

(1984) 12 BOM CK 0009

In the Bombay High Court

Case No : Appeal No. 273 of 1979 in Miscellaneous Petition No. 496 of 1970

Union of India and others

APPELLANT

Vs

Chowgule and Co. Pvt. Ltd.

RESPONDENT

Date of Decision : 13-12-1984

Acts Referred:

Customs Act, 1962 — Section 2, 2(21), 2(22), 2(9), 20

Citation : (1985) 20 ELT 57

Hon'ble Judges : K. Madhava Reddy, J;B.C. Gadgil, J

Bench : Division Bench

Judgement

Gadgil, J.—The respondents in Miscellaneous Petition No. 496 of 1970 have preferred this appeal against the writ issued by the learned Single Judge of this Court directing the present appellant No. 2 not to enforce the impugned order whereunder the original petitioner was directed to file a bill entry u/s 46 of the Customs Act, in connection with the import of the vessel, now known as "Maratha Transhipper". We would refer the parties not as appellants and respondents but as petitioners and respondents in the trial Court.

2. Though in the trial Court a number of contentions have been raised on behalf of the petitioners and also the respondents, it is not necessary to consider all of them as only some or these contentions have been urged before us. We would, therefore, like to narrate a few facts that would be relevant for considering these contentions.

3. On October 15, 1960, the petitioners imported as vessel in Mormugoa Port. The vessel was originally known as "The Tropical Grace". It was an oil tanker. The petitioners, however, got certain modifications made to the vessel with a view to use the vessel for an operation known as "the topping up operation". These modification were made before the vessel was imported. A huge quantity of iron-ore is exported from Mormugoa Port. For that purpose the iron-ore is required to be loaded in the ships. The Mormugoa Port has a shallow draft and hence heavy and large ships cannot be loaded to its full capacity at the harbour. Some loading

is made at the harbour and thereafter such partly loaded ships are taken a little bit away from the harbour where the draft is deep and the remaining loading process is complete there. In the beginning for this purpose small barges would carry iron-ore near such ships and thereafter the iron-ore would be loaded to the full capacity of the ship. This latter process is known as "the topping up operation". The petitioners wanted to use the vessel "Maratha Transhipper" for this topping up operation. Thus, the Maratha Transhipper would carry iron-ore up to the large vessels standing a bit away from the harbour and load that iron-ore in the said ship with the help of mechanical process.

4. Before importing the vessel petitioners have made an application dated July 26, 1967, which is at Ex. 1 (vide pages 173 to 180 of the compilation), to the Government of India, asking permission for purchase of the vessel for such topping up operation. The application has mentioned the subject as "Construction of a Topping up vessel for Iron Ore Exports". Rest of the material portion in the application reads as follows :

PAGE 175 : We would buy a second-hand T-2 tanker or a suitable old ship of about 15,000 tonnes capacity and get it converted into a vessel as per specifications enclosed (APPENDIX "A"). The two grab cranes mounted on this vessel will unload the Iron Ore or Iron Ore Pellets from river barges and store them in the holds. The Ocean going ship will load maximum quantity possible at No. 6 berth and she will then be shifted out to the mid-stream. The vessel will then move alongside the ocean going ship and unload the ore or Iron ore pellets from the holds into the ocean going ship...

PAGE 176 : The vessel which we propose to purchase will be complementary to No. 6 berth installation as it will be a continuation of loading of the ships at mechanicals plant and completing the ships in midstream. Of course, this vessel can be used only during the fair season, that is from 15th September to 15th May.

PAGE 179 : A. T-2 type tanker shall be converted to a 15,000 DWT Topping up vessel for ore loading..."

The Government granted permission to then petitioners for purchasing such second-hand vessel as a "topping up vessel" at Mormugoa harbour. On the basis of this permission the petitioners imported a vessel on October 15, 1969. Thereafter the petitioners wrote a letter dated October 30, 1969 to the Assistant Collector of Customs. The relevant portions of the letter read as follows :

PAGE 181 : "We have acquired the above vessel... for the purpose of up topping large size bulk carrier in stream after they have been loaded at the Mechanical Plant at No. 6 berth up to the permissible draft. We will be operating this ship within the Port limits and she will serve as a "Sea Barge"...

PAGE 182 : ... you will please see that the storage operation need not require any supervision from your department, as it would be purely local handling

operation..."

On November 29, 1969 the petitioners wrote another letter, Ex. 2 (vide page 183 of the compilation) stating therein that "the Maratha Transhipper" has been registered as "Home Trade Vessel". The letter also states as to how the vessel will be used for topping up operation by carrying iron-ore in the vessel to the foreign going ships and then loading it in such ships.

5. The relevant part of section 46 of the Customs Act reads as follows :

"The importer of any goods, other than goods intended for transit or transshipment shall make entry thereof by presenting to the proper officer a bill of entry for home consumption or warehousing in the prescribed form".

The petitioners did not present or file a bill of entry when this ship was imported. Hence, on February 6, 1970 the Assistant Collector of Customs wrote to the petitioners asking for the filing a such a bill of entry (vide Ex. K. page 64 of the compilation). The petitioners wrote to the Assistant Collector of Customs on February 19, 1970 asking him the relevant provisions of law which require such filing of bill of entry. On February 21, 1970 the petitioners were informed that the vessel is in the nature of a sea-barge operating within the Port limits and as such the bill of entry is necessary.

6. It is not necessary to mention certain intervening procedures that took place before the matter was considered by the Assistant Collector of Customs after giving a show cause notice to the petitioners about such filing of bill of entry. The Assistant Collector of Customs passed an order dated May 22, 1970 (page 87 of the compilation) directing the petitioners to file a bill of entry in respect of the said vessel. Certain submissions were made on behalf of the petitioners that the said vessel was an ocean going vessel and as such was exempted from the Customs Duty, under notification dated October 11, 1968. Though the Assistant Collector of Customs has considered this aspect, still he has made specifically clear (vide page 95 of the compilation) that the issue whether the vessel is exempted from the duty under the said notification is not relevant at present and can be decided by a proper officer only after a bill of entry is filed. The petitioners took the matter in appeal before the appellate Collector of Customs. That appeal was dismissed on July 27, 1970 (vide Ex. Q. page 125 of the compilation). Same point was urged by the petitioners that the vessel is exempted from the Customs duty as it is an ocean going vessel. The appellate authority rejected this contention and confirmed the order of the Assistant Collector of Customs. It is these orders that were being challenged in the writ petition. Before the learned Single Judge it was urged that the vessel "Maratha Transhipper" would not be "goods" under the Customs Act and as such the filing of the bill of entry is not necessary. It was also contended that the vessel is an ocean going vessel so as to exempt in from the payment of Customs duty and that, therefore, the filing of bill of entry can be dispensed with. The learned Single Judge discussed these points and had tentatively come to a conclusion

that the vessel in question would constitute "goods" as defined in Section 2(22) of the Customs Act. However, no specific finding was given in that respect. The learned Judge thereafter discussed the question as to whether the vessel in question is exempted from the Customs duty under a notification dated October 11, 1958 on the ground that it is an ocean going vessel. The learned Single Judge accepted this contention and held that the filing of a bill of entry in respect of such ships can be dispensed with. It is in this way that the orders calling upon the petitioners to file the bill of entry have been quashed.

7. Shri Sethna for the appellate (respondents in the petition) made three grievances about the impugned order. He contended that the learned Single Judge should not have entertained the petition as the petitioners have not exhausted a statutory remedy by way of revision under the Customs Act. Though such a remedy is available and has not been sought for, still we think that it would not be appropriate at the stage of the appeal to dismiss the petition on this technical ground. The second contention of Shri Sethna is that the filing of the bill of entry does not involve any civil consequences and as such petitioners could have no justifiable claim in the writ jurisdiction of this Court. Shri Sethna further contended that on merits the vessels in question would be "goods" within the meaning of Section 46 of the Customs Act and that the; learned Single Judge should have given specific finding in this respect so as to required the petitioners to file the bill of entry. The last contention of Shri Sethna is that the question as to whether the vessel is exempted or not from the Custom duty is absolutely irrelevant when point for consideration is as to whether the bill of entry has to be filed u/s 46. He argued that the existence or otherwise of an exemption will have to be decided by an appropriate authority when the question of clearance of the imported goods with or without payment of Customs duty would arise.

8. Shri Setalwad for the original petitioners submitted that the vessel would not be "goods" u/s 46 and that, therefore, there is no liability or obligation on the petitioners to file the bill of entry. He then submitted that at any rate vessel is exempted from the Customs duty under a notification of 1958 and that, therefore, it would be a futile exercise to file a bill of entry. He also raised a plea of discrimination under article 14 of the Constitution.

9. We would now consider these rival contentions. The first question is as to whether by filing the bill of entry u/s 46, the petitioners incur any civil consequences so as to enable him to challenge the said action as un-warranted. In our opinion, such a bill of entry is an innocuous matter. It does not create any obligation or liability on the petitioners. There is much substance in the contention of Shri Sethna that the petitioners could not or should not be permitted to make a grievance with respect to a demand which is innocuous so far as the petitioners are concerned. Shri Setalwad was not able to tell us as to how the filing of a bill of entry would be such a prejudicial act which would require interference in the writ jurisdiction of this Court. He contended that if such a bill of entry is filed the Customs authorities would proceed to decide the

question about the necessity or otherwise of payment of Customs duty and that in this fashion the bill of entry would start the ball rolling against the petitioners. It is not urged before us that the Customs authorities would not be able to take up the case for assessment of Customs duty in the absence of such bill of entry. It will be difficult to imagine that the Customs authorities will be helpless and would not be able to proceed under the Customs Act if the bill of entry is not filed. There is much substance in the contention of Shri Sethna that the petitioners have been unnecessarily making a grievance when the petitioners were called upon to furnish the bill of entry. This is more so when no civil consequence will follow from the mere filing of such a bill of entry. In this background we feel that the grievance of the petitioners about the said demand of filing of entry does not deserve to be considered in the writ jurisdiction of this Court.

10. On merits also the petitioners have no case. Section 46 of the Customs Act requires an importer of the goods to submit a bill of entry. Section 2 of the Customs Act gives a certain definitions. The relevant definitions are that of "conveyance" and "goods". Those definitions read as follows :

"2(9) : "conveyance" includes a vessel, an aircraft and a vehicle.

"2(22) : "goods" includes -

(a) vessels, aircrafts and vehicles;

(b) * * * * (c) * * * * (d) * * * * (e) * * * *

It is, thus, clear that vessel would be "goods" u/s 2(22). It was contended by Shri Setalwad that a vessel cannot at one and the same time be a "conveyance" u/s 2(9) and "goods" u/s 2(22). He further contended that in that background the vessel would not be goods. If this was the position it would have been very easy for the legislature not to mention vessel as one of the items of "goods" u/s 2(22). Shri setalwad then draw our attention to certain other provisions of the Customs Act for the purpose of contending that the vessel would not be "goods". He mainly relied upon Chapter VI of the Customs Act and the various sections mentioned therein. It is, however, material to note that the caption of that chapter is "Provisions relating to conveyance carrying imported or exported goods". It is thus clear that, that chapter deals with those types of vessels which can be termed as conveyance carrying imported or exported goods. For obvious reasons, that chapter will not apply to a vessel which is not a "conveyance" but which would be imported "goods". At this stage we may make a mention that it is nobody's case that a vessel as such cannot be imported. Thus, the provisions of Chapter VI would not be relevant when the vessel is not used as a conveyance but when it is imported as goods. Section 29 provides that the person-in-charge of a vessel entering India from any place outside India shall not call at any place other than the Customs Port. This is necessary whenever a vessel for the first time arrives in India or when it is carrying passengers or bulk. Section 30 provides that the person-in-charge of conveyance carrying imported goods shall

deliver an import manifesto to the Customs Officials. Section 31 prohibits the unloading of the imported goods from the conveyance without necessary orders from the proper officer. Section 32 had added another restriction that no imported goods shall be unloaded unless they are mentioned in the import manifest. Section 33 and 34 require that imported goods shall be unloaded at a place approved for such unloading and that all this should be done under the supervision of the concerned officer. Section 37 enables the concerned officer to board any conveyance carrying imported goods. Section 42 says that no conveyance which has brought imported goods shall leave the Customs Section until a written permission by an appropriate officer is given. Shri Setalwad relied upon all these provisions and contended that it would be impossible to comply with these provisions and more particularly the provisions of Sections 30 and 31 when the vessel itself was imported. He, therefore, urged that the vessel would not be goods within the meaning of these Sections. In our opinion the provisions of Chapter VI are meant for conveyance carrying imported goods. Obviously the conveyance viz., the vessel in which the imported goods are carried is not imported and hence this Chapter VI would not deal with the import of a vessel. The reliance on the various provisions of Chapter VI by Shri Setalwad is, therefore, of no use for the purpose of contending that a vessel which is imported as a vessel and not as a conveyance would not be "goods".

11. Chapter VII deals with the clearance of imported goods and export goods. Section 46 is in this Chapter and as mentioned above it provides for the submission of the bill of entry of imported goods. Shri Setalwad contended that certain provisions of this Chapter would be inappropriate if we treat an imported vessel i.e. the vessel other than "conveyance" as goods. For example Section 46(1) states that the bill of entry shall be in the prescribed form. Form No. 22 has a number of columns. One of the column deals with the name of the vessel and the number of the packages therein. The form also requires a declaration to be filed that the goods are imported against a bill of entry. It was urged that filling of these columns would be impracticable when the vessel itself is imported. It is true that some of the columns such as "packages" etc. would not be applicable when the vessel is imported. However, that does not mean that vessel would not be "goods". Secondly, the form, prescribed by rules, would not restrict or limit the applicability or otherwise of Section 46 to the import of vessels. Shri Setalwad then drew our attention to Chapter VIII which deals with the goods in transit. Section 53 states that if a vessel enters the Customs Port with goods which are in transit to some other country, these goods can be allowed to be transmitted without the payment of duty. In some cases it so happens that such transit goods came to a port in one vessel and they are required to be transhipped into another vessel for its onward journey. Section 54 provides that such transhipment is permissible without the payment of duty. These provision are again irrelevant for the purpose of deciding as to whether the vessel is "goods" or not. It is true the Section 2 (i.e. the definition clause) would not govern the case if the context requires something otherwise. However, we are

not able to find anything in Section 46 to hold that the word "goods" used in that section excludes an imported vessel. The position will be somewhat precarious if the contention of Shri Setalwad is accepted. All ships purchased outside and imported into India on its own power will not be "goods". And once they are not goods there should be neither a bill of entry nor any charge of Customs Duty. However, the Traffic Act has provided for the Customs duty on the import of vessels, ships, etc. (vide entry No. 76 of the Indian Tariff Act).

12. It was next urged by Shri Setalwad that at any rate the department has given an interpretation that the bill of entry is necessary when the vessel is brought for home consumption and that by implication it would mean that ocean-going vessels are exempted from the provisions of Section 46. The term "home consumption" appears in the impugned orders and the correspondence with the Customs officials, as Section 46 itself contemplates that there should be a bill of entry of goods for home consumption. We have already observed that the orders of the Assistant Collector of Customs and the Appellate Collector has discussed the question as to whether the vessel in question is an ocean-going vessel. Shri Setalwad contended that the consideration of this point by the above-mentioned authorities would indicate that those authorities have construed the provisions of Section 46 to mean that they do not apply to the ocean-going vessels. Reliance is placed on the decision of the Supreme Court in the case of K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, . In that case the Income Tax Department has issued certain circulars explaining certain provisions of the Act. The question arose as to whether those circulars can be of any help when the Court has to construe the provisions of the Act. This is what the Supreme Court held on page 1932 -

"The rule of construction by reference to contemporanea expositio is a well-established rule for interpreting a statute by reference to the exposition it has received from contemporary authority, thought it must give way where the language of the statute is plain and unambiguous."

In our opinion, the wording of Section 46 is so clear that there is no scope for applying the principle of contemporaneous exposition or construction of that section by the department and hence the discussion in the impugned orders as to whether a vessel in question is an ocean-going vessel would not be of any use particularly when all the vessels including the ocean-going vessels are covered by Section 46 and filing of bill of entry is mandatory. Before closing this point we may also observe that the question about the nature of the vessel being ocean-going or not is considered by the authorities mainly because that point was urged by the petitioner and Shri Sethna is right when he contends that it was necessary and desired for these authorities to consider the question that was raised before them. This does not, however, mean that the authorities wanted to construe Section 46 to mean that an ocean-going vessel is not covered by that section. On the contrary the observations of the Assistant Collector of Customs in his order (vide page 95 of the compilation) clearly show that whether the vessel

is exempted from the Customs duty on the alleged ground that it was ocean going vessel was not relevant at the point of time when the bill of entry has to be filed and it has to be decided by a proper officer after the bill of entry is filed. The net result, therefore, is that the petitioners were liable for filing a bill of entry when the said vessel was imported and that it would not be open for them to contend that the Customs Officials have no power to ask for such bill of entry.

13. It was also contended that the appellants-respondents will be bound by the reasons given when the petitioners were called upon to file the bill of entry and that the impugned order would fail if the reasons given are not tenable. For example, on February 21, 1970 the petitioners were informed (vide page 65 of the compilation) that the function of the vessel "Maratha Transhipper" was in the nature of the sea barge operating within the Port Limits and that such operations are reserved to the vessels imported for home consumption. It is on this ground that the petitioners were informed that they should file a bill of entry for home consumption as contemplated by Section 46. We do not find anything wrong in this communication inasmuch as Section 46 contemplates the bill of entry with respect to the goods imported for home consumption. It is true that in this communication it is stated that the vessel was in the nature of a sea barge to be used within the Port Limits. However, it cannot be forgotten that by letter dated October 23, 1969 (vide page 181 of the compilation) the petitioners themselves informed Customs Officials that the vessel would be operating within the Port Limits, as a sea barge. The grievance of Shri Setalwad is more with reference to the orders of the Assistant Collector of Customs and Appellate Collector of Customs. We have already observed that there is some discussion as to whether the vessel in question is an ocean-going vessel. Shri Setalwad contends that these authorities came to a conclusion about the need of filing the bill of entry on the basis of the alleged fact that the vessel is an ocean-going vessel. He further contends that if this hypothesis of the vessel being an ocean-going vessel is wrong, the impugned orders are liable to be set aside and that it would not be possible to accept the correctness of the orders on the basis of the interpretation of Section 46. He relied upon the decision of the Supreme Court in the case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, The relevant head-note reads as follows :

"When a statutory functionary makes an order based on certain grounds its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reason in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out."

In our opinion, this decision would not be of any help to the petitioners inasmuch as any observations or discussion about the vessel being an ocean-going vessel or not was absolutely irrelevant while considering the scope of Section 46. Secondly, as stated above the authorities discussed this aspect because the petitioners raised it. Shri Sethna is right when he contends that in the

background of such a contention having been raised before them these authorities must have felt that it would be more appropriate to consider the contention of the petitioners. We have already observed that the Assistant Collector of Customs has stated in his order (wide page 95 of the compilation) that the issue as to whether the vessel was exempted from duty under the notification dated October 11, 1958 (on the assumption that it is an ocean-going vessel) was not relevant at that stage and that it could be decided after the bill of entry was filed. Taking into account all these factors we do not think that Shri Setalwad can place any reliance on the above-mentioned decision of the Supreme Court.

14. It was next urged by Shri Setalwad that the Customs authorities have shown undue discrimination when they called upon the petitioners to file a bill of entry. His contention is that the other importers of similar vessels were not asked or compelled to file a bill of entry. Such an averment appears in grounds Nos. "c", "e", "e1" and "e2" of the petition. In substance it is stated that certain other vessels as mentioned in those grounds were allowed to be imported without insisting upon the bill of entry. It is in this way that the petitioners contend that the impugned orders are discriminatory so as to violate Article 14 of the Constitution. In our opinion, this submission is without any merit. Section 46 requires a bill of entry with respect to all the types of vessels involved in the petition. The respondent's contention is that the vessels mentioned in the above grounds were of different type and that, therefore, the bill of entry was not necessary. Even if it is assumed that this contention is not correct the most that can be said is that the respondents did not insist upon the bill of entry from other vessels. In fact, it is a bounden duty of every importer to file a bill of entry. In case the Customs authorities have not asked the other vessels owners to file the bill of entry it would mean that they have acted in breach of the requirement of Section 46. Such inaction cannot be termed as discriminatory. At the most there can be a writ or order in an appropriate proceeding that the Customs Officials should insist upon the filing of bill of entry, and should enforce the provisions of Section 46 of the Customs Act. To say that inaction on the part of the Customs Officials to enforce the provisions of the enactment with respect to some persons is discriminatory would be a misnomer. It was faintly suggested that the petitioners should also be exempted from filing the bill of entry on the analogy of the other incidents where the importers of similar vessels have not filed the bill of entry. We are not able to accept this contention as the breach of the provisions of a particular section by others cannot be treated as a circumstances for invoking the principles of equality contemplated by Article 14 of the Constitution.

15. The learned Single Judge has issued a writ in favour of the petitioners on the ground that no useful purpose would be served by asking the petitioners to file a bill of entry. This has been so held on a hypothesis that the petitioners' vessel is an ocean-going vessel and it is exempted from Customs duty in view of the notification dated October 11, 1958. The grievance of Shri Sethna is that this approach is unwarranted by law. He contended that the liability or exemption

from payment of Customs duty is absolutely irrelevant when the controversy is whether the bill of entry should be filed or not. There is much substance in this contention. It cannot to be validly urged on behalf of the petitioners that the bill of entry is not required to be filed with respect to those goods which are exempted from the payment of Customs duty. In that backgrounds we do not think that it would be possible for the petitioners to contend that bill of entry should be waived or dispensed on an assumption that the vessel is exempted from the payment of Customs duty. The liability for Customs duty, if any will be decided only by the concerned official is an assessment proceeding in that respect. Shri Setalwad however, contended that as the exemption aspect has been considered by the learned Single Judge, we should scrutinise that point and record our finding in this appeal. By doing so we would be usurping the functions of the Customs authorities.

16. It was then urged that at any rate in due course the question of exemption from Customs duty will have to be decided by the Customs Officials and that our decision on this point would save much time and energy of both the parties. The argument is that if we record a finding that the vessel is an ocean-going vessel as contemplated by the above-mentioned notification, the Customs Officials will act upon that finding and pass an order exempting the vessel from the payment of Customs duty. Shri Setalwad also contended that if our finding would be otherwise then the Customs Officials would act upon it and assess the Customs duty. We do not think that this procedure is warranted. It is true that the learned Single Judge has considered this question. However, that consideration was premature and it would be appropriate if we do not enter upon a discussion on a point which is irrelevant at this stage. The finding recorded by the learned Single Judge in this regard is set at large, to be decided by the Customs authorities if and when the occasion arises.

17. Of course, before parting with this appeal we would like to state a few of the submission that have been made before us on the question as to whether the petitioners' vessel is an ocean-going vessel. We would, however, make it clear that these observations are only for the purpose of placing on record the submissions made before us. Shri Setalwad contended that the term "ocean-going vessel" should be interpreted to mean "the vessel capable of going to the ocean". He argued that the vessel reached Mormugoa Fort on its own propulsion from a foreign country and that this would mean that the vessel is capable of going to the ocean. He also drew our attention to certain provisions of the Merchant Shipping Act, 1958 and more particularly Part V thereof. Section 20 provides that the said part applies only to sea-going ships fitted with mechanical means of propulsion. The other sections of this part deal with the procedures for registration of such ships and u/s 34 a certificate is required to be issued about such registration. The term "sea-going ship" has been defined in Section 3(41) of the Merchant Shipping Act, 1958, in following words :

""sea-going", in the relation to a vessel means a vessel proceeding to see

beyond inland waters or beyond waters declared to be smooth or partially smooth waters by the Central Government by notification in the Official Gazette".

Part XIV of this Act deals with the Control of Indian Ships and Ships engaged in coastal trade. Section 406 provides that no ship shall be taken from sea to Port except under the licence of the Director-General. Initially such a licence was granted to the petitioners for its topping up operation and later on it was amended to include a coastal trade. Reliance is placed upon the above circumstances to suggest that the petitioners vessel is a sea-going ship and consequently it would be an ocean-going vessel. As against this Shri Sethna urged that the definition of the word "sea-going" as given in the Merchant Shipping Act has no relevancy when we have to consider the meaning of the term "ocean-going", as used in the exemption notification. He urged that it is an accepted principle of construction that the definition in one enactment cannot be used while construing same of similar expression under other enactment. He then urged that these provisions would not be of any help to the petitioners even if it is assumed that they can consider. For example, he contended that the definition of "sea-going" indicates that the vessel, by and large, is expected to proceed to sea beyond the inland waters and that mere capability in that respect would be insufficient. He relied upon the underlined words "vessel proceeding to sea" in the above definition. The term "foreign-going vessels" is defined in Section 2(21) of the Customs Act. The definition reads as follows :

"foreign-going vessel or aircraft" means any vessel or aircraft for the time being engaged in the carriage of goods or passengers between any port or airport in India and any port or airport outside India, whether touching any intermediate port or airport in India or not, and includes -

- (i) any naval vessel of a foreign Government taking part in any naval exercises;
- (ii) any vessel engaged in fishing or any other operations outside the territorial waters of India;
- (iii) any vessel or aircraft proceeding to a place outside India for any purpose whatsoever".

The learned Single Judge has considered this definition and has also taken into account the Dictionary meaning, and then came to a conclusion that a vessel which is capable of travel on ocean would be an "ocean-going" vessel. As against this, Shri Sethna urged that mere capability is not a criterion and that the intention of the importer at the time of the import would be decisive. It is for this reason that he drew our attention to the correspondence under which the petitioners have claimed permission from the Government. He further submitted that the petitioners would not have been granted permission if the petitioners would have asked for the permission that instead of using the vessel for topping up operations they would use it for sea-going for some other trade. Shri Setalwad relied upon the following observations in para 42 of the Supreme Court in the case of *Dunlop India Ltd. v. Union of India*, reported in AIR 1977 S.C.

597 : 1983 E.L.T. 1566 (S.C.).

"The basis of the reason with regard to the end-use of the article is absolutely irrelevant in the context of the entry where there is no reference to the use or adaptation of the article."

He, therefore, urged that the capability of the vessel has to be looked into though the vessel has been imported for a specific purpose of topping up operation. Shri Sethna urged that the above decision cannot be of any use to the petitioners when the vessel was imported for a particular use at the Port and not for the purpose of going to the ocean. He submitted that the term "ocean-going" will have to be construed in the background of the facts that the vessel was to be used in the port for the topping up operation. He further contended that the term "ocean-going" will have to be construed to mean as the vessel which actually goes to the ocean and not the vessel which is just capable of going to the ocean. These and other submissions, however, will have to be taken into account by the assessing authorities after bearing in mind the main entries under which the vessels are dutiable and the exemption under those entries. As stated above we have mentioned in brief some of these submissions not for the purpose of recording the finding but mainly with a view to state as to how the rival contentions would be at the time of assessment.

18. Before passing the final order we would like to make a mention of the grievance of Shri Sethna that certain statements in the judgement on pages 257 and 259 of the compilation do not appear to be correct. It is also argued that the inferences and conclusions on page 259 are also not proper. However, it is not necessary to consider this aspect as the appeal succeeds without going into this contention.

19. The net result, therefore, is that the appeal succeeds. The impugned orders in miscellaneous petition No. 496 of 1970 are quashed and the rule in that petition is discharged with costs, throughout.

20. On the pronouncement of this judgement, the learned Counsel for the respondents asked for leave to appeal to the Supreme Court. We are unable to find that this appeal involves such important question of law as requires the consideration of the Supreme Court or this is otherwise a fit case for grant of leave to appeal. Leave refused. However, in the facts and circumstances of the case, the operation of the order is stayed for a period of four weeks.