-port" u/s 11, and a warehousing port u/s 14 of the Act, and that the short case of the respondent is that, when the ships arrived at the customs-port at Tuticorin, bringing on board the oil bunkered by them at the foreign port of Colombo, they had imported goods from Colombo to Tuticorin thus attracting duty u/s 20(1)(a) of the Act. To decide on the correctness of this claim it is necessary to refer to the provisions relating to the other two aspects mentioned above.

11. The mode of assessment to duty is also provided for in Chapter V : The duties prescribed the Central law referred to in section 20 are at rates specified according to a fixed tariff or according to the value of the goods. Section 29, Therefore, requires that on importation of any goods into any customs port, the owner of such goods shall, in the bill of entry, state, to the best of his knowledge and belief, the real value, quantity and description of such goods and subscribe to a declaration as to the truth of the statement. Section 29A states that it is open to the Collector, even prior to the examination of the goods, to assess the duty on the basis of the value declared in the bill of entry, with a right to reassess in the case the statement is found to be incorrect on an examination or otherwise. Section 29B enables him to make a provisional assessment of duty in case he considers further information proof or tests necessary and this will be liable to adjustment on the duty being finally assessed. Section 30 defines "real value". Section 31 provides that, if on examination (to be expeditiously conducted) it is found that the bill of entry correctly shows the real value of the goods, they shall be assessed accordingly. u/s 32, if it appears to the officer that the duty payable will be higher than as per the value stated in the bill of entry, he should detain the goods, inform the owner of the goods of his valuation

thereof and call upon him to either pay the duty as determined by him and take delivery of goods or receive the value of the goods as stated in the bill of entry and surrender them to the Government. This should be done within a reasonable time from the detention of the goods. Section 36 provides that no amendment to any bill of entry will be allowed after the removal of the goods from the customs house. Section 37 provides that the rates of duty applicable in any particular case, will be those in force on the date on which the bill of entry is delivered to the Collector. The Act then proceeds to provide in sections 39 and 40 remedies where the duty has been collected erroneously to the prejudice of the Revenue and the assessed respectively. These sections runs as follows :

"39. When customs-duties or charges have not been levied or have been short-levied through inadvertence, error, collusion or misconstruction on the part of the officers of Customs, or through mis statement as to real value, quantity or description on the part of the owner, or when any such duty or charge, after having been levied, has been, owing to any such cause, erroneously refunded, the person chargeable with the duty or charge which has not been levied or which has been so short-levied, or to whom such refund has erroneously been made, shall pay the duty or charge or the deficiency or repay the amount paid to him in excess, on a notice of demand being issued to him within three months from the relevant date as defined in sub-section (2);

and the Customs-collector may refuse to pass any goods belonging to such person until the said duties or charges or the said deficiency or excess be paid or repaid."

"40. No refund of charges erroneously levied or paid, unless claimed within three months. - No customs-duties or charges which have been paid and of which repayment, wholly or in part, is claimed in consequence of the same having been paid through inadvertence, error of mis-construction, shall be returned, unless such claim is made within three months from the date of such payment."

Reference must also be made to sections 86 and 87 (occurring in Chapter IX), section 89 (of Chapter X) and section 110 (of Chapter XI). u/s 86 the owner of any goods shall, after the delivery of the manifest by the master of the vessel in which they are imported, make entry of the goods for home consumption or warehousing by delivering to the Customs-collector a bill of entry thereof in prescribed form, the particulars of the entry corresponding with the particulars given of the same goods in the manifest of the ship. u/s 87, on the delivery of such bill, the duty (if any) livable on such goods shall be assessed, and the owner of such goods may then proceed to clear the same for home consumption, or warehouse them, subject to the provisions of the Act. u/s 89 (the only section of Chapter X) when the owner of any goods entered for home consumption, and (if such goods be liable to duty) assessed u/s 87, has paid the import duty (if any) assessed on such goods and any charges payable under this Act in respect of the same, the Customs-officer may make an order clearing the same; and such order shall be sufficient authority for the removal of such goods by the

owner. The assessment u/s 87 is made even where goods are entered for warehousing and section 110 (which occurs in Chapter XI dealing with the topic of warehousing) ensures that the duties at the rates prevalent on the date of clearance there from are paid before the goods are allowed to be cleared from the warehouse. These provisions (leaving out of account sections 29A and 29B which were introduced only in 1955) make it clear that the duty is to be assessed as soon as possible after the bill of entry is filed and before the goods are allowed to be removed from the port (or the warehouse, as the case may be). The Act, however, does not envisage any formal assessment order determining the duty payable. Where the value declared by the bill of entry is accepted, duty is paid on that basis and the goods cleared.

Where the value is estimated, the owner should either pay the duty demanded and get the goods released or receive their value and surrender the goods.

12. The above provisions refer to the bill of entry to be filed on an importation of goods. To understand this, it is now necessary to deal with the relevant provisions of Chapters VII to XI which deal with the rules and regulations to be observed by ships arriving at a port, discharging of cargo for home consumption or warehousing and leaving the port. Chapter VII (sections 53-66) deal with the "arrival and departure" of vessels. Section 53 enables the Chief Customs-authority, by notification, to fix a place in any river or port, beyond which no vessel arriving shall pass until a manifest has been delivered to the pilot officer of customs or other person duly authorized to receive the same. Such a manifest should also be delivered where no such place has been notified or where the ship does not cross the place so fixed, within 24 hours after it anchors (section 53-4). u/s 54A (which came into force in 1955) a manifest may be allowed to be delivered in anticipation of the arrival of the vessel. Section 55 enacts that the manifest should be by the master of the vessel; it should specify "all goods imported in such vessel, showing separately all goods (if any) intended to be landed, transhipped or taken on to another port, and all ship's stores intended for consumption in port or on the homeward voyage, and shall contain such further particulars, and be made out in such form, as the Chief Customs-officer may from time to time direct." The manifest will be countersigned by the person receiving it (section 56). u/s 57, no vessel arriving in any customs-port shall be allowed to break bulk (except where a special pass is given u/s 59) until two conditions are fulfilled. One is that the manifest referred above should be delivered along with a copy thereof and an application for the entry of such vessel inwards, by the master or the ship's agent (section 60). The second is that an order should be given by the Collector permitting the entry of the vessel into port after calling for such document and raising such queries as he may consider necessary (section 58). Sections 61 to 66 relate to the procedure for an outward journey. Section 61 provides that no vessel shall take on board any part of her export cargo, until a written application for entry of such vessel outwards, subscribed to by the master of such vessel, has been made to the Customs-collector, or before an order has been given thereon by such officer for such entry. Section 62 makes

it clear that no vessel, whether laden or in ballast, shall depart from any (customs-port until a port-clearance has been granted by the) Customs-collector or other officer duly authorised to grant the same. In order to obtain port-clearance, the master should make an application for such clearance at least 24 hours before the intended departure and such application should be accompanied by a manifest of all goods to be exported in the vessel along with the relevant shipping documents. This manifest should separately show all goods entered in the import manifest, not landed or consumed on board or transhipped (section 63). Section 64 is important. It empowers the Customs collector to refuse port clearance to any vessel until, inter alia, the provisions of section 63 are complied with and "all port-dues and other charges and penalties due by such vessel, or by the owner or master thereof, and all duties payable in respect of any goods shipped therein, have been duly paid, or their payment secured by such guarantee, or by deposit at such rate, as such Customs-collector directs;". The Customs-collector, on being satisfied that the provisions of sections 63 and 64 have been complied with or after obtaining adequate security from the ship's agent, will grant a port clearance to the vessel and return to the master of the ship one copy of the manifest duly countersigned (sections 65 and 66).

13. To sum up, these provisions of the Act require every incoming vessel to deliver a manifest of the goods on board. Thereafter the master of the vessel should also make an application for the entry of the vessel. A ship can break bulk only after obtaining an order for entry. A similar procedure is to be followed by delivering a manifest and application for clearance when the ship intends to leave the port. The ship cannot leave the port until clearance is granted and no clearance will be granted until all the duties are paid or sufficient security has been given for the due payment of the said duties to the satisfaction of the Customs-Collector.

14. Chapter VIII (sections 67-80) contains general provisions affecting vessels in port. These are not relevant for our present purposes but we may notice three provisions. u/s 67, the Customs-Collector at any customs-port could depute one or more officers of customs to board any vessel in or arriving at such port. Sections 67 to 69 ensure that such officers have all powers and are provided all facilities to examine every nook and corner of the ships and to take steps to locate all goods carried on board. Section 70 ensures that no goods other than passengers' baggage or ballast urgently required to be shipped for the vessel's safety, shall be shipped or water-borne to be shipped or discharged from any vessel in any customs-port, except in the presence of an officer of customs. Under sections 72 and 73, no goods can be landed or shipped at any customs-port at any place than a wharf or other place duly appointed for that purpose or on any day or at any time other than those permitted by the customs authority.

15. Chapter IX (sections 81-88) deals with the discharge of cargo and entry inwards of goods. u/s 81 when an order for entry inwards of any vessel which has arrived in any customs-port, or a special pass permitting such vessel to

break bulk, has been given, the discharge of the cargo of such vessel may be proceeded with. However, no goods will be allowed to leave the vessel unless they are entered in the manifest (section 82). Section 86 and 87 of this Chapter, section 89 (being Chapter X) and section 110 (the only relevant section out of the provisions relating to warehousing set out in sections 90-127 comprised in Chapter XII) have already been referred to.

16. While the above are the general provisions applicable to all vessels. Chapter XV of the Act (sections 156-166) deals with coasting trade. Section 156 provides :

"Except as hereinafter provided, nothing in chapter VII, IX, X and sections 136, 139 and 141 to 143 inclusive, of this Act, shall apply to coasting vessels or to goods imported or exported in such vessels."

Since coasting vessels generally travel from customs-port to customs-port and this would not normally involve any import or export, this section prescribes, in place of the cumbrous procedure of filing a bill of entry, obtaining an order for entry and then getting a port-clearance after paying all dues and duties, a simpler procedure involving a delivery of a manifest of goods on board by the master and its return by the Collector duly signed. This will tantamount to an order for clearance. There is, however, a power vested in the Customs-collector to refuse port clearance in certain cases. This section, however, does not materially affect the present case as section 162(b) lays down that if permission is granted by the Collector for the discharge of cargo from any coasting vessel and if the vessels either touched at any intermediate foreign port in the course of her voyage or has on board any dutiable goods, such vessel will be subject to all the provisions of Chapter VII and IX. It is sufficient here to notice only the two proviso to section 159 which provide for the delivery of the manifest of goods on board to the Customs-Collector on the vessel's arrival at any port and before it discharges any goods thereat. These two provisos read as follows :

"If the vessel has touched at any foreign port between such port of arrival and her last preceding customs-port of departure, the master shall append to the manifest a declaration to that effect, and shall also indicate on the manifest the portions (if any) of the cargo therein described which have been discharges, and subjoin thereto a true specification of all goods shipped at such port.

If the customs-port of arrival be an intermediate port, and a portion only of the cargo is to be discharged thereat, the master shall likewise so deliver an extract from the manifest signed by him, relating to such portion, and the Customs-Collector shall, after verifying such extract, return to him the original manifest and all documents accompanying it except those relating to such portion."

17. These, then, are the relevant provisions of the Act in regard to the levy and collection of import customs duty. It will be convenient at this point also to make a reference to the procedure for appeals and revision under the Act. Section 188 provides for an appeal from an order of the officer of customs to the appellate

authority mentioned therein and also provides that every order passed in appeal would be final subject to the right of revision conferred by section 191. Under that section a person aggrieved by any decision or order passed by any officer of customs or Chief Customs authority from which there is no appeal (may) apply to the Central Government which would revise or modify such decision or order. Section 190A (which was introduced in 1955) gave the Chief Customs authority and the Chief Customs officer a power of revision. The authority could, on its own motion or otherwise, call for and examine the record of any such decision or order and pass such order thereon as it thinks fit. This power is subject to two restrictions, (i) that the revision should be made before the expiry of two years from the date of the decision or order sought to be revised; and (ii) that no order prejudicial to any person should be passed, unless the person is given a reasonable opportunity of making a representation against the proposed order.

18. This completes a survey of all the material provisions of the Act. It is in the light of these statutory provisions that the contentions advanced by the learned counsel for the writ petitioner have to be considered.

19. The first question for consideration is regarding the point at which import customs duty u/s 20 is attracted. The relevant clauses of section 20 to be considered here are clauses (a) and (c) Clause (a) envisages a levy of duty "on goods imported by sea into any customs-port from any foreign port". Clause (c) envisages a case where goods are brought to any customs-port and, without payment of duty thereon or being discharged there, are transhipped for or thence carried to and imported at another customs-port. In the present case, duty is demanded u/s 20(a). It is argued for the Revenue that an import takes place when the ships carrying any goods enter any port and that, since the petitioner's vessels were allowed entry within the limits of Tuticorin port, the oil taken on at Colombo and remaining on board the ship at the time of such entry should be deemed to have been "imported" into Tuticorin from Colombo. Some support can also be found for this argument from the use of the words "without payment of duty" in clause (c) which, it is possible to urge, means that the mere act of bringing goods into the port will attract duty but that, if for some reason no duty is then paid and the goods are then brought into another Indian port they would attract duty at the second port. In fact, one can perhaps even go further and urge that an import takes place when the goods enter the territory of, or the territorial waters of India on the basis of section 3A of the Act (introduced in 1950). This section empowers the Central Government to define the "customs frontiers" of India and a notification was issued on 1st April, 1950 under that section. The text of that notification was is not available; possibly it defined the customs frontiers as the boundaries of India but it has been superseded by a notification of 1955 which defines the customs frontiers "as the boundaries of the territory, including territorial waters, of India." It can, Therefore, be suggested that an "import" should be deemed to take place at this stage.

20. We are of opinion, however, that this apparently plausible argument cannot be accepted. It is a far-reaching argument which would result in the levy of an import duty on all goods on board any vessel that touches at any customs-port, whether or not such goods are intended to be or are landed in that port. Such a result, it seems to us, is not envisaged by the scheme of the Act. We have earlier pointed out that the provisions of the Act envisage that the duty should be assessed and collected as soon as possible after the entry of the ship and before goods are taken delivery of by their owner. Section 86 and 87 read together make it clear that the duty is to be assessed and paid by the owner of the goods when he seeks by filing a bill of entry their clearance for purposes of home consumption or warehousing. In the latter event, additional duty may also become payable when the goods are taken out of the warehouse in case there is a change of rates. The emphasis on the owner and the provision that the goods are to be cleared on payment of duty show that the duty is payable only on goods that are landed at the port. The relaxation of the formalities in the case of ships on coasting trade is also explicable on this footing. Normally they will carry no dutiable goods and so the manifests delivered by the master showing the goods discharged or shipped at the port and acknowledged by the customs officer are enough to serve the purpose of enabling the ships to move quickly without too many formalities. However, when the vessel has touched a foreign port or carries dutiable goods, the Act enforces all the formalities of Chapter VII and IX in order to ensure that a bill of entry is presented by the owner and that duty is paid on goods discharged for home consumption or warehousing. Section 20(c), again, does not carry any implication to the contrary. Read with section 128, it also reinforces the idea that no duty is to be paid at the port where the goods are unloaded but transhipped to another Indian port. It will also be appreciated that the duty is payable by the owner of the goods and neither he nor his agents will be there at a port unless the goods are intended to be cleared there. The question of a liability on the part of the ship owner has arisen only because in this case the ship has taken the oil on board for itself and not as carrier for somebody else. Such ship owner or master cannot be in a worse position than other owners of goods and so cannot be mulcted with liability at all intermediate customs-ports merely because the ship has entered the limits of the port. All these considerations, in our view, lead to the irresistible inference that import customs duty is payable only in respect of the goods that are or are intended to be discharged by the vessel at a port for purposes of home consumption or warehousing. We Therefore agree with Sri Rana that no import duty at all was payable in respect of the bunkers taken on board at Colombo and remaining on board the petitioner's ships when they touched Tuticorin and that the customs authorities were right in granting clearance to these vessels without demanding any import duty from them in respect of the bunkers.

21. The above conclusion renders it unnecessary to deal with the other contentions raised on behalf of the petitioner. However, for the sake of

completeness, we shall also deal with them.

22. We are unable to accept the second contention urged on behalf of the petitioner which will arise only if the first contention is answered in favor of the Revenue. Though we agree that normally the duty is to be assessed on the filing of the bill of entry, we are unable to accept the argument that no duty was payable by the petitioner's vessels because they were not required to and did not file any bill of entry. We have pointed out earlier that u/s 162(2), a bill of entry by the owner of the goods is necessary even in the case of a coasting vessel where it has touched at a foreign port before coming to the customs-port or where it has some dutiable goods on board. If, Therefore, the contention of the respondent that duty is attracted the moment a ship enters the territory of India is correct, then there was an obligation on the part of the ship's owner or master to file a bill of entry in respect of the bunkers and pay duty in respect thereof. It cannot be said that the chargeability to duty which has already attached itself to the goods, on the argument of the Revenue, has disappeared by the failure on the part of the owner or master of the ship to file the necessary bill of entry. This argument on behalf of the petitioner, Therefore, fails.

23. This takes us to the third contention of Sri Rana as to the effect of the failure on the part of the Revenue to have a bill of entry delivered in respect of the bunkers and to assess the duty thereon coupled with the positive act on the part of the customs authority in granting port-clearance to all the ships without demanding any duty. There is no doubt that this omission and act have resulted in the escapement of duty (assuming, again, that the first contention discussed earlier is answered in favor of the Revenue). But the question that falls for consideration is whether it is a case of an escapement without there having been an assessment at all initially or whether it is a case of an escapement caused because, on an initial or first assessment NIL duty as demanded due to an error. This distinction becomes material for it may have a bearing on the remedy, if any, available to the Department to set the matter right in case its view of the durability of the bunkers is correct.

24. Of the two aspects of the Department's conduct referred to above, the failure to a bill of entry and make an assessment on basis thereof is only negative in character and cannot be equated to an assessment. It appears to us, however, that the second aspect viz., the grant of port-clearance to the vessels is a positive act and has as clear significance in that it involves a decision by the customs authority as to whether any duties are payable in respect of the goods shipped in the vessel. Before granting port-clearance to a vessel, the customs authorities have to apply their mind to the four matters referred to in section 64, one of which is as to whether all duties have been paid or not, and they are entitled to refuse port-clearance unless have been paid or duly secured. The grant of port-clearance, Therefore, involves a decision regarding the duties payable and this will be so, notwithstanding that the decision is that the amount of duty payable is nil. In this context, it is also important to remember that the

Act contemplates no formal assessment order as such. If there had been the requirement of such a formal order, it will be difficult to infer a first or initial assessment merely from the circumstance that no duty had been levied before the ship left port. But since the assessment under the Act does not need such an order, we are of opinion that the grant of port-clearance must be read as involving a decision or determination (may be erroneous, as contention by the Revenue) that no duties are payable in respect of the goods shipped in the vessel. It should also be appreciated that, having regard to the nature of the duty and the fact that, once a ship has left port it will be difficult of access later, it is necessary to imply a formal decision on this matter at this point of time. The fact that even for action u/s 39, the Act contemplates only a period of three months would also indicate that expedition is of the essence in the making of an assessment. To hold to the contrary will mean that no decision at all regarding the customs duty payable by a ship can be said to have been reached until an assessment or demand is made against it and according to the Revenue such a decision and demand can be made at any time against the ship owner or master because the act contains no prescription of time in this regard. The Act should not be interpreted in such a manner as to result in a sword of Damocles hanging above the ship owner which may fall upon him at any point of time but should be interpreted in a reasonably practical manner.

25. This conclusion leads us on to the last two contentions of the counsel for the petitioner. If, as we have held, the grant of port-clearance is taken as involving a decision that no duty was payable by the ship, that was a decision or order which was final under the Act. There was no question of the assessed filing an appeal u/s 188 or a revision u/s 191 because the decision was in its favor. The department itself could also revise the decision u/s 190A but this section does not help the Revenue in the present case for three reasons, viz., (i) that the action there under has to be taken within two years; (ii) that the section came into force only in 1955; and (iii) that it could be invoked only by an authority to whom the officer making the original decision or order is subordinate and not by the same officer. No power of review of his own order by the same authority can be presumed in the absence of a specific statutory provision and particularly so when the Act confers such a power in a superior authority. It is a realisation of this weakness, apparently that is responsible for the stand of the Revenue that there has been no determination, decision or assessment at all in this case so far and that it is open to them to assess or determine the duty at any point of time and raise a demand. This argument we have already dealt with.

26. We think Sri Rana is correct in his contention that the only statutory provision on which the Revenue can rely for initiating the present proceedings is section 39 of the Act. That is the only section which authorises the same officer to set a previous determination by him. But the difficulty is that under this section, necessary action has to be taken within a period of three months of the original order. This is so whether the original non-levy was due to "inadvertence, error or misconstruction" on the part of the authorities or whether it was due to a

"mis-statement" on the part of the owner. It is contended in the counter-affidavit that the omission to claim duty at the time of departure of the ships was due to the failure of the petitioner file bills of entry and to make proper declarations. We have already pointed out that though it is true that the petitioner does not appear to have filed a bill of entry or made a categorical declaration regarding the bunkers on board of Colombo, the authorities were fully aware of all material facts even at the time. However, even if all the fault was only with the petitioner, the period of limitation for action u/s 39 expired long ago. That is why, again, the Revenue disowns the applicability of section 39 and takes the stand, already negated, that no determination has been earlier made and this is the first determination which can be made at any time. The reason why they say that section 39 does not apply is that the section is said to be applicable only in cases where there has been "a first assessment." This limitation is sought to be read into the section because these words have been used in making a reference to the period of limitation for action. This argument is clearly not maintainable. The operative words of section 39 clearly refer to cases like this where customs duties have not been levied through some error. Even otherwise the expression "short levy" will include a case of "non-levy" [vide N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd.,]. Further, as discussed above, there was an initial NIL assessment when the ships were cleared. N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd., supports this conclusion. Our conclusion that an order for port clearance, i.e., the permission to take the ship and the goods thereon away from the port is an assessment under which the duty payable was determined at NIL is also reinforced by the fact u/s 39, as amended in 1955, action can be taken "in a case where the duty or charge has not been levied". Within three months from "the date on which the customs officer makes an order for the clearance of the goods." We may add that this argument of the Revenue trying to rule out the applicability of section 39 can be of help to the respondent only if its contention that no assessment has as yet taken place in this case is accepted. We have already given reasons why this contention cannot be accepted. The orders and demand, Therefore, clearly fall within the scope of section 39 and are, admittedly, barred by the limitation prescribed for action under that section.

27. We, Therefore, hold that the bunkers in question were not assessable to import customs duty. Even if they were and duty was omitted to be charged before the ships left port due to an error, the respondent cannot revise, review or rectify the position after the lapse of so many years.

28. For the above reasons, we direct the issue of a writ of certiorari quashing the nine orders of the Superintendent, Central Excise dated 30th September, 1964, 1st July, 1965 and 24th January, 1966. The appellate and revisional orders dated 10th Oct., 1966 and 16th June, 1972 confirming in part the orders of the Superintendent are also quashed. Consequently, the demands amounting of Rs. 2,59,692.03 made on the petitioner are quashed shall be refunded.

29. In the result, the writ petition is allowed and the rule made absolute. The petitioner will be entitled to its costs : Counsel's fee Rs. 500.