

2010 (1) G.L.H. 758
K. S. JHAVERI, J.

Essar Steel Limited and Anr....Petitioners

Versus

Superintendent of Stamps and Ors.....Respondents

Special Civil Application No. 1490 of 2007
With
Special Civil Application No. 27059 of 2006
With
Special Civil Application No. 2601 of 2007
With
Special Civil Application No. 2955 of 2007
With
Special Civil Application No. 2608 of 2007
With
Special Civil Application No. 27039 of 2006
With
Special Civil Application No. 2276 of 2007
With
Special Civil Application No. 4093 of 2007
With
Special Civil Application No. 2171 of 2007
With
Special Civil Application No. 904 of 2007
With
Special Civil Application No. 1703 of 2007
With
Special Civil Application No. 2213 of 2007
With
Special Civil Application No.3484 of 2008
with
Special Civil Application No.13501 of 2007
with
Special Civil Application No.1827 of 2007

D/- 24.02.2010

[A] STAMP DUTY - Constitution of India, 1950 - Art. 246, Schedule VII, List I Entry 91 - Schedule VII, List II, Entry 63 - Schedule VII, List III, Entry 44 - Bombay Stamp Act, 1958 - S. 2(i), S. 74 and Art. 24 - Indian Stamp Act, 1899 - S. 3 - Art. 14 - Customs Act, 1963 - S. 8, S. 30, S. 46 and S. 47 - Sale of Goods Act, 1930 - S. 2(2) and S. 2(4) - The practice of

the petitioner for discharging cargo from ship is that as an when ship carrying cargo consign for the petitioner arrives at the Jetty, the cargo in the tank of the ship is directly transported via conveyor belt to the custom bonded house for custom clearance, where it is directly transported via conveyor belt to the petitioner Company s storage facilities and from there it is taken for consumption - All this is done only against Bill of Lading - Held, since the cargo in question is directly received, taken delivery of and transported to the petitioners, there is no entrustment of the cargo to the respondents and therefore, there is no necessity for any other instrument - Only instrument involved in the transaction is Bill of Lading, the levy of stamp duty in respect of which is not within the legislative competence of the state but it can be levied only by the parliament - Since the goods are directly delivered to the owner of the goods no stamp duties involved - Further, held if the Bill of Lading and bill of entry are in the same name and if the person whose name is in the Bill of Lading is taking the goods, no separate stamp duty can be levied as it is already paid under the Central Act.

Now let us examine the case of the petitioners. In the case of the petitioners, the practice that is followed at their captive jetty, for discharging of cargo from ships is concerned, is that as and when a ship carrying cargo consigned for the petitioners arrives at the jetty, the cargo in the ship s tanks is directly transported via conveyor belt to the custom bonded house/yard for custom clearance, where it is directly transported via conveyor belt to the petitioner Company s storage facility and from there, it is taken for consumption. All this is done only against production of/undertaking to produce the Bill(s) of Lading. The respondents are not involved in so far as entrustment of the cargo by the carrier to the petitioners are concerned. The cargo is directly delivered to the petitioners via the jetty utilizing the conveyor belt. The cargo is not delivered to the Port Authorities, which might be in the case of an individual consignee at a conventional port, for further delivery to the ultimate consignee. Thus, I am of the view that since the cargo in question is directly received, taken delivery of and transported to the petitioners, there is no entrustment of the cargo to the respondents. Consequently, there is no bailment of the cargo by the carrier (bailor) to the Port Authorities (Bailee). Instead, there is a direct delivery by the carrier to the consignee and it appears that this is the very purpose for promoting the construction of captive jetty. Therefore I am of the view that there is no necessity whatsoever for the carrier issuing any instruction, either styled as a delivery order or otherwise, to the Port Authorities to deliver the cargo to the consignee. ([Para 10](#))

Thus, in case of a bill of lading, the Act is not applicable and no stamp duty can be levied. In short, Section 2(l) and Section 74 of the Bombay Stamp Act clearly exclude a bill of lading from the purview of the Bombay Stamp Act. ([Para 11.5](#))

Thus, mere filing of bill of entry would not mean that the petitioner is required to pay stamp duty especially the goods are imported by way of Bill of Lading. As in the present case the tax has already been paid on bill of lading, there is no question of making any further tax on the same. ([Para 11.8](#))

In short, if the bill of lading and the bill of entry are in the same name and if the person whose name is in the bill of lading is taking the goods, no separate stamp duty can be levied as the stamp duty is already paid under the Central Act. Again imposing tax on the very same person would amount to double taxation on the same person. However, if the goods are transferred to a third person the bill of entry will come into play and the third party is required to make the payment in accordance with Article 24. Therefore, no fault can be found in Article 24 and even the Circulars issued on the basis of the said Article. ([Para 13.4](#))

[B] WORDS AND PHRASES - "Bill of Lading" and "Delivery order" - Meaning and purpose explained.

The crux of the contention of the petitioners is that since the only document/instrument involved in the process of delivery is a bill of lading, any levy of stamp duty can only be with reference to this document/instrument. In Mitra s Legal & Commercial Dictionary (Sixth Edition) by Tapash Gan Choudhary, the Bill of Lading is explained as under:

Bill of lading: A shipmaster s detailed list of the ship s cargo.

Bill of lading is a memorandum signed by masters of ships in their capacity of carriers, acknowledging the receipt of merchant s goods, of which there are usually three parts - one part belongs to the consignor, one sent to the consignee and one preserved by the master. It is the evidence of the title, to the goods shipped; and by its endorsement and delivery, the transfer of the property in the goods specified therein is generally effected.

A bill of lading is a writing, signed on behalf of the owner of the ship in which goods are embarked, acknowledging the receipt of the goods, and undertaking to deliver them at the end of the voyage subject to such condition as may be mentioned in the bill of lading. It is well settled in commercial world that a bill of lading represents the goods and the transfer of it operates as a transfer of goods." ([Para 9](#))

The "bill of lading", typically, is a document, which is issued by or on behalf of a carrier, in relation to the carriage of goods, by sea. A bill of lading, serves three functions. It constitutes evidence of receipt of the goods by the carrier/ship; it is a document of title to the goods covered thereunder; and it is evidence of the terms and conditions of the contract of carriage. A bill of lading is a negotiable document. Title to the consignment covered under the bill of

lading and the right to receive delivery of the consignment covered by the bill of lading, can, therefore, be negotiated and/or transferred and/or assigned. A holder of a bill of lading is entitled to demand, from the carrier, delivery of the goods covered thereunder. The Bills of Lading Act, 1856 governs the rights and obligations in relation to a bill of lading in India. ([Para 9.1](#))

A "delivery order" is a document which is very different. It does not cover the carriage of goods by sea. A "delivery order" is a written order or instruction by the bailor of goods, directing a warehouseman, the port authorities or other bailee to deliver the goods to the person named in the delivery order or to the person in lawful possession of the delivery order. A delivery order is, therefore, different and distinct from a bill of lading. A delivery order is normally issued in cases where there is bailment of goods and is issued by the bailor and addressed to the bailee. Where goods are loaded onto a ship, and a bill of lading issued, the shipper is the bailor and the carrier is the bailee. I am, therefore, of the view that a bill of lading, which is issued by the carrier (bailee) can, therefore, never treated the description of a delivery order. ([Para 9.2](#))

Cases Referred :

1. Chowgule & Co. Pvt. Ltd. v. Union of India & Ors., - 1987(28) ELT 39 (SC) - Relied ([Para 4.1](#))
2. Union of India & Ors. v. Chowgule & Co. Pvt. Ltd., 1985 (20) ELT 57 (Bom.) Relied ([Para 4.2](#))
3. State of Andhra Pradesh V. K. Shree Ramamurthy - AIR 1962 SC 1585 ([Para 4.3](#))
4. Hindustan Lever & Ors. v. State of Maharashtra & Ors., (2004)9 SCC 438 ([Para 4.4](#))
5. State of Rajasthan v. Bhilwara Spinners Ltd., AIR 2001 Raj. 184 ([Para 4.5](#))
6. Bayyana Bhimayya v. Government of A.P., AIR 1961 SC 1065 Relied ([Para 6.0](#))
7. State of Kerala & Ors. v. Mcdowell & Co. Ltd., 1994 Supp (2) SCC 605 Relied ([Para 8.1](#))
8. J. K. Industries Ltd. v. Union of India-2005 (186) ELT 3 (Raj) ([Para 8.2](#))
9. Vijaya Industrial Products (P) Ltd. v. Union of India, 1995(76) ELT 531 (Mad.) Relied ([Para 8.3](#))
10. Bharat Commerce & Industries Ltd. v. Collector of Customs, Bombay, 1997 (93) ELT 653 (SC) ([Para 8.4](#))
11. Union of India v. Marmagoa Steel Ltd., 2008(229) ELT 481 (SC) Relied ([Para 8.5](#))
12. Ashirwad Ispat Udyog v. State Level Committee, AIR 1999 SC 111 - Dissented ([Para 8.6](#))
13. Commissioner of Income Tax, Kerala v. Tara Agencies, 2007 (214) ELT 491 (SC) Relied ([Para 8.7](#))
14. IRC v. G. Angus & Co., (2004) 9 SCC 438 Relied ([Para 11.2](#))
15. Union of India & Ors. v. Chowgule & Co. Pvt. Ltd. 1985 (2) ELT 57 (Bom)

Relied ([Para 11.6](#))

16. John F. Fidele & Co. v. Collector of Customs, 1992 (58) ELT. 498 (Mad.)

Relied ([Para 11.7](#))

Appearance :

Nanavati Associates for Petitioner

Mr. Kamal Trivedi, Advocate General with

Ms. Sangeeta Vishen, (A) GP for State Government

Mr. P. R. Nanavati for Gujarat Maritime Board.

PER : Mr. K. S. JHAVERI, J. :-

1.

As common facts and law are involved in these petitions, they were heard together and are being decided by the present common judgement.

2.

The challenge in these petitions is to the legality and correctness of (1) the Circular dated 29th March 2006 issued by the State Government stating, inter alia, that stamp duty at the rate of Re1/- per Rs.1000/- or part thereof is payable on goods imported through Ports and (2) the Circular dated 10th January 2007 issued by the Respondent No.3-Gujarat Maritime Board stating, inter alia, that "No Demand Certificate"

(NDC) in respect of the vessel arrived at Magdalla (Surat) Port will be issued after submission of clearance from "Registrar of Stamp Duty" regarding payment of stamp duty on the entire imported cargo and that NDC will not be issued by the said office to the vessels of import cargo without receipt of "Stamp Duty Clearance" (hereinafter collectively referred to as "the impugned Circulars").

2.1

The petitioner companies in the above petitions are manufacturers of various steel products and are having their plants at Hazira. The petitioners, with the permission of the Government of Gujarat and the respondent No. 2, constructed a captive jetty for the purpose of landing or shipping of captive industrial raw materials or finished goods from the jetty at a cost of over Rs.115 crores. After the vessels with imported goods arrive at the Port, goods are discharged and transported to custom bounded area through the use of conveyor system and after such goods are cleared by the customs authorities, the same are transported through conveyor system to the bunker of the petitioners for use thereof in manufacturing finished goods.

2.2

The captive jetty of the petitioners has been notified as a "landing place" for the purpose of loading or unloading of goods under Section 8 of the Customs Act, 1962. The petitioners pay wharfage charges to the respondent No. 2 at the prescribed rates for loading and unloading of goods at the said port.

2.3

The respondent No. 1 issued a Circular dated 29th March 2006 stating, inter alia, that stamp duty at the rate of Re.1/- per Rs.1000/- or part thereof is payable on goods imported through ports. Thereafter the respondent No. 3 issued a Circular stating, inter alia, that "No Demand Certificate" in respect of the vessel arrived at Magdalla (Surat) Port will be issued after submission of clearance from "Registrar of Stamp Duty" regarding payment of stamp duty on the entire imported cargo and that NDC will not be issued by the said office to the vessels of import cargo without receipt of "Stamp Duty Clearance".

2.4

Thus, No Due Certificate would be issued to the vessel only upon payment of the stamp duty. There are vehicles of the petitioners unloading cargo, the delivery of which is done on the basis of Bill of Lading. If these vessels are detained for want of "No Due Certificate" as contemplated in the Circular dated 10th January 2007, due to non-payment of stamp duty on delivery order, the petitioners would incur heavy demurrage charges per vessel per day.

2.5

According to the petitioners, amended Article 24 of the Bombay Stamp Act (hereinafter referred to as Stamp Act or the Act) applies to cases where a delivery order is in fact issued and produced before the concerned Port Authorities for obtaining delivery of imported goods received in the port area. The amendment and the impugned Circulars contemplate to deal with cases where goods have been sailed and/or entrusted by the carrier to the Port Authorities and the Port Authorities are requested to deliver them to the ultimate consignee who presents to them a Delivery order issued by or on behalf of the Carrier.

2.6

According to the petitioner neither Article 24 in its amended form deals with nor could deal with a situation where delivery is direct by the consignee without the involvement of the Port Authorities, against the production of a bill of lading. Neither amended Article 24 deals with nor could deal with or contemplate a case of direct delivery by the carrier to the consignee at a captive

jetty against a bill of lading or even otherwise, without the issuance of a Delivery Order. In view of these contentions the present petitions have been filed challenging the aforesaid impugned circulars.

3.

Learned Advocate for the petitioners has raised the following contentions:-

3.1

That it is a fundamental principle of law that stamp duty is levied on a document or instrument. No stamp duty is can be levied on a mere right or on a transaction in the abstract or in vaccuo. The incidence of levy of stamp duty is, therefore, required to be related to the existence of such a document/instrument and the existence of such a document/instrument attracting stamp duty is therefore a *sine qua non*. In absence of a document/instrument no stamp duty is leviable.

3.2

That in the present case it is an uncontroverted fact that so far as delivery of cargo to the petitioners at the captive jetty is concerned, the only document/instrument involved is a bill of lading/undertaking to produce a Bill of Lading furnished to the charterer. The petitioners receive delivery of imported cargo at the captive jetty, from the carrier against a bill of lading and no other document or instrument is involved for the delivery of goods.

3.3

That in the case of delivery of cargo to the petitioners at the said captive jetty, no delivery order is issued. In fact the issuance of a delivery order is completely inconsistent with the manner in which delivery is effected at the captive jetty. Delivery is not effected to the Port authorities but directly to the petitioners. There is no bailment or entrustment of goods by the carrier to the Port. Consequently, the question of subsequent delivery of goods by the Port Authorities to the petitioners does not arise. The carrier is not the Bailor and the Port Authority is not the Bailee and there is no bailment to the Port. The manner in which the actual delivery is effected is inconsistent with the issuance of the delivery order. The respondents have not been able to point out a single case where a delivery order has in fact been issued.

3.4

That the delivery of cargo against a bill of lading/undertaking to produce a Bill of Lading is a universally recognized and accepted practice.

3.5

That since the only document/instrument involved in the process of delivery is a bill of lading, any levy of stamp duty can only be with reference to this document/instrument. In so far as a bill of lading is concerned, it is clear that the levy of stamp duty on a bill of lading can only be done by Parliament and it is not within the legislative competence of a State to prescribe stamp duty in respect of a bill of lading. Section 2(L) and Section 74 of the Bombay Stamp Act, clearly exclude from the purview of the Bombay Stamp Act, a bill of lading. The respondents cannot, therefore, charge, prescribe, levy or recover any stamp duty on the bill of lading at the rate other than what is prescribed in the Indian Stamp Act.

4.

In support of the contentions, learned Advocate for the petitioners has relied upon the following Judgements:

4.1

In the case of ***Chougule & Co. Pvt. Ltd. V. Union of India and others, reported in 1987(28) ELT 39 (SC)***. Paras 10 and 11 thereof read as under:

"10. In regard to the levy of customs duty the scheme of the Act appears to be as follows: - Goods which are imported into India, that is, goods which are brought into India from a place outside India, are on entry into India, broadly classified into (i) goods entered for home consumption under Sec. 46(1)(ii) goods entered for warehousing also under Sec.46(1); (iii) goods in transit; and (iv) goods for transshipment. In the case of goods in transit and goods for transshipment duty is not required to be paid subject to fulfilling the conditions prescribed by Sections 53, 54, 55 and 56. In the case of these goods there is no need to present a Bill of Entry. Bill of Entry is necessary and has to be presented in the case of goods for home consumption or warehousing: Goods entered for home consumption are required to be cleared on payment of duty. Warehoused goods may be cleared either form home consumption or exportation on payment of import duty or export duty, as the case may be. Goods entered for home consumption are to be subjected to duty at a rate and tariff valuation as on the date of presentation of a Bill of Entry under Section 46 and goods cleared from a warehouse are to be subjected to duty at a rate and tariff valuation as on the date of actual removal from the warehouse. Other goods, presumably goods not disclosed but discovered to be imported or which have otherwise escaped duty, are to be subjected to duty at a rate and tariff valuation as on the date of payment of duty.

11. Section 56(1) which we have extracted earlier requires the importer of any goods for home consumption or warehousing to present to the proper officer a

bill of entry in the prescribed form. The question, which arises for consideration, therefore, is whether the vessels in the two cases before us are goods brought into India for home consumption? Mixed up with this question is the question whether a transhipper is an ocean going vessel? We will first consider the question whether a vessel is goods so as to attract Sec. 46(1) of the Customs Act. By definition a vessel, aircraft or vehicle is included among goods, vide Sec. 2(22). But according to Sri Setalvad, notwithstanding the definition, the scheme of Chapters VI and VII of the Customs Act and the context in which the expression "goods" is used in Section 46 of the Act require the expression to be interpreted for the purpose of Section 46(1) as excluding a vessel, aircraft or vehicle. In answer to a direct question by us, Shri Setalvad canvassed that if a vessel, aircraft and vehicle are required to be excluded from the meaning of the expression goods in Section 46(1) of the Act, he was unable to suggest what other purpose was to be served by the inclusive definition of the expression which expressly brought within its shadow vessel, aircraft and vehicle. He frankly stated that he was unable to point out any provision in the Act into which the inclusive definition could be read. We cannot attribute redundancy to the legislature particularly in the case of a definition in a taxing statute. We must proceed on the basis that such a definition is designed to achieve a result. Under Section 12 of the Customs Act what are dutiable are goods imported into or exported from India and if goods are defined to include vessels, aircrafts and vehicles, we must take it that the object of the inclusive definition was to bring within the net of taxation vessels, aircrafts and vehicles which are imported into India. It is undisputed and indeed it is undisputable that Section 46(1) is a prelude to the levy of duty or a first step in that direction. It must, therefore, follow as a necessary sequitur that vessels, aircrafts and vehicles are goods for the purpose of Section 46(1). Any other interpretation may lead to most anomalous results. Under Section 15 of the Customs Act, the rate of duty and tariff valuation in the case of goods entered for home consumption under Section 46 shall be as on the date when the bill of entry is presented, in the case of goods cleared from a warehouse under Section 68 as on the date on which the goods are actually removed from the warehouse and in the case of any other goods as on the date of payment of duty. Goods which are entered for home consumption under Section 46 and goods which are warehoused are naturally goods which are openly imported into India without concealment. The expression other goods mentioned in Section 15[c] is obviously meant to cover other imported goods such as goods imported clandestinely and goods which have otherwise escaped duty."

4.2

In the case of ***Union of India and others V. Chowgule and Co. Pvt. Ltd., reported in 1985 (20) ELT 57(Bom.)*** it is held that a Bill of Entry is an innocuous matter. It does not create any obligation or liability on the petitioner. It is more so when no civil consequence will follow from the mere filing of a Bill of Entry. 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. Therefore the petitioners have been unnecessarily making a grievance when the petitioners were called upon to furnish the Bill of Entry. In this background, petitioners grievance about the demand of filing of Bill of Entry is not a prejudicial act which would require interference by the High Court under Article 226 of the Constitution.

4.3

In the case of ***State of Andhra Pradesh V. K. Shree Ramamurthy, reported in AIR 1962 SC 1585*** it is held as under:-

"Where on receiving a part of the purchase price, the Mills issue delivery orders directing the delivery of goods as per contract and these are handed over to the dealer buyer on his honouring a hundi for the value of the goods, but the buyer, instead of himself taking delivery of the goods, kept ready, from the godowns of the Mills, endorses the delivery order which passes through several hands before the ultimate holder of it presents it to the Mills and obtains delivery of the goods from them, the transaction so entered into by the buyer is not mere sale or transfer of delivery order but is a sale of goods so as to bring them to charge under S.3 of the Madras General Sales Tax Act, 1939. A delivery order is a document of title to goods by virtue of S. 2(4) of the Sale of Goods Act, 1930 and the possessor of such a document has a right not only to receive the goods but also to transfer it to another by endorsement or delivery. At the moment of delivery by the Mills to the last endorsee, there are, in effect, two deliveries: one by the Mills to the dealer buyer, represented in so far as the Mills are concerned by the dealer-buyer's agent, the endorsee and the other, by the dealer-buyer to the endorsee as buyer from the dealer-buyer. These two deliveries may synchronize in point of time, but are separate in point of fact and in the eye of law."

4.4

In the case of ***Hindustan Lever and another V. State of Maharashtra and Another, reported in (2004)9 SCC 438*** it is held as under:-

"45. It was contended that since the transaction was not between "living beings" the same was not "inter vivos" as the transfer of property had not taken place between living beings. We do not agree. "Transfer of property" has been defined in Section 5 of the Transfer of Property Act, 1882 to mean an act by which a living person conveys property, in present or in future to one or more other living persons. Company or association or body of individuals, whether incorporated or not, have been included amongst "living person in this Section. It clearly brings out that a Company can effect transfer of property. The words "inter vivos" in the context of Section 394 of Companies Act would include

within their meaning also a transfer between two "juristic persons" or a transfer to which a "juristic person" is one of the parties. The transaction between a minor or a person of unsound mind with the other person would not be recognized in law, though the same is between two living beings, as they are not juristic persons in the eye of law who can by mutual consent enter in a contract or transfer the property. The Company would be a juristic person created artificially in the eye of the law capable of owning and transferring the property. Method of transfer is provided in law. One of the methods prescribed is dissolution of the transferor Company by merger in the transferee Company along with all its assets and liabilities. Where any property passes by conveyance, the transaction would be said to be inter vivos as distinguished from a case of succession or devise."

4.5

In the case of ***State of Rajasthan V. Bhilwara Spinners Ltd., reported in AIR 2001 Rajasthan 184***. Para 23 thereof reads as under:-

"23. The aforesaid definition makes it clear that a document which either creates any right or liability is created, transferred, extended, limited, extinguished or recorded can fall within the category of instrument. Even if no such right or liability is created, transfer, limited, extended, extinguished or recorded in fact but purports to create transfer or record any right or a liability it may invite attraction of stamp duty. But, obviously, the right or liability referred to under above definition can only relate to the right or liability in respect of which the instrument has been executed. If any transaction has been carried out between two parties without execution of an instrument, the provisions of the Stamp Act cannot be attracted on the assumption that in order to create, transfer, limit, extent, extinguish or record validly what instrument ought to be executed or purporting to create any right or a liability, or purporting to create such right or liability no provision of Stamp Act can be invoked for the purpose of levying Stamp Duty by assuming existence of any document for the said purpose. Else, it would amount to duty on transaction and not duty on the instrument. The instrument is chargeable even the transaction which it recoded or purports to record cannot be effected. For example if a person having no interest in any property which he could transfer executes a document purporting to transfer such interest in immovable property, the document will attract Stamp Duty. Conversely also, as the duty is on the instrument even though where the parties have acted in furtherance of the agreement between them by conducting their affairs accordingly but have not executed any instrument to that effect, in the absence of any instrument to that effect between the parties, no duty under the Act can be come chargeable.

5.

Mr. M.J. Thakore for the petitioners submitted that in case of Bill of Lading the delivery is taken by the petitioners themselves and therefore there is no question of imposing any further duty. According to him Bill of Entry is not a delivery order. He has relied upon Sections 30, 46 and 47 of the Customs Act and submitted that in case of Bill of lading it is a matter of clearance and there is not a delivery. According to him, only in case the goods are entrusted to a third party, then the question of bill of entry will come into play and the goods would be leviable as per the Circular of the respondent authorities.

6.

Mr. S.N. Soparkar, Senior Advocate submitted that though the bill of entry is filed, if the goods are transferred under Bill of lading, the tax is already paid and only in case of a fresh transaction the duty is leviable. He has relied upon a judgement in the case of ***Bayyana Bhimayya V. Government of A.P., reported in AIR 1961 SC 1065*** (V 48 C 178) wherein it is held that in so far as the third parties were concerned, they had purchased the goods by payment of an extra price, and the transaction must, in law and in fact, be considered a fresh transaction of sale between the assesseees and the third parties.

7.

Mr. Kamal Trivedi, learned Advocate General appearing for the respondent State submitted that the Bill of Entry is not a procedural formality, but it creates the following rights in favour of the importer of the goods:

[i] To have the goods assessed at the value and rate of duty as in force on the date of presenting the said Bill of Entry.

[ii] To have the goods cleared and delivered in its favour, and

[iii] To avail of Cenvat Credit of the import duty paid on the imported goods while paying duty on the finished goods manufactured therefrom, under Rule 9 of the Cenvat Rules.

As against the above, no sooner Bill of Entry is filed under the provisions of the Customs Act, 1962, there arises liability on the part of the importer to pay the required customs duty in respect of the imported goods.

7.1

He submitted that the Bill of Entry is very much an "instrument" as per Section 2(1) of the Bombay Stamp Act, 1958 inasmuch as it creates right as well as liability on the part of the importer, which entitles him to the delivery of the imported goods. In other words, importer cannot take delivery of imported goods from the control of the Customs Authorities, unless the Bill of Entry is

filed and till then, the goods remain within the custody of the Customs Authorities and that there would be no question of creation of the aforesaid rights and liability on the part of the importer.

7.2

Mr. Trivedi submitted that after the amendment in Article 24 with effect from 1.4.2006, concept of transfer of ownership or concept of authorizing third party to make the delivery of the goods or the concept of tripartite arrangement are all foreign to the provisions contained in Article 24 relating to "delivery order" in respect of goods.

7.3

According to him, the language of Article 24 is very clear and that therefore the said provision under the Bombay Stamp Act cannot be interpreted by taking recourse to the provisions of other legislations like Sections 2(2) and 2(4) of the Sale of Goods Act, dealing with "delivery" and "document of title to goods".

8.

He has relied upon the following decisions in support of his contentions:-

8.1

State of Kerala and others v. Mcdowell & Co. Ltd., reported in 1994 Supp (2) SCC 605. Para 21 thereof reads as under:-

"21. The respondents become liable to pay excise duty on the liquor they make at the point of time at which it is made. Collection of the amount of excise duty is ordinarily deferred until the liquor is cleared from the respondent's distillery. Section 7 of the Akbari Act entitles the appellants to clear the liquor for export outside the State of Kerala upon their executing an instrument in a form set out in the Rules made under the statute. The instrument in question permits the respondents to remove the quantity of liquor stated therein from their distillery to a location outside the State of Kerala without payment of the excise duty thereon subject to the condition that the respondents would deliver the same into the custody of the Excise Officer in charge of the importer thereof and the respondents would on demand pay or cause to be paid to that excise Officer excise duty on all or any portion of such liquor not delivered. The obligation of the respondents under the instrument in question is that if there be a breach of all or any of its provisions or of the Rules they would forthwith pay to the State of Kerala the sum of money mentioned in it, representing the amount of the excise duty payable upon the quantity of liquor to be exported, upon payment the obligation would be void and of no effect. By the instrument in question, therefore, the respondents avail themselves of the advantage of

clearing from their distillery for export outside the State of Kerala, liquor without paying excise duty thereon. They do so upon the condition that the liquor shall be delivered into the custody of the Excise Officer in charge of the importer and excise duty shall be paid to that Excise Officer on all or any portion of the liquor which is not so delivered. As required by the Abkari Act, the respondents obliged themselves in the event of breach of the condition, to pay to the State of Kerala the sum of money mentioned in the instrument in question, being the amount of the excise duty. Under the instrument in question the respondents clearly oblige or bind themselves to pay to the State of Kerala a specified sum of money and can be sued thereon. The instrument in question is, therefore, an instrument whereby a person obliges himself to pay money to another, the obligation to become void if a specified act is performed. It is a bond within the meaning of the Kerala Stamp Act."

8.2

In the case of ***J.K. Industries Ltd. V. Union of India, reported in 2005 (186) ELT 3 (Raj)*** it is held that the Custom Authorities under whose jurisdiction the bonded warehouse is situate, is the person before whom application seeking permission to remove goods for home consumption is to be made. The bill of entry is also required to be presented to him and liability to pay Customs Duty on such goods be removed for home consumption also arises then.

8.3

In the case of ***Vijaya Industrial Products (P) Ltd. V. Union of India, reported in 1995 (76) ELT 531 (Mad.)*** it is held that the mere fact that any one information in the prescribed form is not furnished or any defective or incorrect information is furnished, for any reason whatsoever, is no disentitling or disqualifying factor to outright reject or condemn the Bill of Entry presented otherwise in the prescribed form or to treat the same as one not presented on the actual date of its presentation as such.

8.4

In the case of ***Bharat Commerce & Industries Ltd. V. Collector of Customs, Bombay, reported in 1997 (93) ELT 653 (SC)***, in para 12 it is held as under:

"We do not have a case of penalty before us. We are also of the view that filing of a bill of entry in the prescribed form is not a procedural formality. Otherwise any importer may write a letter to the proper officer stating that certain quantities of goods have been imported and the goods will have to be cleared on the strength of the letter only. If a statutory form is prescribed for presentation of a bill of entry, the the bill of entry has to be in the prescribed form. Section 46(5) contemplates substitution of one bill of entry by another. The second bill of entry must also be prepared and lodged with the proper

officer in the prescribed form. No order could be passed upon it by the proper officer by treating it as a bill of entry for warehousing."

8.5

In the case of ***Union of India V. Marmagoa Steel Ltd., reported in 2008(229) ELT 481 (SC)*** it is held as under:

"11. Now in the present case, as far as Bills of Entry dated 30th May 1994 and 31st May 1994 are concerned, Bills of Entry were produced by the assessee which indicate that M/s Essar Gujarat Limited had paid duty at the time of import and, therefore, the assessee was entitled to take MODVAT Credit for the duty paid on the imported goods. However, when we come to the 3rd Bill of Entry dated 6th June 1994, only the above Certificate at Page No.42 of the Paper Book was relied upon and the triplicate copy of the Bill of Entry was not produced. In the circumstances, in our view, the respondent had wrongly availed of MODVAT Credit of Rs.1,78,582/- on the quantity of 212.659 MT scrap referred to in the above Chart."

8.6

In the case of ***Ashirwad Ispat Udyog V. State Level Committee, reported in AIR 1999 SC 111***, in para 8 it is held as under:-

"8. Decisions construing the meaning of the word "manufacture" as used in other statutes do not apply unless the definition of that word in the particular statute under consideration is similar to that construed in the decisions. The plain construction of the special definition of the word in a particular Act must prevail. In the special definition given in Section 2(j) of the said Act manufacture has been defined as including a process or manner of producing, collecting, extracting, preparing or making any goods. There can be no doubt whatsoever that "collecting" goods does not result in the production of a new article. There is, therefore, inherent evidence in the definition itself that the narrow meaning of the word "manufacture" was not intended to be applied in the said Act. Again, the definition speaks of "the process of lopping the branches (of trees), cutting the trunks". The lopping of branches and the cutting of trunks of trees also, self evidently, does not produce a new article. The clear words of the definition, therefore, must be given due weight and cannot be overlooked merely because in other contexts the word "manufacture" has been judicially held to refer to the process of manufacture of new articles."

8.7

In the case of ***Commissioner of Income Tax, Kerala V. Tara Agencies, reported in 2007 (214) ELT 491 (SC)***, it is held as under:-

"59. Undoubtedly, the facts of Nilgiri s case are identical to the facts of the present case and the ratio of Nilgiri s case is fully applicable to this case. But we have to bear in mind a significant difference in the language employed in Section 8 of the Bombay Sales Tax Act, 1953 in Nilgiri s case and the language of Section 35(1)(B) of the Income-tax in the present case. The difference is that the term "processing" which has been specifically incorporated in Nilgiri s case has been specifically omitted in the present case. Similarly, in Chowgule s case the term "processing" has been incorporated in the statute and the activities of the assesses both in Chaowgule s and Nilgiri s cases were held to be processing and these respective cases, in these respective cases, the assesses were held to be entitled to the benefit under respective statutes. In the present case, same benefit cannot be extended to respondent-assessee because the word "processing" has been specifically omitted in the statute. The activities of the assesses both in Nilgiri s and Chowgule s cases amount to processing. The activity of the respondent-assessee in the present case also amounts to processing . Section 35(1)(b) governing the instant case incorporated the terms manufacture and production and omitted the term processing . Therefore the respondent-assess cannot be extended the benefit of Section 35(1)(B) of the Income-tax Act.

60. The processing is only an intermediate stage of production and/or manufacture. The processing of tea of the respondent-assessee falls short of either manufacturing or production, therefore, because of the language of Section35(l)(B) of the Income Tax Act, the respondent-assessee cannot be extended the benefit which has been extended to the assesses in Nilgiri s and Chowgule s cases.

61. Since the legislature in its wisdom has not used the term processing in Section 35(l)(B) of the Act, it would be erroneous to incorporate the word in the Section and then interpret the Statue. In this view of the matter Chowgule s case and Nilgiri s case dealt with by this Court in Chwgule s case are clearly distinguishable because of the language of the statutes.

62. The intention of the legislature has to be gathered from the language used in the statute which means that attention should be paid to what has been said as also to what has not been said.

Xx xxx xxx

67. Therefore, the legal position seems to be clear and consistent that it is the bounden duty and obligation of the Court to interpret the statute as it is. It is contrary to all rules of construction to read words into a statute which the legislature in its wisdom has deliberately not incorporated.

68. On clear construction and interpretation of Section 35B(1A) of the Act we are clearly of the opinion that the respondent s activity amounts to processing

only and the activity does not amount to either production or "manufacture . The term "processing" has not been included in Section 35B(1A) of the Act, therefore the respondent is not entitled for weighted deduction of Section 35B (1A) of the Act."

9.

The crux of the contention of the petitioners is that since the only document/instrument involved in the process of delivery is a bill of lading, any levy of stamp duty can only be with reference to this document/instrument. In Mitra s Legal & Commercial Dictionary (Sixth Edition) by Tapash Gan Choudhary, the Bill of Lading is explained as under:

Bill of lading: A shipmaster s detailed list of the ship s cargo.

Bill of lading is a memorandum signed by masters of ships in their capacity of carriers, acknowledging the receipt of merchant s goods, of which there are usually three parts - one part belongs to the consignor, one sent to the consignee and one preserved by the master. It is the evidence of the title, to the goods shipped; and by its endorsement and delivery, the transfer of the property in the goods specified therein is generally effected.

A bill of lading is a writing, signed on behalf of the owner of the ship in which goods are embarked, acknowledging the receipt of the goods, and undertaking to deliver them at the end of the voyage subject to such condition as may be mentioned in the bill of lading. It is well settled in commercial world that a bill of lading represents the goods and the transfer of it operates as a transfer of goods."

9.1

The "bill of lading", typically, is a document, which is issued by or on behalf of a carrier, in relation to the carriage of goods, by sea. A bill of lading, serves three functions. It constitutes evidence of receipt of the goods by the carrier/ship; it is a document of title to the goods covered thereunder; and it is evidence of the terms and conditions of the contract of carriage. A bill of lading is a negotiable document. Title to the consignment covered under the bill of lading and the right to receive delivery of the consignment covered by the bill of lading, can, therefore, be negotiated and/or transferred and/or assigned. A holder of a bill of lading is entitled to demand, from the carrier, delivery of the goods covered thereunder. The Bills of Lading Act, 1856 governs the rights and obligations in relation to a bill of lading in India.

9.2

A "delivery order" is a document which is very different. It does not cover the carriage of goods by sea. A "delivery order" is a written order or instruction by the bailor of goods, directing a warehouseman, the port authorities or other bailee to deliver the goods to the person named in the delivery order or to the person in lawful possession of the delivery order. A delivery order is, therefore, different and distinct from a bill of lading. A delivery order is normally issued in cases where there is bailment of goods and is issued by the bailor and addressed to the bailee. Where goods are loaded onto a ship, and a bill of lading issued, the shipper is the bailor and the carrier is the bailee. I am, therefore, of the view that a bill of lading, which is issued by the carrier (bailee) can, therefore, never treated the description of a delivery order.

10.

Now let us examine the case of the petitioners. In the case of the petitioners, the practice that is followed at their captive jetty, for discharging of cargo from ships is concerned, is that as and when a ship carrying cargo consigned for the petitioners arrives at the jetty, the cargo in the ship s tanks is directly transported via conveyor belt to the custom bonded house/yard for custom clearance, where it is directly transported via conveyor belt to the petitioner Company s storage facility and from there, it is taken for consumption. All this is done only against production of/undertaking to produce the Bill(s) of Lading. The respondents are not involved in so far as entrustment of the cargo by the carrier to the petitioners are concerned. The cargo is directly delivered to the petitioners via the jetty utilizing the conveyor belt. The cargo is not delivered to the Port Authorities, which might be in the case of an individual consignee at a conventional port, for further delivery to the ultimate consignee. Thus, I am of the view that since the cargo in question is directly received, taken delivery of and transported to the petitioners, there is no entrustment of the cargo to the respondents. Consequently, there is no bailment of the cargo by the carrier (bailor) to the Port Authorities (Bailee). Instead, there is a direct delivery by the carrier to the consignee and it appears that this is the very purpose for promoting the construction of captive jetty. Therefore I am of the view that there is no necessity whatsoever for the carrier issuing any instruction, either styled as a delivery order or otherwise, to the Port Authorities to deliver the cargo to the consignee.

10.1

It is also required to be noted that a delivery order is a document which contains an instruction by the Bailor to the Bailee to deliver the goods bailed to the person named in the delivery order or the holder thereof. In this case there must be bailment of goods, the document must be issued by the Bailor and the document must contain instructions to the Bailee. In the case of bill of lading, it is not a delivery order. It is issued by the Bailee. It does not contain any

instruction to the Bailee. A bill of lading does not have any of the incidents, ingredients or characteristics of the delivery order.

10.2

Thus, the bill of lading represents the goods and the transfer of it operates as a transfer of goods. A bill of lading serves three purposes viz. (1) it is a receipt for the goods shipped containing the terms on which they have been received; (2) it is evidence of the contract for the carriage of goods and (3) it is a document of title for the goods specified therein. In the case of bill of lading the goods are directly transferred to the owner of the goods and no third party is involved.

10.3

In view of the above discussion it is clear that since the cargo in question is directly received, taken delivery of and transported to the petitioners, there is no entrustment of the cargo to the respondents, there is no necessity for any other instrument.

10.4

Section 2(l) and Section 74 of the Bombay Stamp Act clearly exclude the bill of lading from the purview of Bombay Stamp Act. In so far as a bill of lading is concerned, it is clear that the levy of stamp duty on a bill of lading can only be done by Parliament and it is not within the legislative competence of a State to prescribe stamp duty in respect of a bill of lading. In this case since the goods are directly delivered to the owner of goods, no stamp duty is involved.

10.5

The power to levy stamp duty is concurrent under Entry 44 of List III of Schedule 7 of the Constitution of India. Entry 91 of List 1 of the 7th Schedule prescribes the instruments in relation to which the Central Government may enact legislation to prescribe the rate of stamp duty. Entry (1) of Schedule 7 is reproduced below:

"91. Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of Insurance, transfer of shares, debentures, proxies and receipts."

10.6

Entry 63 of List 2 of Schedule 7, defines documents in respect of which the State Government may legislate. Entry 63 of List 2 reads a sunder:

"63. Rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty."

10.7

Thus, a plain reading of Entry 63 of List 2 and Entry 91 of List 1 makes it clear that the State Government has no competence to prescribe a rate of stamp duty in respect of documents specified in List 1 Entry 91. Clearly, one of the documents specifically mentioned in Entry 91, List 1 is "Bills of Lading". Therefore, so far as Bills of Lading are concerned, admittedly, it is only the Central Government which can legislate including prescribing the rate of stamp duty thereon.

11.

It is necessary to refer to the relevant provisions of the Bombay Stamp Act, 1958. Section 2(l) of the Stamp Act defines "Instrument" as under:-

(1) "instrument" includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded but does not include a bill of exchange, cheque, promissory note, bill of lading, letter of credit, policy of Insurance, transfer of share, debenture, proxy and receipt.

Explanation: The term "document" also includes any electronic record as defined in clause (t) of sub-Section (1) of Section 2 of the Information Technology Act, 2000."

11.1

Thus, a bill of lading is not included in the definition of instrument. Similarly Section 74 of the Act states that:

"74: Act not applicable to rates of stamp duty on bills of exchange, etc.: For the avoidance of doubt, it is hereby declared that nothing in this Act shall apply to rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of Insurance, transfer of shares, debentures, proxies and receipts".

11.2

It is also required to be noted that in the case of ***IRC V. G. Angus & Co. reported in (2004)9 SCC 438*** the apex Court held that the thing which is made liable to stamp duty is the "instrument". It is not a transaction of purchase and sale, which is struck at, it is the "instrument" whereby the purchase and sale are effected which is struck at. It is the "instrument"

whereby any property upon the sale thereof is legally or equitably transferred and the taxation is confined only to the instrument whereby the property is transferred. If a contract of purchase or sale or a conveyance by way of purchase and sale, can be, or is, carried out without an instrument, the case would not fall within the Section and no tax can be imposed. Taxation is confined to the instrument by which the property is transferred legally and equitably transferred. In the case on hand the only instrument is Bill of Lading on which tax has already been paid and the same is exempted from the definition of "instrument".

11.3

I may also quote Section 2(4) of The Sale of Goods Act, 1930 which is as under:

"2. Definitions - In this Act, unless there is anything repugnant in the subject or context, -

Xxx xxx xxx

(4) "document of title to goods" includes a bill of lading, dock-warrant, warehouse keeper s certificate, wharfingers certificate, railway receipt, multimodal transport document, warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented;"

11.4

The aforesaid definition would show that a bill of lading is a proof of possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods.

11.5

Thus, in case of a bill of lading, the Act is not applicable and no stamp duty can be levied. In short, Section 2(l) and Section 74 of the Bombay Stamp Act clearly exclude a bill of lading from the purview of the Bombay Stamp Act.

11.6

As regards filing of bill of entry is concerned, it does not create any obligation or liability on the petitioners. In the case of ***Union of India and others v. Chowgule and Co. Pvt. Ltd. 1985 (2) ELT 47 (Bom)***, the Bombay High Court held that a Bill of Entry is an innocuous matter; it does not create any

obligation or liability on the petitioner and it is more so when no civil consequence will follow from the mere filing of a Bill of Entry. It is further held 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. Therefore, the petitioners have been unnecessarily making a grievance when the petitioners were called upon to furnish the Bill of Entry.

11.7

In the case of ***John F. Fidele & Co. v. Collector of Customs, reported in 1992 (58) ELT. 498 (Mad)*** it is held that as a purchaser of the distress vessel, the petitioner has a right to break the same and dispose of the dismantled materials, but when at the same time in order to avoid any controversy as to the contents of the distress vessel, there should be an inventory and such an inventory is possible only after the petitioner files a Bill of Entry.

11.8

Thus, mere filing of bill of entry would not mean that the petitioner is required to pay stamp duty especially the goods are imported by way of Bill of Lading. As in the present case the tax has already been paid on bill of lading, there is no question of making any further tax on the same..

12.

A contention has been raised stating that filing of bill of entry is not optional. It may be so. But in all cases it is not necessary that tax is required to be imposed, especially when the tax has already been paid in case of bill of lading.

13.

Now, the impugned Circulars were issued on the basis of amended Article 24 of the Bombay Stamp Act. While the Indian Stamp Act prescribes the rate of stamp duty on a Bill of Lading, the Bombay Stamp Act contains provisions for the rate of stamp duty on "delivery order". Article 24 of the Schedule to the Bombay Stamp Act (prior to 1st April 2006) prescribed the rate of stamp duty that would be leviable on "delivery order in respect of goods". Prior to its amendment on 1st April 2006, Article 24 read as under:-

"24. Delivery order in respect of goods - That is to say, any instrument entitling any person therein named or his assigns or the holder thereof, to the delivery of any goods lying in any dock or port, in any warehouse in which goods are stored, or deposited on rent of hire, or upon any wharf, such instrument being signed by or on behalf of the owner of such goods upon the sale or transfer of

such goods the sale or transfer of the property therein when such goods exceed in value twenty rupees." (emphasis supplied).

13.1

With effect from 1st April 2006, the description of "delivery order in respect of goods" was, however amended. The amended article reads as under:-

"24. Delivery order in respect of goods, that is to say, any instrument entitling any person therein named or his assigns or the holder thereof, to the delivery of any goods lying in any dock or port, in any warehouse in which goods are stored, or deposited on rent or hire, or upon any wharf, when such goods exceed in value one hundred rupees." (Emphasis supplied).

13.2

A perusal of the Article, prior to amendment and after amendment, shows that a "Delivery Order" as contemplated by Article 24 shows that the intention of the Legislature was to cover the bill of lading which is in the name of a particular person who has transferred by bill of entry and subsequently the benefits are taken by the person who has not imported the goods or has no contract with the original seller. In such cases the stamp duty is required to be made by way of bill of entry as the goods are transferred to a third party. Bill of Entry is an instrument and provisions of Article 24 would apply to it.

13.3

A bare reading of the amended Article 24 further makes it clear that it applies to cases where a delivery order is in fact issued and produced before the concerned Port Authorities for obtaining delivery of imported goods received in the port area. Clearly, the amendment and the impugned Circulars contemplates to deal with cases where goods have been bailed and/or entrusted by the carrier to the Port Authorities and the Port Authorities are requested to deliver them to the ultimate consignee who presents to them a Delivery Order issued by or on behalf of the carrier. Neither Article 24 in its amended form deals with nor could deal with a situation where delivery is direct by the consignee without the involvement of the Port Authorities, against production of a bill of lading. Neither amended Article 24 deals with nor could deal with nor contemplate a case of direct delivery by the carrier to the consignee at a captive jetty against a bill of lading or even otherwise, without the issuance of a delivery order.

13.4

In short, if the bill of lading and the bill of entry are in the same name and if the person whose name is in the bill of lading is taking the goods, no separate

stamp duty can be levied as the stamp duty is already paid under the Central Act. Again imposing tax on the very same person would amount to double taxation on the same person. However, if the goods are transferred to a third person the bill of entry will come into play and the third party is required to make the payment in accordance with Article 24. Therefore, no fault can be found in Article 24 and even the Circulars issued on the basis of the said Article.

14.

In view of the above discussion it is clear that if the name of the party is the same in the bill of lading and bill of entry, then no stamp duty can be levied upon them. However, in case the petitioners where the name of in the bill of lading and name in the bill of entry is different, then it amounts to transfer to third party, then the Circular will come into play and stamp duty will be levied. With this clarification these petitions are disposed of.

15.

In the premises, on the facts of the case, it is declared that since the goods are delivered in the same name to party in these petitions, it is not necessary to obtain "Stamp Duty Clearance". Consequently the impugned Circular dated 18-30/12/2007 issued by the Gujarat Maritime Board is hereby quashed and set aside. Rule is made absolute accordingly in all these petitions with no order as to costs.

(SBJ) (Rule is made absolute)

