

(1986) 05 CAL CK 0034
In the Calcutta High Court

In Re : S.S. Jain and Co. and Another

Date of Decision : 02-05-1986

Acts Referred:

Central Excises and Salt Act, 1944 — Section 2
Customs Tariff Act, 1975 — Section 3

Citation : (1986) 8 ECC 172 : (1986) 25 ELT 14

Hon'ble Judges : S.C. Sen, J

Bench : Single Bench

Advocate : Somnath Chatterjee, N.C. Roy Chowdhury, Rabindra N. Das and Farook M. Razack, for the Appellant; Jatin Ghosh, Samir Kumar Sengupta and Sunil Chatterjee, for the Respondent

Judgement

S.C. Sen, J.—A series of writ petitions have been filed challenging the vires of levy of excise duty on goods and materials obtained by breaking up of ships, boats and other floating structures. The case of the petitioners is that the petitioner purchases old ships and vessels for breaking up these old ships and vessels imported by the petitioner after due observance of all formalities including payment of customs duty. After the dismantling of the ships and vessels, the dismantled portions are sold to different purchasers. It has been argued on behalf of the petitioners that the dismantling of old ships and vessels does not involve any manufacturing at all.

2. It has been stated on behalf of the petitioners that the petitioners have to pay customs duty at the rate prevailing at the time of first importation of the vessels. In addition to basic duty of customs, countervailing duty by way of additional duty equal to excise duty had been levied and imposed upon the imported old ships and vessels u/s 3 of the Customs Tariff Act, 1975.

3. The petitioners' grievance is that the Central Excise authorities without having regard to the levy of customs duty and countervailing duty on the ships imported by the petitioner have taken a decision to levy Central Excise Duty on goods and materials obtained by breaking up of the imported ships. It has been contended that the petitioners have been required to take out a licence and pay Central

Excise Duty on goods of foreign manufacture.

4. It has been contended on behalf of the petitioners that Section 3 is the charging section of the Central Excise Act, by which a duty can be levied on all excisable goods first sold which are "produced or manufactured in India". The phrase "produced or manufactured in India" has received judicial interpretation in a number of cases. Dismantling of an imported ship will not come within the phrase "produced or manufactured in India". My attention was drawn, to the definition of "manufacture" and it was argued that even the extended definition will not take in its ambit dismantling of a ship. The definition of "manufacture" as amended, now stands thus :-

"2(f) Manufacture includes any process -

(i) incidental or ancillary to the completion of a manufactured product;

(ii) which is specified in relation to any goods in the section or Chapter notes of the Schedule to the Central Excise Tariff Act, 1985, as amounting to manufacture; and the word "manufacture" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods but also any person who engages in their production or manufacture on his own account."

5. Section 3 which is the charging section of the Central Excise Act, levies duty on all excisable goods which are "produced or manufactured in India". The question that has to be decided in this case is whether dismantling of a ship comes within the phrase "produced or manufactured in India".

6. It is to be noted that the definition of "manufacture" given in Section 2(f) is an inclusive definition. Certain activities which might not otherwise be regarded as manufacture has been specifically included in the definition of "manufacture".

7. An argument was made on behalf of the Central Excise Department that the second part of the definition has specifically provided that process relating to "any goods in the section or notes of the Schedule to the Central Excise Tariff Act, 1985" will have to be regarded as "manufacture".

8. This contention, in my judgment, is without any substance. Section 2(f)(ii) provides that any process which is specified in relation to any goods in the section or chapter notes or schedule to the Central Excise Tariff Act, 1985 as amounting to manufacture will be regarded as "manufacture". In other words, if in the chapter notes or in the section itself, an activity has been regarded as "manufacture", then there cannot be any dispute that that activity will have to be treated as "manufacture". It is not open in such cases to investigate what is the real meaning of "manufacture". But in this case, we are concerned with dismantling of a ship. The Advocate, appearing on behalf of the Department, was unable to show me any chapter note or section in which the activity of dismantling has been specifically treated as "amounting to manufacture". Therefore, no support can be derived by the Department from Section 2(f)(ii).

9. On behalf of the petitioners, it has been argued that "manufacture" includes any process "incidental or ancillary to completion of a manufactured product." Dismantling of a ship cannot be regarded as an activity incidental or ancillary to completion of a manufactured product. The scraps that are produced are not incidental to production of any goods. My attention was drawn to the judgment of the Supreme Court in the case of Empire Industries Limited and Others Vs. Union of India and Others, . It was argued on the strength of this judgment that if as-a necessary corollary to manufacturing any finished product, scraps are obtained, such scraps can be regarded as goods manufactured by the producer. But in a case like this, where no finished product is being broken up, the activity will not amount to "manufacture" in common parlance. There is also nothing in the definition of the term in Section 2(f) which will justify the interpretation that has been sought to be placed by the Department.

10. This problem has several aspects which will have to be examined. A new marketable commodity may be brought into existence by the act of fitting together a number of manufactured parts into a complete machine, structure or unit of a machine. In such a case, the activity of fitting together of manufactured parts must be regarded as "manufacture" and the -end product must be regarded as goods produced or manufactured by this process. But the converse process by which a manufactured commodity is broken up or taken apart cannot be regarded as manufacture or production of the components. To take the simple illustration of a car which is produced by assembling various parts in the assembly line. The activity of fitting together various components to make a complete car must be regarded as manufacture of that car. The end product of the activity is the car. But when that car is broken up and things like carburetor, battery or other fittings are taken apart, can it be said that these things have been manufactured by the process of taking apart the car. In my opinion, neither in common parlance nor by the definition of "manufacture" given in the Act, can it be said that these components which were taken apart in the process of breaking up of the car were manufactured or produced by the activity of breaking up of the car.

11. The question, however, is when a ship is broken up and scraps are obtained, can it be said that a new marketable product has been manufactured or produced by the ship breaker. The relevant entries are in Chapters 72 and 73 under the heading "Articles of Iron and Steel." Chapter 72 is under the heading "Iron and Steel". The excisable goods have been described under the heading numbers 72.01 to 72.14 and the duty imposable is between Rs. 80 per ton to Rs. 1375 per ton. 72.15 provides "Goods and materials of heading Nos. 72.03, 72.06, 72.08, 72.09, 72.10, 72.11, 72.12 and 72.13 obtained by breaking up of ships, boats and other floating structures." A flat rate of duty has been imposed of Rs. 1800 per ton.

12. The heading of Chapter 73 is "Article of Iron or Steel." Heading Nos. 73.01 to 73.08 contain description of various items of articles of Iron or Steel which have

been brought under excise duty at rates varying from Rs. 80 per ton to Rs. 1100 per ton. Tariff item 73.09, however, provides "Goods and materials of Heading Nos. 73.03, 73.04, 73.06, 73.07 and 73.08 obtained by breaking up of ships, boats and other floating structures." Duty leviable under this heading is Rs. 1800 per ton.

13. It has been argued, on behalf of the petitioners, that breaking up of ships, boats or other floating structures can never come within the definition of the word "manufacture". Moreover, it has been urged that it is of significance that the duty has been levied at the flat rate of Rs. 1800 per ton on all goods obtained by breaking up of imported ships whereas waste and scrap obtained otherwise are dutiable at the rate of Rs. 80 per ton or Rs. 365 per ton under Tariff Item No. 72.03. This differential duty is accounted for by the fact that the goods are of foreign make. It has been urged that what in effect is being sought to be done is to impose a higher rate of tax for the imported goods. What has really been done is to impose an excise duty on goods manufactured outside India.

14. I am unable to uphold this argument. The description of goods in Tariff Item Nos. 72.15 and 73.09 is of goods and materials obtained by breaking up of ships, boats or other floating structures. The intention is not to differentiate between ships, boats or other floating structures made in India and ships, boats or other floating structures of foreign origin. The duty is leviable equally upon all ships, all boats and all other floating structures whether made in India or abroad.

15. The only question that remains to be considered is whether breaking up of ships, boats and other floating structures can be regarded as a process by which goods and materials mentioned in Heading Nos. 72.03, 72.06, 72.07, 72.08, 72.09, 72.10, 72.11, 72.12, 72.13 and also 73.03, 73.04, 73.05, 73.06, 73.07 and 73.08 can be said to have been manufactured or produced in India". This question will have to be examined in the context of economic realities. The word "manufacture" has generally been understood to mean making of a thing which is useful for its own sake and which has a market of its own. It cannot be denied that at the moment there is a tremendous demand in India for "waste and scrap" which are rerolled by the Mini Steel Plants or Rerolling Mills. In fact, a news item has appeared in the Calcutta issue of the Economic Times on April 10, 1986 about the tremendous demand of scrap iron. It has been reported that the Metal Scrap Trade Corporation has assessed the scrap import requirements of the country for 1986-87 at 1.4 million tonnes. It has been reported :

"Import of this quantum, together with the internal availability of two million tonnes should, according to MSTC, take care of the needs of mini steel plants in the current financial year.

An important decision this time is to go in for import of both shredded scrap and heavy melting scrap. This import-mix, it is contended, will afford cost benefits to the user units. As there is scope for misuse of heavy melting scrap, however,

MSTC has been advised by the steel ministry to make arrangements for mutilation of the import consignments before these are made available to mini steel plants.

The scrap import plan has been drawn up by MSTC, taking into account the production programmes of mini steel plants. Largely due to the improvement in power availability during 1985-86, mini steel plants could close the year with a higher output of mild steel. According to tentative estimates, they produced in 1985-86 2.36 million tonnes of mild steel, registering an increase of well over 4,00,000 tonnes in 1984-85."

16. Judicial notice must be taken of the fact that ship breaking has become a big industry in India. In fact, more than 10 writ petitions were presented by the ship breakers in this Court challenging the provisions of levy of excise duty on scrap obtained by breaking up of ships. The writ petitioners are ship breakers and the writ petitions are in respect of ships which are being actually broken in Calcutta Port. This gives an indication of the range of the activity of this industry. The main object of this ship breaking industry is to obtain waste and scrap for sale in the market. The things that are obtained by breaking up of ships have a ready market. The ships are being broken up for the purpose of catering to the demands of mainly Mini Steel Plants and Rolling Mills.

17. Ships are being imported regularly from foreign countries for the purpose of breaking in India. When there is an organised activity on such a large scale for obtaining waste and scrap, it is difficult to hold that the end product of the activity "waste and scrap" cannot be regarded as products of the industry. The entire organised activity is designed to produce scrap.

18. It is true that when the composite whole is broken up into components, it cannot be said that the components have been manufactured and produced by the process of breaking up. But in a case where the object is not to obtain the components as such and sell them as components but to obtain raw-materials for Mini Steel Plants and Rolling Mills, the output of the industry must be regarded as its Products, the entire purpose of the organised activity of the ship breaking industry is to produce "waste and scrap" which has a ready market. The goods that would be sold have a trade name and a marketable identity. Such goods must be regarded as the products of the industry. Therefore, in my judgment, waste and scrap obtained by dismantling of ships in the instant case must be regarded as goods which are "produced or manufactured in India".

19. An argument was advanced that these scraps and waste are really manufactured abroad. In fact, that is the reason why the duty on waste and scrap obtained from dismantling of ships is Rs. 1800 per ton. Whereas the normal rate of duty on waste and scrap under Tariff Item 72.03 is Rs. 80 per ton in case of iron and Rs. 365 per ton in case of steel. It has been argued that this differential rate of duty can only be justified on the ground that waste and scrap that are obtained from dismantling of ships are of foreign make. Until and unless

the goods are manufactured in India, no excise duty can be levied.

20. In my judgment, this contention cannot also be upheld. If the ship breaking activity comes within the expression "produced or manufactured" the end product of the activity which is carried on in India must be regarded as "produced or manufactured in India."

21. I am fortified in the view that I have taken by a judgment of a Division Bench of the Bombay High Court in the case of Commissioner of Sales Tax. v. Indian Metal Traders 41 - Sales Tax Cases 169. That was also a case of ship breaking. There the question was whether the definition of the term "manufacture" in Section 2(17) of the Bombay Sales-tax Act, 1959 will take in within its scope dismantling of a ship. It was held by the Bombay High Court that the scrap iron and steel which were obtained by dismantling and breaking up of the ship must be regarded as a different commercial commodity from the ship itself and hence, the activity would amount to manufacture. The goods manufactured would be the scrap iron and steel obtained or manufactured by the dismantling and breaking up of the ship. It was further held that the mere fact that the respondents had purchased the ship for the purpose of breaking up and scraping the same would not convert the ship into scrap. The ship could well be regarded as the raw material and the scrap iron and steel obtained from the ship by dismantling and breaking up could be regarded as finished goods.

22. It is, however, to be noted that this judgment was rendered in the context of the definition of "manufacture" provided by Section 2(17) of the Bombay Sales-tax Act. It was observed in that case by Kania J. at pages 173-174 as follows :

"Now, in the present case, it is not disputed by Mr. Sheth, the learned Advocate for the respondents, that the process of dismantling the ship so as to obtain from it iron and steel or steel plates which had been formerly welded together is an elaborate process requiring the use of appliances such as acetylene torches. This process of dismantling would undoubtedly prima facie, be covered by the definition of the term "manufacture" in clause (17) of Section 2 of the said Act. A new commercial commodity, viz., iron and steel scrap, was obtained by applying the process of dismantling on the ship and hence it appears to us that the provisions of Section 13(a) of the said Act would be attracted and the respondents would be liable to the payment of purchase tax on the, price attributable to the frame or hull or body proper of the ship. In our opinion, it could be said that the iron and steel scrap was produced or manufactured with the use of the said ship. It is not necessary to consider whether iron and steel plates, wooden planks excluding loose ones, rivets and bolts could be said to be new commercial commodities or manufactured with the use of the said ship, as these have admittedly been obtained also from the framework or hull or body proper of the said ship."

23. A further question that has been raised on behalf of the petitioners now will have to be examined. It has been contended that duty has not only been levied

on iron and steel scrap and things which have been earned from the frame or hull or body, proper of the ship. The duty has been levied on articles of iron and steel in Chapter 73. Tubes and pipes made of iron and steel (73.03), rain water pipes and their fittings (73.04), wire ropes of iron or steel (73.06) or the articles mentioned in Tariff Items such as chains, nails, tacks, drawing pins, rivets, cotter-pins, washers, stoves, ranges, radiators for central heating, sanitaryware and parts thereof of iron or steel can hardly be regarded as goods manufactured or produced by breaking up of a ship. Similarly, under the heading iron and steel in Chapter 72 apart from waste and scrap, duty has been levied on goods like angles, shapes and sections of iron or steel (72.10) These goods Were used in the manufacture of a ship and after breaking up of the ship, the goods will be separated. It is difficult to hold that these goods were produced in the process of breaking up of the ships. These goods can only be produced and were produced by manufacturers of steel goods. The ship breaking activities has not brought these goods into existence. The goods that were in existence and which had been fitted into a composite whole have been taken apart with the help of an acetylene torch. But that is not the same thing as manufactured or production of the goods.

24. This construction would also lead to absurdity. The same goods cannot be manufactured or produced twice. The nails or tacks or rivets used in construction of a ship do not cease to be the same nails or tacks or rivets when the ship is broken or taken apart. It cannot be said that nails, tacks and rivets have been manufactured in the process of breaking up of the ships.

25. In the case of Commissioner of Sales Tax v. India Metal Traders - 41 STC 169 Kania J. as follows :

"From the statement of the case it appears that what was obtained from the breaking up and dismantling of the said ship was iron or steel scrap, iron or steel plates, wooden planks and rivets, bolts, boilers, fans and some other articles, a list of which has been annexed to the statement of the case as Annexure "A".

It was further observed at page 173 of the said report :

"We have already referred to the goods described in the statement of the case as having been obtained by the breaking up and dismantling of the ship. The goods set out in Annexure "A" to the said statement of the case are like propeller, anchors, lifeboats, navigation signals and so on. Mr. Sanghvi has conceded that the only goods with regard to which it was being urged that the same were obtained by the respondents by the activity of manufacture with the use of the ship were iron and steel scrap, iron and steel plates, wooden planks excluding loose planks, rivets and bolts. As far as the other goods obtained as aforesaid are concerned, it is conceded by Mr. Sanghvi that it could not be said that the same were manufactured with the use of the said ship within the scope of Section 13(a) of the said Act."

27. I am of the view that only those things which are obtained from breaking of a

ship which are used as waste and scrap for manufacturing other products can be regarded as goods produced or manufactured in the process of ship breaking but those goods like nails or tacks or angles which are meant to be sold as finished goods without any further transformation cannot be regarded as goods manufactured or produced in the process of ship breaking. If a ship is broken to obtain goods which are to be used for the purpose of manufacturing and converting into other kinds of goods, for example, rolled steel or machinery, must be regarded as goods obtained by the process of ship breaking.

28. It is well-settled that what is essential for an activity to amount to manufacture or production is that it must result in a different commercial article or commodity. In other words, it must be an article or commodity known and saleable in the market. Many things may be obtained by breaking up of a ship. Some of the components and things obtained from breaking of the ship has a market as waste or scrap. The things may have been purchased at the time of manufacture of the ship as finished product but will be sold after breaking the ship as a different commercial commodity. A piece of rolled steel may be sold for the purpose of rerolling. In every case, it is a question of fact.

29. A large number of cases were cited on behalf of the Revenue which, in my opinion, do not throw any light on the controversy. The case of Khandelwal Metal and Engineering Works and Another Vs. Union of India (UOI) and Others, was cited for the proposition that a parliament does not lack jurisdiction to enact the Central Excise Tariff Act, 1985, providing for levy of Central excise duty on waste and scrap. It was argued that the parliament had a legislative competence to pass law because of the combined operation of Article 248 and Entry 97, List I of the Seventh Schedule.

30. This argument, in my opinion, entirely overlooks the points that had been argued on behalf of writ petitioner. The legislative competence of the parliament has not been denied. What is in issue is whether the activity of breaking up or dismantling a ship comes within the phraseology "produced or manufactured in India".

31. The decision in the case of Chhotabhai Jethabhai Patel and Co. Vs. The Union of India and Another, wherein it was held that levy of duty with retrospective effect was not unconstitutional or violative of Article 19 is also quite irrelevant for the purpose of the present case.

32. Reliance was also placed on the case of Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Poo Food Packers, where the Supreme Court applied the test "does the processing of the original commodity bring into existence a commercially different and distinct article?" But that was a case where the question was whether any manufacturing process was involved in the activity of turning pineapple fruit into again pineapple slices. The Supreme Court held that sliced pineapple was a presentation of fruit in a more convenient form.

33. In that case, the Supreme Court also referred to the test laid down in the case of *Anheuser-Busch Brewing Association v. United States* (1907) 52 ED 336 where the Court said :

"Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment labour and manipulation, but something more is necessary. There must be transformation; a new and different article must emerge, "having a distinctive name, character or use."

34. The goods described in Tariff Item Nos. 72.06, 72.07, 72.08, 72.09, 72.10, 72.11, 72.12 and 72.13 are excisable goods. When these goods are manufactured by Steel Plants, taxes are levied on manufacture of such goods. These goods may have been utilised in the manufacture of ships, boats or other floating structures, When ships, boats or other floating structures are dismantled, goods like angles, hoops, stripe etc. may be separated from the composite whole. By this process it cannot be said that new excisable goods have emerged. Various excisable commodities which were in existence had been put together to make a ship. When the ship is broken up, those commodities are once again brought back to their original state. It cannot be said that apart from waste and scrap, other goods mentioned in Tariff Item No. 72.15 are brought into existence by the process of dismantling of a ship.

35. Neither by clear words of the statute nor by necessary implication, the submissions suggested on behalf of the Department can be accepted. Therefore in my judgment, levy of excise duty on waste and scrap under Tariff Item 72.03 is valid. But Tariff Item 72.15 and 73.09 are ultra vires the provisions of the Central Excises and Salt Act, 1944 insofar as duty is sought to be imposed on goods under Tariff Item Nos. 72.06, 72.07, 72.08, 72.09, 72.10, 72.11, 72.12 and 72.13 and also goods and materials of Heading Nos. 73.03, 73.04, 73.05, 73.06, 73.07 and 73.08. Unless there is an activity of production or manufacture of goods in India, the charging section of the Act (Section 3) is not attracted. The activity of dismantling a ship has not been specified in Chapter Notes of the Schedule to the Central Excise Tariff Act, 1985 as amounting to manufacture.

36. Therefore, this writ petition is disposed of by the following directions:

37. It will be lawful for the Central Excise authority to levy and collect excise duty on waste and scrap (Heading No. 72.03) obtained by breaking up ships. But the Central Excise authority will not be entitled to levy and collect any duty on any goods obtained by breaking ships falling under Tariff Item Nos. 72.06, 72.07, 72.08, 72.09, 72.10, 72.11, 72.12 and 72.13 and also goods and materials of Heading Nos. 73.03, 73.04, 73.05, 73.06, 73.07 and 73.08. The interim order is vacated.

38. The writ petition is disposed of finally as above.

39. There will be no order as to costs.

40. This order will govern the other Writ petitions, namely, (1) Lala Shyamlal Jain

Shipbreaking Company and Anr., (2) Amar Steel Industries and Anr., (3) Gopi Chand and Company and Anr. and (4) Shree Parashnath Shipbreaking Company and Anr..

41. Prayer for stay of the operation of the order made on behalf of the Department by Mr. J.N. Ghosh is refused in all the writ petitions.