
(1983) 05 DEL CK 0043

In the Delhi High Court

Case No : Civil Writ Appeal No. 1507 of 1980

Jain Shudh Vanaspati Limited

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 11-05-1983

Acts Referred:

Citation : (1983) ECR 1827 : (1983) 14 ELT 1688 : (1983) ILR Delhi 327

Hon'ble Judges : Rajinder Sachar, J; D.R. Khanna, J

Bench : Division Bench

Advocate : D.D. Thakur, A.J. Rana, P.G. Gokhale, D.P. Wadhawa and Madan Lokur, for the Appellant;

Final Decision : Dismissed

Judgement

Sachar, J.—This petition along with a bunch of petitions will be disposed of by this common judgment as most of the points raised are common, where necessary, we shall deal with a particular petition separately.

2. The petitioners challenge the action of the respondents in demanding the duty of custom on consignment of PVC Resin imported by the petitioners.

3. PVC Resin is classified under Chapter 39 of 1st Schedule to Customs Tariff Act 1975 and falls under heading No. 39.01/0.6 and the rate of duty indicated therein is 100 per cent. However, in exercise of powers u/s 25(1) of the Customs Act. Central Government had issued a notification dated 15-3-1979 exempting the PVC Resin when imported into India, from the whole of the duty of custom livable thereon which is specified in the First Schedule. This notification was stated to remain in force up to and inclusive of 31-3-1981.

4. However, on 16-10-1980 another notification was issued under Sub-Section (I) of Section 25 of the Customs Act in supersession of the earlier notification of 13-3-1979 by which the Central Government exempted PVC Resin when imported into India from so much of the duty of custom livable as is in excess of 40 percent cent ad valorem. The result of this notification was to impose a duty

of 40 percent on imports of PVC Resin from that date onwards.

5. The petition states that the petitioner had placed indent some time in July, 1980 for the import of PVC Resin. The ship arrived at Sand heads (which is within the territorial waters of India) on 7-10-1980. The Import General Manifest in respect of the said vessel was filed with the Customs Authorities on 7-10-1980. The Bill of Entry for Home Consumption was filed on 13-10-1980. Permission was obtained by the petitioner to store the goods in the warehouse pending clearance. The Bill of Entry inwards is dated 23-10-1980. The petitioners when they went to clear the goods sometimes about 21/10/1980 were asked to pay duty of Custom, of 40 per cent 5 per cent plus countervailing 45 per cent plus special 5 per cent on countervailing. The demand was created because the respondents "stand was that in view of notification dated 16-10-1980 duty of custom at 40 per cent was payable, as the goods were admittedly being cleared after that date, when the above rate of duty was leviable. The petitioners challenge this demand for payment of 40 per cent duty of custom.

6. The main thrust and stress in the petition was that acting on the representation made in the notification of 15-3-1979 which was originally stated to remain in force up to 31-3-1980. (But which by means of further notification dated 25-3-1980 substituted for 31-3-1980 the words, figures and letters 31-3-1981), the petitioner had placed orders for import of PVC Resin "in July, 1980 and that it was not permissible for the respondents/Union of India, nay, it was estopped to supersede the notification of 15-3-1979 of total exemption by the notification of 16-10-1980 which only gave partial exemption From the payment of duty of custom as is in excess of 40 per cent. The notification of 16-10-1980 was, Therefore, claimed to be illegal and a clam to import goods without payment of duty of custom was asserted as being vested in the petitioner. Point No. 1 : Is plea of promissory estoppel maintainable?

7. A similar plea of promissory estoppel raised in analogous circumstances was rejected by a Division Bench of this Court in M/s. Super Traders vs. U.O.I. (1983) ELT 258 (1), wherein one of us (Sachar J.) speaking for the Court observed:

These arguments proceed on misunderstanding of the role of importance of Import and Export Policies of a State. In the matter of import and export no party can claim any vested right to compel the Government or the legislature to refrain from making any changes during the financial year. This is because the position of foreign exchange varies so much and the requirement and the considerations of national economy are so urgent that it would be trespassing on the legislative and administrative field if courts were to hold that a rate of duty or tax was immutable for any particular period.

It was also held that these arguments amount to pleading promissory estoppel against the legislature which is impermissible.

8. Again a Division Bench of this Court in Khandelwal Metal & Engg. vs. Union of India & Ors. (1983) ELT 292 (2) decided on 19-10-1982 held that the fact that

the power has been delegated to the Executive to issue a notification u/s 25(1) does not convert that power into an Executive or Administrative power and that such an exercise of power is an exercise of legislative power and no estoppels can be pleaded against a Statute.

9. This matter was considered again by a Full Bench of this Court in *Bombay Conductors & Electricals Ltd. vs. Sh. K. Chandramouli*, C. W. 1295/1980 decided on 3-3-1983. The Full Bench has taken the same view as the *Bombay Conductors and Electricals Ltd.* and another *Vs. K. Chandramouli*, Under Secretary to the Govt. of India and others, earlier Division Benches and has held that a notification under sub-section (1) of Section 25 is a legislative order and against the Statutory notifications issued from time to time u/s 25(1), estoppel cannot be pleaded because of the theory that against the operation of the Statute there can be no estoppel. Point No. 2: Is the Notification of 16-10-1980 issued in the public interest ""

10. The next argument is that no public interest is served by the 16-10-1980 notification superseding the earlier notification by which the which of custom duty has been exempted. There are a series of hurdles for the petitioners to succeed in this plea. This argument is really the same as that of plea of promissory estoppel, though put in adherent manner. We have already held that order u/s 25(1) is legislative in character and there can be no estoppel against the statute. If that be so how can the court be asked to examine the question of public interest. The argument of lack of public interest is really an argument that there is improper motive in this legislative order. This scrutiny is not for the court, for it is well settled that "it is very important to notice that if the legislature is competent to pass the particular law. The motives which impel it to pass the law are really irrelevant."..... " Malice or motive is beside the point, and it is not permissible to suggest Parliamentary incompetence on the score of mala fides".(See *R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another*,).

11. That the invocation of public interest to compel the continuance of total exemption notification of 15-3-1979 is misconceived, and it has been so held in the *Bombay Conductors case (supra.)*, where Avadh Behari, J. speaking for the Court observed:

Now if the Central Government in public interest decides to grant exemption at one moment and decides to withdraw it at another the court cannot compel it to continue the exemption beyond the time it (the Government) thinks necessary in public interest to do. This applies to the power to issue notifications whether they are time bound or not.

Next limb of the argument is that the considerations which weighed with the Central Government in issuing notification of 16-10-1980 are not germane to public interest. This argument asks the court to substitute its opinion for that of Central Government to which the statute has entrusted it, which is

impermissible. As said by one of us (Sachar, J.) in *Super Traders* case (supra) that "the Courts are not concerned with the wisdom and expediency of a policy. Their concern is the legality of the action. Once the legislation or the executive action steers clear of constitutional or legal prohibitions it must be allowed to experiment with any administrative policies which are felt in the circumstances to best serve the public interest. We must not forget that as to what duty is to be imposed are matters of administrative policy with which the Courts have no concern for the simple reason that they do not have the expertise nor possess all relevant information.

It is not the province of the judiciary to inquire whether the excise is reasonable in amount or in respect to the property to which it is applied. Those are matters in respect to which the legislative determination is final.

[Vide *Patton v. Brady* 184 U.S. 608 (5)1.

12. Estoppel cannot be invoked where the result will be to compel the Government to continue the exemption which a competent enactment has validly authorised the executive to withdraw in the public interest at any time. In public interest exemption can be granted. In public interest exemption can be rescinded" [see *Bombay Conductors*" case (supra)]

13. In that view, as observed above, it is really unnecessary to examine the circumstances from which the Central Government was satisfied that it was necessary in the public interest to issue the notification of 16/10/80. In that context there would be no infirmity as was sought to be urged by Mr. Gokhle, the learned counsel appearing in one of the Civil Writ petitions, to the effect that no facts had been placed in justification of the later notification which dealt with the item, unlike PVC Resin which is the item imported in most of the writ petitions. But nevertheless, Mr. Wadhwa the learned counsel for the Union of India, stated that consideration was given in detail by the Central Government when issuing the impugned notification in the same manner as was done when issuing the impugned notification of 16-10-80 dealing with PVC Resin. As a matter of fact detailed justification is given in the reply of Union of India to support its action in having issued the impugned notification of 16-10-80. Thus in denying the allegation made in the writ petition C.W. 1508/1980 that there was no new things or supervening circumstances which could form the basis for justifying the withdrawal of earlier notification of 15-3-1979 and that no public interest was served by the subsequent notification of 16-10-1980, it is explained in the reply that the original notification of 15-3-1979 had given full exemption from the payment of duty of custom because at that time international prices were high and this was done to enable the indigenous processing industries to get imported material. But sometime in the middle of 1980 international prices of resins including P. Chloride registered a fall and it was found that the average CI prices had gone down from 950 dollars in June 1980 to 700 dollars in July 1980. But even then indigenous PVC was being priced at a level much higher than the landed costs. In order to give protection to the indigenous industries against the

anti-dumping from multi-nationals abroad full exemption notification was notified by only giving partial exemption. Even then it was found that the difference between the landing costs at the old rate of duty and the then existing ex-factory price of India was around Rs. 4,500 prior to the duty charged in October, 1980. Similar exercises were also done in earlier years and it is pointed out that whereas prior to November, 1977 duty of custom was 60 per cent it was reduced to 30 per cent up to March 1978. It was 100 per cent from 1-4-1978 to 26-7-1978 and was 60 per cent thereafter up to 14-3-1979, then was 40 per cent subsequent to 16-10-1980. Split up of price shown for the month of July and August, 1980 shows that the total prices for the indigenous PVC resin in September, 1979 worked out to Rs. 9570 while for the imported PVC it was Rs. 10,960 i.e. a difference of Rs. 1390 in favor of indigenous resins. In July 1980 the indigenous PVC resin was selling at Rs. 13,330 per tonne while imported PVC was selling at Rs. 8,800 per tonne, thus creating a difference of Rs. 4530 per tonne in favor of imported resins. Even while making the above changes and after the issue of notification of 16-10-1980 a difference of about Rs. 800 per tonne was maintained in favor of imported resins. These facts are detailed in support of the plea that public interest required preventing anti-dumping operations from abroad and further public interest was kept in view by reducing the difference between the imported PVC resin and the indigenous price to a reasonable margin which still permitted the indigenous consumer to get the imported material either at the price of domestic material or even from abroad. The petitioners argument seems to suggest as if public interest is only for the importer so that if he could import PVC as he was doing in, July 1980 with a margin in favor of the imported PVC resin of Rs. 4530 all this benefit should have been allowed to remain. By modifying full exemption public interest is served by state sharing a part of Revenue and yet give reasonable protection to the local industries. Thus even on the short ground of facts it can not be suggested that there was no reasonable ground for the Central Government to be satisfied that it was necessary that full exemption which had been granted by 15-3-1979 notification should be modified to provide for partial exemption, as per 16/10/80 notification. Though we have examined the details we must reiterate that in these matters of policy decision concerning international trade and commerce the decision taken by the authorities concerned must be accepted without demur and courts should not be expected to launch into the desirability, the economic wisdom, the soundness of monetarists policies which are necessarily involved when such decisions are taken by the Central Government, if for no other reason than that to assess the court has not the necessary data and material to assess the situation, apart from the question of these policy decisions being beyond the ken of judicial scrutiny and field, in the absence of any constitutional infirmity.

The quantum of tax levied by the talking statute, the conditions subject to which it is levied, the manner in which it is sought to be recovered, are all matters within the competence of the Legislature, and in dealing with the contention raised by a citizen that the taxing statute contravenes Article 19 Courts would

naturally be circumspect and cautious. (Vide Rai Ramkrishna and Others Vs. The State of Bihar,).

14. An argument was raised that as it has been alleged that the withdrawal of total exemption by notification of 16/10/80 was not in the public interest, onus was on the respondent to show that this was in public interest. In our view the argument is misplaced. There is a presumption that official acts have been done bona fide. "If the Government decides an economic policy that import or export should be by a selected channel or through selected agencies the court would proceed on the assumption that the decision is in the interest of the general public unless the contrary is shown". (Vide Daruka and Co. Vs. The Union of India (UOI) and Others,).

15. Mr. Kohli appearing for some of the petitioners made bold to say that once having issued a notification of 15-3-1979 the Central Government was denuded of any power to issue again a notification like 16-10-1980. which had the effect of modifying the total exemption to partial exemption. The argument is understandable. It is well settled that under the General Clauses Act an authority which has the power to issue a notification has the undoubted power to rescind, modify the said notification in the like manner. Reference to Section 159 by Mr. Kohli only shows that a notification issued u/s 25 has to be placed before each House of Parliament and if both Houses agree in making any modification or both Houses agree that the notification should not be issued the rule or notification shall have effect only in such modified form or be of no effect as the case may be. It is not Mr. Kohli's case that the notification issued on 15-3-1979 or 16-10-1980 did not comply with the provisions of Section 159. He, however, sought to urge that as the earlier notification of 15-3-1979 had not been modified by the Parliament it became immune and Central Government could not thereafter issue a notification modifying the total exemption to partial exemption. It is a strange argument because it is the Central Government which initiated the earlier notification of 15-3-1979 and it is the same authority later on which is to initiate any subsequent notifications. The Central Government when issuing notification u/s 25(1) is not in any way violating the mandate of Parliament because in fact the power to issue a notification u/s 25(1) is a delegation of the legislative power given to the Central Government, and in any case the notifications were placed before the Parliament. It is not suggested that any modification was made in the notification issued on 16-10-1980. by the Parliament, as originally issued by the Central Government. This part of the contention of the petitioner, therefore fails. POINT No. III: What is the date applicable for rate of duty for imported goods?

16. Faced with this situation Mr. Thakur and Mr. Rana, counsel for the petitioners (in C.W. 1507 & 1508/1981) made the alternative plea, their main plank of attack. It is urged that as the ship bringing the imported good centered the territorial waters on 7-10-1980, the chargeable event occurred on that date. The next limb in the argument is that as the notification of 15-3-1979 granting full

exemption from the levy of duty of custom, was continuing on that date the rate of duty payable by them must be judged with reference to that date i.e. 7-10-1980, which is obviously nil. It is the validity of this argument so strenuously canvassed before us by Mr. D. D. Thakur and Mr. Rana, that has now to be examined.

17. Section 12 of the Customs Act provides that except as otherwise provided in the Act..... duty of Custom shall be levied at such rates as may be specified under the Customs Tariff Act. A reference to the Tariff Act shows that the goods imported by the petitioners are covered under Heading 39.01/0.6 of the First Schedule to the Tariff Act the rate of duty is 100 per cent. Section 25(1) however, empowers the Central Government to exempt goods of any description from the whole or any part of duty of custom livable thereon. As mentioned above the original notification of 15-3-1979 exempted the goods from the whole of duty of Custom livable thereon. This, however, underwent a change and by the notification of 16-10-1980 the duty of custom livable is now 40 per cent. The ship carrying the consignment for the petitioner entered the territorial waters on 7-10-1980. The Bill of Entry, however, bears an endorsement of Entry inwards on 23-10-1980: the goods were sought to be removed from the warehouse subsequently. It is not disputed by the counsel for the respondents that if goods had been removed from the warehouse earlier to 16-10-1980 there could have been no demand for duty of custom. On their side it is conceded by the counsel for the petitioners that if ship carrying the goods had entered the territorial waters after 16-10-1980 the same would have to bear levy of duty of custom at 40 per cent in terms of 16-10-1980 notification. But the counsel for the petitioners, contend that the moment the ship entered the territorial waters on 7-10-80 the importation took place and was complete and the rate of duty of custom livable is that prevailing on that date, which because of notification dated 15-3-79 of full exemption would be Nil (duty). Support from this contention is sought from Section 2(23) of Act which defines "import to mean bringing into India from a place outside India" and Section 2(27) which defines India" "to include the territorial waters of India". This argument proceeds on the assumption as if the Act gives no indication as to how to determine the date for rate of duty. Rather the contrary. The Act specifically fixes a date for determination of rate of duty..... of imported goods, in Section 15 of the Act which reads as under:

DATE for determination of rate of duty and tariff valuation of imported goods. (1) The rate of duty and tariff valuation if any, applicable to any imported goods, shall be the rate and valuation in force, : (a) in the case of goods entered for home consumption u/s 46, on the date on which a bill of entry in respect of such goods is presented under that section;(b) in the case of goods cleared from a warehouse u/s 68, on the date on which the goods are actually removed from the warehouses; (c) in the case of any other goods, on the date of payment of duty; Provided that if a bill of entry has been presented before the date of entry inwards of the vessel by which the goods are imported the bill of entry shall be

deemed to have been presented on the date of such entry inwards. (2) The provision of this section shall not apply to baggage and goods imported by post. 18. In terms of Section 15 as the goods could obviously be cleared only after 23-10-80 the date of Entry inwards on Bill of Entry, the rate of duty applicable must be determined with reference to that date which evidently will have to be calculated in terms of the impugned notification dated 16-10-80, which was then in force. This is precisely what the Custom authorities are seeking to do. The counsel for the petitioners however, insists that the date for determination of rate of duty is 7/10/1980 when the ship entered the territorial waters of India as the import took place on that date and chargeability would be Nil on that day and anything subsequent to that date is irrelevant for the levability of duty. For this contention they mainly rely on the decision of a Division Bench of Bombay High Court (1978) 2 Bom 435 = D. S. Sawhney v. M/s. Sylvania and Laxman Ltd. (1975) 77 B.L.R. 380 (8). In that case notification giving total exemption from the whole of duty livable was in force on 29-3-67 when the ship entered the territorial waters of India. The said notification was in force only up to 31-3-1967. The Bill of entry was filed on 27-4-1967, goods were cleared in June, 1967. The demand of the Custom from levy of duty on the importer was quashed by the Bench because it took the view that the taxable event occurred when the goods entered the territorial waters of India, and the import was thus complete when the goods crossed the custom barrier which was prior to 31-3-1967. The Bench rejected the claim of custom that date has to be determined in terms of Section 15 of the Act. It held that reading Section 2(23) and 2(27) that import takes place when goods are brought into territorial waters of India from place outside India. It was also of the view that a clear distinction exists between the concept of chargeability and the concept of assessment or quantification of the amount payable by way of custom duty. Though it was noticed that Section 15 of the Act specifies the date for determination of rate of duty, but yet it was held that this is entirely different from the chargeability which arises simply by section 12(1) of the Act, which is when goods are brought into territorial waters of India. The bench rejected the contention of Custom that rates of duty must be worked out in terms of Section 15. According to it the moment goods entered territorial waters that was the relevant date, and as exemption notification was in force on 29-3-67, no duty was payable. With all our respect to the learned judges we are unable to agree. Now Section 12(1) specifically provides that except or otherwise provided in the Act, duty of custom shall be levied at such rates as specified in Tariff Act. Now goods imported are dutiable goods, as being covered by heading 39.01/0.6 in the Schedule to the Tariff Act.

19. Then comes Section 15(1) which lays down in various clauses, the rate of duty, if any, applicable to any imported goods, and to relate it to a definite date with reference to a particular event, like presentation of bill of entry [vide clause (a)] or on the date when goods are naturally removed from the warehouse [vide clause (b)] or on the date of payment of duty [vide clause (c)]. The learned judges in Sylvania case, with respect, omitted to notice that Section 15 does not,

only talk of the rate but also talks of the date with reference to which alone the rates can be calculated. In our opinion it would be wrong to read that Section 15 covers only the quantification but the date with reference to which quantification let to be done could relate back to the earlier period of time when the ship had entered the territorial waters. Statute is clear that irrespective of the date when ship enters territorial waters calculation for the purpose of rate of duty must be done with reference to the date mentioned in Section 15 in various circumstances. Now if at that date there is no exemption notification u/s 25 of the Act the goods imported by the importer would bear a rate of duty as mentioned in the Schedule (100 per cent in the present case). But if by virtue of notification u/s 25(1) of the Act there is total or partial exemption, effective rate of duty will be correspondingly worked out. In the present case it would be Nil duty prior to 16-10-80 and 40 per cent subsequent to that. This is the only effect of a notification issued u/s 25(1) of the Act. It does not in any manner change the date of importation for the purpose of duty. We feel that this misapprehension in Sylvania case arose presumably from the fact of resuming that when a notification u/s 25(1) has been issued exempting the goods from the whole of the duty of custom leviable, it has the effect as if the entry in question has been deleted from the first Schedule of the Tariff Act so that, Section 12(1) is inapplicable. This is a misconception on a point of law. As a matter of fact the notification u/s 25(1) is issued precisely because the goods are covered by First Schedule to the Tariff Act and are subject to duty of Custom. The heading 39.01/0.6 of Tariff Act continues to cover the goods in question. Issue of notification u/s 25(1) does not mean that the goods in question are not chargeable to the levy of duty u/s 12. To take the present exemption notification issued on 16-10-80 where the exemption is given from so much of duty of custom as is in excess of 40 per cent it cannot be urged that part of the goods are not chargeable to duty of custom. In fact the whole of goods are chargeable. Only effect of section 25(1) notification is to reduce the effective rate of duty leviable. Goods in question continue to be dutiable as held in a Division Bench judgment of this court in Vishal Andhra Industries v. Union of India & others (in CW 720/1982 decided on 19-3-1982. When Therefore, a question is posed before the Customs authorities as to what rate of duty is to be charged on the imported goods, he has to look at section 12 and find out whether the goods imported is subject to duty of custom under the Tariff Act. If it is so, the further step is to find whether there is any exemption notification, total or partial u/s 25 and then to work out the effective rate of duty of custom. But the calculation obviously has to be relate able to some date. The legislature has not left that vague, but has chosen to particularize the dates in Section 15 of the Act. Ignoring of this reference to dates in Section 15 really amounts to corroding and making Section 15 redundant. It is well settled that no superfluity can be attributed to the legislature. When specific provisions fixing date for rate of duty is given by the statute (Section 35) it is not permissible to indulge in any alternative exercise to fix other dates. The fallacy in Sylvania's case flows from giving a broad meaning to what would constitute import by merely relying on the definition of India" as

including territorial waters of India. Technically and loosely under the Act it may be that goods are imported when they enter the territorial waters of India. But from that the consequence does not necessarily follow that for the purpose of working the rate of duty payable on such imported goods the time and date has not to be calculated in accordance with Section 15 even when it is so statutorily provided. This general meaning of the word "import" as argued by the petitioner has not been accepted by the courts as laying down correct law. Reference may with advantage be made to *Express Mills v. Municipal Committee, Wardha* AIR 1958 SC 347 (10). In that case it had been argued for the Union of India that the import should bear the ordinary dictionary meaning of bringing into and export should bear the meaning of taking out. Large number of High Courts in India had taken this view. The Supreme Court however, rejected this and held that "by giving the word "imported into" or "exported from" their derivative meaning without any reference to the ordinary connotation of these words as used in the commercial sense, the decided cases in India have ascribed too general a meaning to these words which it appears from the setting context and history of the clause was not intended." "Such an interpretation would lead to absurdity which has, according to the rules of interpretation, to be avoided," (para 22). The Supreme Court, therefore, quoted with approval the observations of Chief Justice Marshall in *U.S. Supreme Court* as follows:

Duties, according to that practice are charged on those articles only which are intended for sale or consumption in the country. Thus stores, goods imported and re-exported in the same vessel, goods landed and carried over land for the purpose of being re-exported from some other port, goods forced in by stress of weather and landed, but not for sale are exempted from the payment of duties. The whole course of legislation on the subject shows that in the opinion of the legislature the right to sell is connected with the payment of the duties"...."sale is the object of importation, and is an essential ingredient of that intercourse, of which importation, constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself...

(Vide para 23). It then went on to observe that

IMPORT is not merely the bringing into but comprises something more i.e. "incorporating and mixing up of the goods imported with the mass of the property" in the local area. The concept of "import" is as implying something brought for the purpose of sale or being kept.

Similarly in *Re: Sea Customs Act*, S. 20 AIR 1963 SC 1760 (11) the Supreme Court held that "truly speaking the imposition of an import duty, by and large, results in a condition which must be fulfilled before the goods can be brought inside the customs barriers, i.e. before they form part of the mass of goods within the country". A futile effort was made by the counsel for the petitioners to distinguish *Empress Mills Case* (supra.) by urging that the definition of import was not given therein while the same is mentioned in the Customs Act. This distinction is meaningless because the Supreme Court was clearly laying down as

to what is the meaning to be given to the word Import" not for the purpose only of Octroi duty but for the purpose of showing as to what import really signifies, and emphasising that import must result in incorporating and mixing up the goods imported with the mass of property in the local area.

20. It was then suggested that State of Maharashtra Vs. Hans George, would show that bringing into territorial waters would amount to import. That case, in our opinion, rather goes contrary to the petitioner's contention. In that case Section 8 of the Foreign Exchange Regulations Act laid down that no person shall except with the general or special permission of the Reserve Bank bring or send into India any gold. Explanation provided that bringing into any port in India of any such article intended to be taken out of India without being removed from the ship or conveyance in which it is carried shall nonetheless be deemed to be bringing as the case may be or sending into India articles for the purpose of the Section. The Reserve Bank had issued a notification that except with the permission of the Bank no person shall bring or send into India any gold. Now the passenger was traveling from Zurich to Manila and in the manifest he was shown as transit passenger. His plane landed at Bombay Air-port and the Custom Officers found gold from him. By a majority the Supreme Court held that offence had been committed by the passenger. It will be seen that but for the Explanation the court would have held that no offence was committed because even though the words "bringing into India" were used in Section 8(1), in the absence of Explanation as the passenger had no intention to land and bring the goods into India but was only in transshipment, there would have been in law no bringing in of the goods into India. That is why Explanation had to be inserted to create a fiction that notwithstanding that the goods are not removed from the ship in which it is being carried it shall nevertheless be deemed to amount to bringing into India of that article for the purpose of that Section. This case really supports the contention of the respondents that import can only take place at the point of time when the goods are off-loaded to form a part of the mass of goods in the main land. Applying the same ratio to the present case bringing into territorial waters cannot amount to import for the purpose of duty leviable.

21. There are also serious and grave implications involved in accepting the argument that import should be deemed to be complete for the purpose of calculating the duty of custom the moment a ship enters the terrestrial waters of India.

22. It will be seen that there is no definition of territorial waters of India in the Customs Act 1962. However, under the Territorial Waters Continental Shelf Act No. 80 of 1976 Section 2 defines the limit in relation to territorial waters, the continental shelf..... to mean the limit of such waters, shelf..... Section 3(2) say "the limit of territorial waters is the unit of every point of which is at a distance of 12 nautical miles from the nearest point of the appropriate base line. Section 3(3) empowers the Central Government whenever it considers necessary to alter the limits of territorial waters. Now if the argument of the

counsel for the petitioner was to be accepted that import for fiscal purpose must be deemed to have taken place and rate of duty to be calculated with reference to that point of time when the ship enters the territorial waters of India grave and anomalous and unpredictable consequences can follow. As territorial waters extend up to 12 nautical miles from the base line the question as to and at what particular time a ship entered the territorial waters can always become a subject matter of debate and dispute between the importer and customs authorities. It is evident that there is no machinery with the customs authorities to keep a check and to know the exact lime when the ship enters the territorial waters. To take the dates of the Sylvania case the difference between the two dates i.e. 29th of March and 31st of March, was so closes as to cause problem if enquiry in all such cases is to be held. Section 15 when it specifies the test with reference to which date is to be fixed for the purpose of calculating the rate of duty has obviously the merit of providing a definite and specific event about which there can never be any dispute between the importer and the Custom Office. Section 7 authorises the Central Government to appoint ports and Air Ports which alone shall be the Custom Ports for the unloading of imported goods. Obviously, therefore, the question of calculating the duty cannot arise unless the conditions for the unloading at the place specified has been reached and that obviously is not reached in the territorial waters i.e. a distance of 12 nautical miles from the base line. Section 12, Therefore, when it levies a duty on goods imported into India must necessarily refer to the stage of time when goods are to be unloaded at the Custom Port specified u/s 7. It is apparent that as to what rate of duty is livable depends on the classification of goods which must require inspection by the Customs authorities. This is obviously impossible while the goods are on the ship which is still in the territorial waters. This element of certainty is powerful factor for interpreting Section 15 of the Act, as contended by the respondents.

23. "Import" Therefore must necessarily mean at a point of time when the goods are to be off loaded from the ship so that thereafter they form a part of the mass of goods in the country of consumption. To take an instance if a ship passes through the territorial waters of India onwards to Colombo (Sri Lanka) it is apparent that no custom duty is payable by the ship and yet the ship had entered the territorial waters of India, this instance would show the infirmity in the contention of counsel for the petitioners. Reference may also be made to 1898 App Cas 735 (13). In the case Section 4 of the Customs Tariff Act provided for levying of Custom duty on all goods enumerated, the several rates of duties when such goods are imported, into Canada. Raw sugar of the description imported by the party could be imported free under old Schedule. But Schedule "A" to the Tariff Act was amended and a duty imposed. This amendment came into force on 3-5-1895. The ship sailed from Antwerp with sugar consigned for Montreal. On 29-4-1895 the vessel put into the Port of North Sidney, Canada. The ship reached Montreal on May 4, 1895. Before the arrival of the ship i.e. 2nd May, 1895, entry had been made at Montreal Custom House. Section 25 of Tariff Act required a master of every vessel when entering into the port in Canada to

report to Custom Office which was done. Section 31 required that when any goods are brought in any vessel from any place out of Canada to any port of entry and not landed but is intended to convey to some other port, the duty shall not be paid or entry completed at the first port but at the port here the goods are to be landed. Section 150 provided that wherever on the levying of any duty for any purpose it becomes necessary to determine the precise time of importation of any goods if made by sea it shall be deemed to have been completed from the time the vessel in which such goods were imported came within the limits of the port at which they ought to be reported. The importer maintained that as ship had reported on 29th April 1895,(before 2nd May) at North Sydney, Canada, no duty was leviable, because importation was complete on 29th April, 1895. This plea of the company was rejected by the Privy Council. It posed a question as to whether the sugar was imported before or after 3-5-1895. Their Lordships made the following observation on the phrase "imported into Canada :

(1)The imposition of the duties is contained only in the direction for their payment. There are no words which render the goods liable for the duty or make the duty (as it said) attach at any date prior to the date of payment. (2) The words "when such goods are imported into Canada" express the time at which the duties are to be paid.

Their lordships also further emphasised.

THE result is that, in the opinion of their Lordships, the words "imported into Canada" must, in order to give any rational sense to the clause, mean imported at the port of discharge, and cannot be used in the sense attributed to the words" imported "by the appellants, in accordance with the construction placed by them on the definition in s.150 of the Customs Act.

24. Reference with advantage be also made to *Wilson v. Chambers and Company Proprietary Ltd.* (1926) 38 C.L.R.131 (14). In that case the company was the consignee of paint ship from England which was sent to Sydney (Australia).Ship arrived at port Kembla which was a proclaimed port and a custom officer was in attendance there. One Chambers purchased the paint while it was on ship and thereafter the ship left the port but without paying duty. Chambers was charged with offences for failing to enter the goods and for evading payment of duty. Section 68 of the Customs Act provided that all imported goods shall be entered either for home consumption or for warehousing or for transshipment. The question was whether the goods were imported within the meaning of the section. It was admitted case that the ship came to port and the only reason given why the goods were not landed was because Chambers had agreed, while the ship was in the port, to sell them to the owner of the ship. The argument was that as goods had not been taken off the ship there was no import. This plea was rejected, though Chief Justice Knox agreed (page 136) that goods are imported whenever they are brought into port for the purpose of being discharged there. But he held that goods had come at the port of destination and their character of

importation cannot be affected merely because the goods had been sold while on the ship. That entering merely the territorial limits would not amount to import was said by Starke J. when he observed :

They may be imported by means of a ship or aircraft or through the post (cf. see s. 49 and 35). They may be brought within the territorial limits of Australia, and may indeed be subject to Custom control and yet not be "imported" in the fiscal sense of the term. Thus goods shipped from England to New Zealand via Australia are not imported into Australia because in the course of her voyage the ship with the goods on board comes within the territorial limits of Australia for commercial purposes. Yet such goods would be subject to the control of the Customs (Customs Act. section 31). Again goods coming ashore from wrecks could hardly be classed as imported goods, and the Customs Act has made special provisions to meet the case (vide see s.65, 66, 67 and 148).

25. Reference to the Australian cases noted in *Shri Ramlinga Mills v. Assistant Collector of Customs* (1983) E.L.T. 65 (15), is of great help where Gibbs J. was quoted as having held that (para 17) "However whether or not the sea within three nautical miles of the coast should be regarded as part of Australia for other purposes, it is, in my opinion clear that goods are not imported simply by bringing them within the three miles limit." Barwick C, J. also was thinking on the same lines when he observed in the aforesaid decision:

However, in any case, it is to my mind a completely impractical concept that importation of goods takes place so soon as and wherever the ship carrying them enters the marginal seas, perhaps only to leave them again for navigational purposes as it moves towards the port of discharge.

26. In *Union of India and Others Vs. Khalil Kacherim*, (16), a passenger traveling by air landed at Bombay. He declared to custom officer that he was carrying some diamonds but for re-export. Later on the diamonds were seized on the ground that they were imported in Indian Custom barriers contrary to prohibition, as contained in Section 111(d) of customs Act 1962. The argument of Union of India was that the moment the plane landed at Palam Air port, New Delhi there was import of diamonds into India. Rejecting the contention, a Division Bench of this Court observed as follows :

I am not prepared to accept this contention because if this contention is accepted any goods or articles which are contained in a plane which has landed in India or in a ship which has entered the territorial waters of India would be liable to the payment of duty or to confiscation if the import thereof is prohibited even though the goods or articles are no unloaded from the plane or the ship for being brought into India.

UNLESS, therefore, the goods are brought into the country for the purpose of use, enjoyment, consumption, sale or distribution so that they are incorporated in and mixed up with the mass of the property in the country, they cannot be said to have been imported or brought into the country.

We are in respectful agreement with the said view. It is significant to note that Sylvania's case proceeded on the assumption that the Bombay High Court case Gopal Mayaji Prab and Another Vs. T.C. Seth and Another, (17) where a learned Judge had made the observation that the act of importation would be complete at the period of time when the goods crossed the custom barrier, was approved in Radha Kishan Bhatia Vs. Union of India (UOI) and Others, it meant that it had also been decided that the rate of duty must be worked out when the ship crossed the territorial waters of India. We may with "respect point out that the issue in Radha Kishan's case (supra) was very different from the present one. In that case the question was with regard to Section 167 (8) of the Customs Act of 1878 which provided that if any goods the importation of or exportation of which is for the time being prohibited, any person concerned in any such offence shall be liable to penalty. In that case gold was seized from the accused when he was going from Jaisalmer to Pokharan (both within India). The Supreme Court held that accused could not be concerned in the commission of offence, if he was not responsible for bringing the gold in India. It was in that connection that it was observed that "offence of importation of goods is complete when the goods have crossed the Custom barrier". No question of levy of duty arose, or the larger question of what constitutes import for the purpose of duty. as explained in various cases mentioned above. This misconception in our humble view is to be taken as a wrong view of law in Sylvania's case.

27. That the Sylvania case had taken too extreme and untenable a view in not applying Section 15 of the Act was recognized in the later Division Bench of Bombay High Court in *Synthetic and Chemicals Ltd. v. S.C. Coutinho and others* 1981 E.L.T. 414 (Bom.) (19). In that case the ship arrived in the territorial waters on 20-8-1968. The Bill of Entry was also prepared for storing the goods in warehouse on the same date. At that time duty was 60 per cent. Sometime later a notification was issued u/s 25(1) of the Act on 12-10-1968 where duty in excess of 27 1/2 per cent was exempted. Goods were removed in December 1968 to June 1969. The importer claimed that he was liable to pay a duty of 27 1/2 per cent. The learned single judge following Sylvania's case held that as the ship entered the territorial waters earlier to the exemption notification of 12-10-68 the importer was liable to pay 60 per cent. Importer filed appeal which was allowed and it was held that the importer was liable only to pay 27 1/2 per cent of duty which was in existence on the date the goods were cleared. It is clear that if Sylvania's case was to be followed the importer should have paid 60 per cent duty because at the time when it entered the territorial waters this was the rate of duty. The Bench however held that the relevant date for calculating the duty would be the date of actual removal in terms of Section 15(1)(b) read with Section 68 of the Act. The Bench, purported to restrict the ratio of Sylvania's case only to a case where on the date of importation there was a total exemption but not if there was a partial exemption. It distinguished Sylvania's case by observing that when there is total exemption it is as if Entry is not there, and such a case there is no chargeability and the goods are not liable to duty. Here

again, the Bench misappreciated the position in law, for as we have pointed out above, notwithstanding the total exemption, goods remain chargeable by virtue of Section 12(1) of the Act (the Entry in Tariff Act is not deleted). Only effect is that duty is not payable because of total exemption. Goods can be said to be not chargeable only when the said goods do not fall within any entry in the Tariff Act. In our view Synthetic Chemicals "case came to the correct conclusion that the rate prevalent on the day of clearance will apply u/s 15(1)(b) of the Act. Having come to the above conclusion the Bench could not still have distinguished Sylvania"s case and should have held it to be wrongly decided. To hold that if there is a total exemption when the goods enter the territorial waters but later on that exemption is withdrawn, the goods will still be chargeable to no duty, is to fall in the error of giving the general meaning to the word "import" which has been criticised in Empress Mills" case (supra).

28. In our view the fixation of the date for the purpose of duty is not affected whether there is total exemption or a partial exemption. Synthetic Chemicals" case (supda) accepts that if by exemption notification duty was chargeable at the rate of say, 1 per cent at the time ship enters territorial waters but by the time goods were cleared exemption had been withdrawn and duty was chargeable at 100 per cent, importer would have to pay the rate of duty at 100 per cent. But curiously holds that if because of total exemption the rate of duty is Nil, at the time the ship entered territorial waters and even if it has been withdrawn before clearance of goods importer will not be liable to pay duty at the rate applicable at that time. With respect we can find no logic or consistency in this approach. Either one holds that import is complete at the time when ship enters territorial waters and that point of time: would determine the rate of duty which is applicable (as Sylvania"s case held). But Synthetic Chemicals" case does not so hold, but says the rate applicable is u/s 15(1)(b) of the Act. It thus accepts that the date of import (in the loose sense) in the sense of entering the territorial water of India has no relevance for determining the rate of duty which must be worked as u/s 15(1) of the Act. Though Mr. Thakur sought to explain this hesitation in Synthetic Chemicals "case to say clearly that Sylvania"s case was wrongly decided. Mr. Rana took the logical in pursuit of his argument to say that the distinction between a case of total exemption and partial exemption made by the Bench shows an inconsistency and is wrong. According to him there is no difference in either case. Mr. Rana goes to the length of saying that whenever there is an exemption notification issued u/s 25(1) of the Act whether for total or partial the date for levy of duty will always be the date when the ship enters the territorial waters of India. According to him there is exemption from chargeability in one case and in the other the liability is pro rata. The argument so put shows its unsoundness. How can in a case where partial exemption is given can it be said at all that there is no chargeability. In such a case the whole of the consignment is chargeable to a duty. Only because of partial exemption rate of duty will be calculated at 40% instead of 100 per cent. For calculation, the total value of consignment will bear a levy of duty at a rate of 40 per cent, and not

that 40 per cent value of consignment will be levied a duty at a rate of 100 percent. The argument of Mr. Thakur suffers from the infirmity of assuming that if there is nil assessment the goods cease to be dutiable. As a matter of fact Section 2(2) defines assessment to include provisional assessment.... and any order of assessment in which the duty assessed is nil. Even the word "short levied" under the Excise Act, has been held to include where Nil duty is levied. Thus it has been held that in order to attract Rule 10 of the Central Excise Rules which provides that where duties or charges have been short-levied through inadvertence..... the person chargeable with the duty or charge so short-levied shall pay the deficiency on a written demand by the officer being made within 3 months, to mean that it is not necessary that some amount of duty should have been assessed and that the said amount should also have been actually paid. "That provision will apply even to cases where there has been a nil assessment in which case the entire duty later on assessed must be considered to be the duty originally short-levied". (Vide N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd., . Thus where there is total exemption it amounts to nothing more than saying that nil payment of duty is payable. This does not in any manner make section 15 of the Act inapplicable. When pressed as to when Section 15 will apply, Mr. Rana could only offer on instance when there is an increase or decrease in the rate of duty under the Customs Tariff Act for the time being in force. Thus if when ship entered territorial waters rate of duty is 50 per cent, under the Tariff Act, but when it presents the bill of entry it is raised to 100 per cent, the importer would be liable to pay the later duty i.e. 100 per cent. But this illustration by Mr. Rana itself nullifies his earlier contention that duty must be levied when there is import, which according to him means when the ship enters the territorial waters of India. This will show to what uncut knots this argument of Mr. Rana leads to. In point of fact, that rate of duty has to be calculated with reference to the date and point of the time mentioned in Section 15 of the Act stands concluded by the decision in Prakash Cotton Mills (P) Ltd. Vs. B. Sen and Others, (as was even noticed in Synthetic Chemicals" Case).

29. In Prakash Cotton Mills" Case, the facts were that the Bill of Entry was filed on 23-8-1965. The goods were kept in warehouse on 22-9-1965. Currency was devalued in June 1966 and the Customs Amendment ordinance was promulgated in 7/07/1966 by which Sections 14 and 15 were amended. The goods were cleared in September and December, 1966. The grievance of importer was that goods were allowed to be cleared on payment of enhanced duty according to the amended provisions of the Act. The Custom Authorities held that they were liable to pay the enhanced duty. The question before the Supreme Court was whether custom authorities were justified in applying the rate of duty according to the rate prevalent on the date of their actual removal from the warehouse. It may be that Section 15 had been amended by Act XX of 1966 by which "Rate of exchange" had been inserted in Section 15, after the word "rate of duty". In the case before the Supreme Court this was the position (it was only by Act 25 of

1978 that the word "rate of exchange" was omitted from Section 15(1), but the same purpose was effected by adding a proviso to similar effect in clause to sub-section (1) of Section 14 of the Act. The argument before the Supreme Court was that the Custom authorities were not entitled to take the new rate of exchange on the depreciated value of the currency into consideration in respect of the consignment as it had been shipped in Bombay and stored in warehouse before the amended Section 15 came into force. This plea was rejected by the Supreme Court which held that it is Section 15 which specifies the date for determination of the rate of duty of the imported goods. It then went on to observe "it is thus clear requirement of clause (b) of sub-section (1) of S. 15 of the Act that the rate of duty, rate of exchange and tariff valuation applicable to any imported goods shall be the rate and valuation in force on the date on which the warehoused goods are actually removed from the warehouse"..... "As it is not in dispute before us that the goods, which are the subject-matter of the appeals before us were removed from the warehouse after the amending Ordinance had come into force on 7/07/1966, the customs authorities and the Central Government were quite right in taking the view that the rate of duty applicable to the imported goods had to be determined according to the law which was prevalent on the date they were actually removed from the warehouse, namely, the amended Sections 14 and 15 of the Act."

30. We can find no feature to distinguish the Supreme Court case from the present case. The Supreme Court has clearly held that rate of duty applicable to imported goods is to be as per Section 15 of the Act notwithstanding that the goods may have entered the territorial waters earlier to the amended ordinance. In face of such authoritative pronouncement it is futile for the petitioner to contend that the relevant date for determination of duty is the time when goods enter the territorial waters of India. We have no doubt that had the learned Judges deciding Sylvania's case the benefit of opinion expressed in Prakash Cotton Mills case (supra), their decision would have been to the contrary. Admittedly in all the cases either the presentation of Bill of Entry, or the date of entry inwards or the date on which the goods are actually removed from the warehouse are all subsequent to the notification of 16-10-1980. As such the rate for determination of duty is the one relevant subsequent to that date and by then total exemption had been withdrawn and it was only partial exemption of duty as was in excess of 40 per cent. The demand of the Customs Authorities in applying Section 15, Therefore, could not be faulted. The effort of the counsel for the petitioner to pre-date the time for calculation of duty at a point of time when ship entered the territorial waters, has nothing to commend itself either in principle or law. In this connection reference may also be made to The Collector of Customs, Calcutta and Another Vs. G. Dass and Co. and Others, . There Section 37 of the 1878 Act (corresponding to the present Section 15) provided that the rate of duty applicable to any imported goods would be the rate in force on the date on which the Bill of Entry is delivered to the customs Collector u/s 86, but Section 86 provided that the Bill of entry could be delivered upon and

before the landing of the goods. On 27-4-1955 the importing vessel obtained the order for inward entry up to 30/04/1955 the rate of duty was Re. 1 per pound and subsequently it was reduced to 12 annas per pound. Cargo was discharged after 30-4-1955. The Court held that even though the Bill of entry had been given earlier to 30-4-1955 but as u/s 86 it could be delivered only on the date of landing the Bill of Entry even if presented earlier must be deemed to have been delivered on the landing of the goods i.e. after 30-4-1955 and the rate of duty chargeable on the imported goods must be the rate in force on that date. It was consequently held that the importer was liable to pay reduced duty, i.e. at the rate of 12 annas per lb. only.

31. That it is section 15 which determines the date for calculating the rate of duty is also the view of other High Courts.

32. In *K. Jamal Co. V. Union of India* 1981 23 ELT 162 (Mad.) by means of a notification of 1-7-1977 there was a total exemption on the import of palmoline. The importer's ship arrived on 22-2-1979. On 1-3-1979 another notification was issued by which the exemption was given as is in excess of 12.5 per cent. The Bill of Entry was filed by the importer on 13-3-1979. The importer claimed that he was not liable to pay any duty in terms of 1-7-1977 notification. This plea was rejected and the High Court held that the relevant date is the date for presentation of the Bill of Entry which is 13-3-1979, in terms of Section 15 of the Act.

33. Similarly in *Ramlinga Mills case* (1983) E.L.T. 65 (Ker), u/s 25, notification of total exemption had been issued which was valid up to 30-12-1978. In between the ship arrived at Bombay and then sailed for Cochin which was the destination port, where it reached on 4/01/1979. Subsequent to 5-1-1979 there was again notification giving total exemption. The argument of the importer was that as the goods had entered territorial waters in Bombay by 28th December, and the act of importation was complete and he was entitled to the earlier notification till 31-12-1979, giving total exemption. This plea was rejected and it was held that importation only took place when the vessel crossed the custom barrier at the intended port of importation namely Cochin. The argument of import taking place merely because of goods having entered the territorial waters was rejected. We may note in passing *Sylvania's case* was referred to but it was observed that it was not necessary to examine the correctness of the decision because of the factual changes in that case. Some obiter observations that if the ship enters the territorial waters and hearth at the port of destination it may be that the importation is complete must be read in the context of the clear recognition that *Sylvania's case* was not applicable. These observations cannot be read to mean that for finding out the date Section 15 is not the only relevant section more so when the Kerala High Court noticed the subsequent Bombay case in *Synthetic Chemicals case* and also the Supreme Court case in *Prakash Cotton Mills*.

34. Similar view has also been taken in *Shewbuxrai Onkarmall v. Assistant Collector of Customs & Others* 1981 E.L.T. 298 (Cal) 24. Mr. Rana made an effort

to persuade us to hold by referring to various provisions of the Act that import for fiscal purpose would be complete by the mere entry into territorial waters and inevitably the rate of duty must be calculated on that date. We have already pointed out that this argument ignores Section 15 for which we can find no justification. Reference to Section 2(25) of the Act, to the definition of "imported goods" does not advance the matter for the petitioner. Definition says that "imported goods" means any goods brought into India from a place outside India but does not include goods which had been cleared for home consumption. Thus it is dear "that the goods remain "imported goods" till they are cleared for home consumption, which cannot be done without complying with Section 15, and after presenting a Bill of Entry u/s 46 of the Act. Therefore, the definition of the "imported goods" would suggest that import is not complete only at the time when the ship enters the territorial waters. Rather import is not complete till the goods are cleared for home consumption. This finds from the definition of" importer "which includes an owner in relation to any goods at any time between their importation and the time when they are cleared for home consumption. As a matter of fact a reference to Section 83 will show the hollowness of the argument of the counsel for the petitioners. This section provides for the rate of duty applicable to goods imported by post and provides that the rate in force on the date on which the postal authorities present to the appropriate officer a list containing the particulars of goods for the purpose of assessing the duty will be the rate. Proviso explains that if such goods are imported by vessel and a list of goods containing the particulars was presented before the date of arrival of the vessel it shall be deemed to have been presented on the date of such arrival. Obviously the arrival of the shipments arrival at the port. and not in the territorial waters, because u/s 29 of the Act no one will cause a vessel to call or land on arrival in India at any place other than a custom port. Thus the rate will be determined not by the entry in territorial waters.

35. Reference by the counsel to Section 21 of the Customs Act rather goes against him. This Section provides that all goods derelict, jetsam; flotsam and wreck brought or coming into India, shall be dealt with as if they were imported into India. Now Jetsam is where goods are cast into the sea and there risk and remain under water; flotsam is where the goods continue to float on the surface of the water; Wreck are such goods including the ship or cargo or any part as are afloat or cast upon the land by sea. If the argument of the counsel for the petitioner was correct that mere entering into territorial waters amounts to import for fiscal purposes then this fiction need not have been. created by Section 21 because it would have been superfluous. Why fiction has been created is because under the meaning given to import, it would be impossible to apply this to flotsam, wreck, because these are never meant to form a part of the mass of goods on the main land. There is no question of clearing wreck, jetsam for home consumption, and the question of payment of duty would never arise. But Section 21 creates a fiction of import. This would not have been necessary, if as argued by Mr. Rana import was complete the moment goods enter territorial

waters. This fiction has been created for the obvious purpose so that people engaged in smuggling may not just throw away the goods on the sea or under the sea to be picked up by concerned persons and claim that they were never brought within the port for the purpose of home consumption. It is to check this menace that this fiction has been created.

36. Section 22 which provides for abatement of duty on the damaged or deteriorated goods also supports the contention of the respondents. It will be appreciated that the definition of imported goods does not include the goods which have been cleared for home consumption. This definition would, therefore, include goods which may have been kept in a warehouse but have been damaged before clearance for home consumption in fact it is so provided for in Section 22(c). Similarly Section 22(b) covers a situation where any imported goods are damaged after the unloading but before their examination u/s 17 (for assessment of duty). In both these cases in accordance with sub-section (2) of Section 22 the duty to be charged shall bear the same proportion to the duty chargeable on the goods before the damage or deterioration which the value of the damaged or deteriorated goods bears to the value of the goods before the damage or deterioration. Now If the argument of counsel for the petitioner was correct that rate of duty is to be that which is chargeable when the goods enter the territorial waters, this will come in conflict with Section 22(2) which provides for charging proportionate duty. Evidently Section 22 becomes unworkable if the argument of the petitioners was accepted that the rate of duty should be that which is prevalent at the time when goods enter the territorial waters. On this argument the question of further rebate on goods in warehouse could not arise because the import must on that argument be learned to have been completed much earlier. The only way Section 22 becomes workable is on the argument of respondents that import is not completed for fiscal purposes till the goods are off-loaded and become apart of the mass of goods on the main land.

37. Section 23 which provides for remission of duty where goods are lost before clearance for home consumption evidently contemplates a situation not only where the ship containing the goods had entered the territorial waters but also where the goods had been kept in a warehouse but were destroyed thereafter. Thus this provision also contemplates giving remission much after the ship had crossed the territorial waters of India. This illustration also goes counter to the meaning sought to be given to the word "import" by the counsel for the petitioners.

38. Reference to Section 125(2) is of no assistance because all that it lays down is that a person will be liable to pay duty even if fine is imposed in lieu of confiscation of goods. All that it means is that where the goods are liable to confiscation the officer may instead impose a fine in lieu of confiscation but that would not absolve the person from paying the duty with respect to those goods. This has been provided out of abundant caution so that it may not be used that by paying the fine or by confiscation a demand of duty is not permissible.

39. As a result of the above discussion we find no merit in the contention of the counsel for the petitioners. We are of the view that the time of import of goods and the time for taxability of goods must not be taken to be coextensive and to coalesce at the same time. It may be that the goods are imported in the sense of bringing them within India which includes territorial waters of India. It is true that the moment ship with goods enters the territorial waters of India it would be subject to the control of the custom authorities and would also be subject to the provisions of the Customs Act and the provisions of prohibition and other restrictions placed on the import and the manner of import of those goods. But entry in the territorial waters, though amounting to import yet will not for fiscal purposes, determine the date and time for the purpose of calculating the rate of duty which is livable under the Customs Act and for which we have to look to Section 15 of the Act.

40. We would, Therefore, hold as follows : (a) that for the purpose of calculating the rate of duty livable on the goods imported, the rate of duty applicable to such imported goods shall be the rate on the dates mentioned in Section 15(b) the date for calculation of the rate of duty is not the date when the ship carrying the goods enters the territorial waters but is the date in the context of the various circumstances mentioned and specified in Section 15 of the Act: and (c) that the modification of the earlier total exemption notification dated 15-3-1979 by the later partial exemption notification of 16-10-1980 was in public interest and to subserve public good and is not liable to any constitutional or legal challenge.

41. As a result, the petitions fail and are dismissed with costs. The respondents Union of India will have costs of petitions which we assess at Rs. 1,000 in each petition.

42. As the writ petitions are being dismissed the interim orders permitting the petitioners to import goods without paying the duty asked for by Customs Authorities are hereby recalled and vacated. The respondents are at liberty to take any appropriate steps as advised to realise the amount of duty from the petitioners in terms of the bond and/or bank guarantee and to encash the same which were furnished to them in pursuance of this court's order or to proceed against them for recovery in any way as is leaned proper.

43. We having regard to the general policy of the State and with special reference to Article 39 of the Constitution of India feel that some part of this cost being awarded to the Union of India should be given to a legal aid society. We would, Therefore, direct that out of Rs. 1,000 cost awarded to the Union of India Rs. 250 will be given to the Indian Council of Legal Aid and Advice (110, Supreme Court Chambers) of which Mr. Daniel Latifi is the Chairman. Such a course has the approval of the Supreme Court in *Priya Wart B. K. Dubaldhan and Others v. State of Haryana and Others*, (1982) 2 SCC 142 and *State of Maharashtra v. G. A. Patre and ors.* (26).

44. Per Khanna, J."--The significant question posed in this batch of writ petitions

is when the taxable event in the matter of levy of custom duty on the import of goods take space under the Customs Act, 1962. Co-related and incidental thereto is whether the import and the taxable event must coincide and be co-extensive. This is more so when Section 2(25) of the Customs Act defines "imported goods, "as to mean any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption. Thus once the imported goods are cleared for home consumption and become part of the mass of goods in the country, they cease their character as imported goods. It, however, remains to be ascertained at what stage they became and for how long they remained imported goods before they mingled with the mass of goods.

45. The Customs Act 1962 has consolidated and amended the law relating to customs. The term "import" has been defined in Section 2(23) as to mean bringing into India from a place outside India. The description of "India" on its part includes the territorial waters of India vide Section 2(27). Sub-section 2(28) next defines "Indian customs waters" as to mean the waters extending into the sea up to the limit o contiguous one of India u/s 5 of the territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act; 1976, and includes any bay, gulf, harbour, creek or tidal river. Another important inclusive definition is given in sub"-section 2(22) of "goods" so as to cover vessels, aircrafts" stores," baggage etc. Thus even vessels and aircrafts, are treated as goods, and when they come from any place outside India and are not cleared for home consumption, they acquire and retain the character of "imported goods".

46. A plain reading of these provisions do lead to the inference that the legislature has very much broadened the scope of imported goods from what is commonly and in ordinary parlance understood. Thereby not only those goods which are intended for and actually brought on the land mass of the country and cleared for home consumption, are treated as goods imported, but their very bringing into India including its territorial waters renders them "imported goods". Rather the clearance for home consumption makes them to loose the imported character.

47. Section 12 of the Act which is of considerable significance, and on which much emphasis has been laid from the side of the petitioners, reads as under :-

12. Dutiable goods : (1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall believed at such rates as may be specified under the Customs Tariff Act, 1975, or any other law for the time being in force, on goods imported into, or exported from India. (2) The provisions of sub-section (1) shall apply in respect of all, goods belonging to Governments they apply in respect of goods, not belonging to Government.

48. These provisions thus lay the base for the levy of custom duty and open the goods to chargeability on their import into or export from India. The Section is,

however subject to other provisions contained in the Act or/any other law for the time being in force.

49. Section 15 next on which the Union of India and the custom department have primarily placed reliance intern, reads as under:

15. Date for determination of rate of duty and tariff valuation of imported goods : (1) The rate of duty and tariff valuation, if any, applicable to any imported goods, shall be the rate and valuation in force : (a) in the case of goods entered for home consumption u/s 46, on the date on which a bill of entry in respect of such goods is presented under that section; (b) in the case of goods cleared from a warehouse u/s 68, on the date on which the goods are actually removed from the warehouse; (c) in the case of any other goods, on the date of payment of duty, Provided that if a bill of entry has been presented before the date of entry inwards of the vessel by which the goods are imported, the bill of entry shall be deemed to have been presented on the date of such entry inwards. (2) The provisions of this section shall not apply to baggage and goods imported by post.

50. These provisions thus elaborate the stage at which the rate of duty and tariff valuation are to be determined. They lay down the time factor for the rate at which the duty is to be computed and when it is to be levied. Earlier Section 14 elaborates in what manner the valuation of goods for purpose of assessment of custom duty has to be arrived at. The actual assessments are effected under Sections 17, 18 and 19.

51. There are next a large number of Sections in the Customs Act which provide for exceptions to the levy of custom duty as envisaged by Section 12. Section 25(1) itself empowers the Central Government if satisfied in public interest, to exempt generally either absolutely or subject to such conditions as may be specified in the notification, goods of any description from the whole or any part of duty of customs livable thereon. Sub-section (2) of this Section at the same time empowers the Central Government to exempt from payment of duty under circumstances of exceptional nature to be stated in such order, any goods on which duty is otherwise leviable. The former powers thus cover goods in general of particular type while the latter is exercisable with respect to specified individual goods.

52. Section 13 exempts imported goods from levy of duty if they are pilfered after unloading, but before clearance for home consumption. Section 20 provides for the bringing back or import of goods which had been earlier exported provided the event occurs within a specified period. Derelict, jetsam, flotsam and wreck are dealt with by Section 21. In case imported goods get damaged or deteriorated, appropriate relief can be granted u/s 22. The remission of duty on lost, destroyed or abandoned imported goods is looked after by Section 23. Similarly Section 24 provides for denaturing or mutilation of imported goods.

53. The person-in-charge of a conveyance [which term includes a vessel, an

aircraft and a vehicle as per section 2(9)1] carrying imported goods is required within 24 hours after arrival at a custom station to deliver to the proper officer an import manifest and subscribe to a declarations to the truth of its contents. The Import Manifest (Vessels) Regulations Act, 1971 requires declaration of all cargo carried by the conveyance in such import manifest, and this is irrespective of whether the cargo is to be landed there or to be transhipped or retained. Section 31 of the Customs Act next prohibits the unloading of any imported goods by any master of vessel until an order has been given by a proper officer granting entry inwards to such vessel. Such entry inwards in turn can not be given until an import manifest has been delivered or the proper officers satisfied that there was sufficient cause for non- delivery. The he unloading and loading besides have to be done at approved places only and not on holidays, and under supervision of custom officers vide Sections 33, 34 and 36. The proper officer is further empowered to board the vessels, aircrafts etc., and require production of documents and ask questions with regard to the goods so imported vide Sections 37 and 38.

54. Chapters VII, VIII, IX and XI of the Act make further provisions in what circumstances the custom duty is or is not leviable. They provide for custody of the imported goods until cleared for home consumption or warehoused or transhipped (Section 45), presentation of bill of entry for home consumption or warehousing with regard to goods other than those intended for transit or transshipment (Section 46), clearance of such goods for home consumption after payment of import duty (Section 47), sale of goods not so cleared or warehoused within a specified time, by the proper officer (Section 48), storage of imported goods in warehouse (Section 49), non-charging of duty on those goods imported into a customs port which are mentioned in the import manifest as meant for transit or transshipment to any port outside India (Sections 53 and 54), the port which has to be treated as port of first importation in cases where the vessel touches different ports in India as well as when goods are transported by land to another port (Sections 55 and 56), appointment of public and private warehousing, the mode of deposit of goods there and the period for which they can be kept there and their control by the proper officers (Sections 57 to 62). Section 68 which is of some significance, may next be reproduced here:

68. Clearance of warehoused goods for home consumption: The importer of any warehoused goods may clear them for home consumption if (a) a bill of entry for home consumption in respect of such goods has been presented in the prescribed form; (b) the import duty livable on such goods, and all penalties, rent, interest and other charges payable in respect of such goods have been paid; and (c) an order for clearance of such goods for home consumption has been made by the proper officer.

55. Chapter XI contains provisions with regard to baggage carried by owners. Stores imported in a vessel or aircraft and meant for use and consumption in the vessel or transfer to another vessel are exempt from payment of duty (Sections

86 and 87).

56. Chapter XIV contains provisions for confiscation of improperly imported goods, and elaborates in what circumstances imported goods can be treated as such. Even an attempt to improperly import has been made penal. Section 125 gives an option to pay fine in lieu of confiscation. However, such payment of fine does not absolve the payment of duty and other charges otherwise leviable.

57. These various provisions of the Act have been referred to in some details in order to show that its scheme endeavors to meet different contingencies in which customs duty can still not be levied though the goods otherwise are treated as "imported goods". This had to be done in view of the very wide definition of "goods", "import", "imported goods", "India", "Indian customs waters" given in Section 2 as referred to above. Thereby the import purports to take place the moment the goods enter India including its territorial waters. They have to be characterised from thence on as imported goods. This situation ex facie appears repulsive and irreconcilable to what is commonly understood as import with implication of importing into India for being made part of the mass of goods in the country. A ship may be carrying large cargo, a part of which alone is cleared in one or the other port in India, while the bulk is carried away to a third country. A ship can as well stray into Indian waters without berthing or an aircraft fly over part of Indian space without landing. By no stretch they would appear to import the goods into India. It would also appear fantastic that a vessel or an aircraft bringing goods to India, can itself be treated as imported goods as they in any case, have to sail or fly away. However, the definitions of the terms "goods", "import", "imported goods" and "India" would tend to bring them all in the realm of imported goods. It was as such that in *Shri Ramlinga Mills Private Ltd. and others v. Assistant Collector of customs and others* 1983 E.L.T. 65 Ker.. It was observed that to interpret the words "Import" and "Export" literally would cause even to the goods in transit subjected to tax on arrival and departure at every intermediate station, which would cause not only inconvenience and confusion but would result in an inordinate delay and unbearable burden on the trade. The term "import" is derived from the Latin word "importare" which does not have reference to goods in transit. It generally contemplates pause and repose of goods. The test is the intention with which the goods are brought in. In *K. R. Ahmed Shah v. Additional Collector of Customs, Madras and others* 1981 E.L.T. 153 Mad. (27), it was as well observed that it is well settled law that unless goods brought into the country for the purpose of use, enjoyment, consumption, sale or distribution are incorporated in and got mixed up with the totality of the property in the country, they cannot be said to have been imported. As such it cannot be said the moment the aircraft passes through the country or a ship enters the territorial waters, an importation takes place. Importation can only be when the goods cross the customs barrier. In *K. Jamal Co. v. Union of India* 1981 E.L.T. 162 (Mad) also the word "import" in Section 2(23) has been interpreted to mean bringing into India for purpose of clearance of goods. Similarly in *Prabhat Cotton and Silk Mills Ltd. v. Union of*

India 1982 E.L.T. 203 (Guj) (28), it was taken note that Section 12 ibid refers to "exportation from or importation into" of goods with reference to landmass of India and not with reference to the territorial waters of India. Had it been not so, "importation into India" would mean that customs duty would be payable even if the ship were to stray in territorial waters, or when the ship enters the territorial waters changes its course, turns back and leaves the territorial waters before landing the goods on the landmass of India. In 1981 E.L.T. 298, the view that the goods get imported when they enter the sea waters of India, was termed as absurd.

58. The framers of the Act, it seems, were not oblivious of such piquant situations, and therefore, proceeded to introduce a large number of other provisions in the Act to adequately meet and look after all such incidents. Thereby the wide amplitude of the aforesaid terms and their sweeping effect have been amply curtailed and rendered practicable when it comes to the stage of levy of customs duty. Thus the goods in transit or for transshipment, or which are just stores meant for use in the ship itself, are not made liable to duty. They though technically speaking, can be termed as imported goods, are still immune from the levy of customs duty because ultimately they do not fructify in becoming part of the mass of goods in the country. The ship and the aircraft too have not to remain in India, but have to move away, and, Therefore, the moment they leave India and its territorial waters, they cease to retain the character of imported goods. It can be that contingencies so elaborate in the Act may not meet all eventualities as human ingenuity or situations may take unfathomed course. However, the determination of their precise nature and their chargeability to duty may have to be ultimately dependent on whether they get cleared for house consumption or become part of the mass of the goods. Analogous considerations can then be invoked in the context of specific provisions existing in the Act.

59. It further seems that the Legislature has in its wisdom and not without purpose, introduced these wide definitions in the Customs Act in order to leave no loopholes and to meet varied and subtle attempts and acts to smuggle goods into India, and thus frustrate the possible setting up of technical defenses when the imports take place. A vessel or a motor-boat may enter Indian territorial waters with prohibited and other goods for landing them at places other than customs station (which means any customs port, customs airport or land customs station vide Section 2(13). In case they are caught by the customs authorities within the territorial waters, but before they have reached the land-mass, they can as well plead that they had just strayed in and were otherwise taking the goods elsewhere, and, therefore, they cannot be treated as imported goods". They may as well like to dump the goods into sea finding that they cannot escape being caught. There may similarly be various other happenings. Extensive territorial waters thus can be-furiously be exploited by all sorts of elements with immunity. The authorities may as well find it extremely difficult to rope them in clutches, of law if the narrow definition of import as to synchronise

with the stage of actual mingling with the mass of the goods or ready for clearance for home consumption is allowed to prevail.

60. The Bombay High Court has thus in the case of *M. S. Sawhney v. Messrs. Sylvania and Laxman Ltd.*, 1975 The Bombay Law Reporter 380, taken the view that import takes place when the goods are brought into the territorial waters of India. However, the learned Judges further proceeded to observe that there was nothing in the Customs Act which indicated that the chargeability was postponed until a bill of entry was presented. It is with regard to these latter observations that, with respect, it must be said that the impact of the provisions contained in Section 15 of the Act has not been properly construed. These provisions do not relate entirely to the limited assessment aspect of chargeability. The latter is taken care of by Sections 17 to 19. The scope of Section 15 is much larger as it provides the time factor when the duty is to be levied and at what stage the actual computation of the duty and tariff valuation has to take place. Section 12 itself is subject to the provisions contained in Section 15 when it starts with "Except as otherwise provided in this Act". These provisions thus have a sort of prevailing effect over Section 12.

61. The concept, of chargeability about which Section 12 lays the base, is given effect to and brought into actuality u/s 15. For all intents and purposes, the implementation of chargeability and the taxable event take place u/s 15. It is at this stage that the customs duty gets levied, and the Section leaves no misgivings that the date for determination of rate of duty and tariff valuation is when its provisions are given effect to. It cannot be relegated to the position of a machinery section for the purpose of assessment. It brings out substantively the stage and time factor when the duty is charged, and which particular rate should be applied. My learned brother in this regard has extensively dealt with the case law. the contentions raised and the position of law under the Customs Act, 1962. I wholly agree with him. The subsequent decision of the Bombay High Court in the case *Synthetics and Chemicals Ltd. v. S.C. Coutinho and others* 1981 E.L.T. 414 (Bom), recognised that the duty as in existence on the date of the clearance of the goods is liable to be paid. My learned brother has at the same time rightly observed that the distinction drawn by this decision from the *Sylvania's* case (supra) whether there existed total exemption or not. can as well not be sustained.

62. Reference from the side of the petitioners to the Supreme Court decision in the case *M/s. Universal Imports Agency and another and Universal Imports Agency and Another Vs. The Chief Controller of Imports and Exports and Others*, wherein it was observed that a purchase by import involves a series of integrated activities commencing from the contract of purchase with a foreign firm and ending with the bringing of the goods into the importing country, and the purchase and resultant import form parts of a same transaction, cannot be of much avail to them as here we are dealing with specific provisions contained in the Customs Act, 1962 which leave no matter of doubt that irrespective of when

the goods are treated as imported goods., the stage and time for chargeability is u/s 15.

63. The fact that the incidence of import has no bearing ultimately on the incidence or quantum of duty levied u/s 15 is substantially dealt with by the Supreme Court in the case *Prakash Cotton Mills (P) Ltd. Vs. B. Sen and Others*, when following observations were made:

There is Therefore no force in the" argument that the requirement of the amended S. 15 should have been ignored simply because the goods were imported before it came into force, or that their bills of lading or bills of entry were lodged before that date

The observations of the Supreme Court in *Re Sea Customs Act*, AIR 1963 Supreme Court 1760, that the duties of customs including export duties though they are levied with reference to goods, the taxable event is either the import of goods within the customs barrier or their export outside the customs barriers were again not made in the context of specific provisions contained in the Customs Act, 1962 providing for the stage of levy and computation of customs duty.

64. The petitioners have as well made reference to the following observations of the Judicial Committee in *Whitney v. Commissioners of Inland Revenue*, (1926) Appeal Cases 37(30), at page 52:

Now, there are three stages in the imposition of a tax : there is the declaration of liability, that is the part of the statute, which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, ex-hypothesis has already been fixed. But assessment particularizes the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay.

These observations are pertinent and there can be" no quarrel with them. However, under the Customs Act, 1962 as already noted above, the incidence of chargeability to duty, arises u/s 15 itself, and the same cannot be treated as a mere machinery provision for effectuating the assessment.

65. Subject to these observations. I entirely agree with the well considered judgment delivered by my learned brother.