N- REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 3788 OF 2003

M/S. MUSTAN TAHERBHAI -- APPELLANT

VERSUS

COMMNR. OF CENTRAL EXCISE & CUSTOMS -- RESPONDENT

J U D G M E N T

D.K. JAIN, J.:

1. This appeal, under Section 130E of the Customs Act, 1962 (for short "the Act"), is directed against order dated 18th February, 2003, passed by the Customs, Excise & Gold (Control) Appellate Tribunal, as it existed at the relevant time, (for short "the Tribunal"). By the impugned order the Tribunal has dismissed the appeal filed by the appellant herein and confirmed the levy of customs duty on the ocean going vessel, registered as M.V. Jagat Priya, purchased by them in a Court auction, for breaking/ scrapping purpose in terms of Notification No. 133/87-Cus.

2. M.V. Jagat Priya was manufactured by M/s. Hindustan Shipyard Ltd. in the year 1975 in a Customs Bonded Warehouse at Vishakapatanam, using certain imported items. The said vessel was cleared on 30th November, 1975, and was delivered to M/s. Dempo Steamship Ltd. for a consideration of ‘7,61,12,400/- and Central Excise duty at the rate of 1% was paid thereon. The vessel was registered as Indian vessel tonnage and flying an Indian flag.

However, it ceased to ply and was grounded at Bedi Bunder, Jamnagar, in June 1986. On 16th October, 1992, an order was passed by the High Court of Judicature at Bombay in Admiralty suit at the instance of

Union of India and the Shipping Credit and Investment Co. of India Ltd. for auction of the vessel on "as is where is" basis "free from all encumbrances and existing liens".

3. On 12th February, 1993, the vessel was auctioned and being the highest bidder, the appellant viz. M/s. Mustan Taherbhai purchased the vessel. The sale in favour of the appellant was confirmed by the High Court and in furtherance thereof, the possession of the ship was delivered on 4th March, 1993. Thereafter, on 10th May, 1993, on the direction of the Superintendent of Central Excise & Customs, the appellant filed a bill of entry claiming that the ship was an Indian built ship, and therefore, no customs duty was payable. On 12th May, 1993, the Superintendent of Central Excise, Jamnagar passed a provisional assessment order demanding customs duty @ 5%, and an additional duty of ‘ 1000/- per LDT.

4. Being aggrieved, the appellant preferred Special Civil Application No. 4924 of 1993 before the High Court of Gujarat. The High Court, vide interim order dated 25th May, 1993, permitted the appellant to clear the materials obtained by breaking the ship in question without payment of provisional duty on the condition that the appellant will file a bond with security deposit. Vide order dated 23rd July, 1993, the High Court disposed of the said application, and directed the appellant to file an appeal before the

Commissioner (Appeals). Accordingly, the appellant preferred an appeal before the Commissioner (Appeals).

5. The Commissioner (Appeals), vide order dated 29th April, 1994, dismissed the appeal and confirmed the order of provisional assessment dated 12th May, 1993.

6. Being aggrieved, the appellant preferred an appeal before the Tribunal. Vide order dated 10th July, 1998 the Tribunal dismissed the appeal. Relying on the decision of this Court in Union of India & Ors. Vs. M/s. Jalyan Udyog & Anr.1, the Tribunal observed that Notification No. 133/87-Cus was applicable in the instant case, and

therefore, the appellant was liable to pay customs duty on the vessel at the rate prevalent at the time of breaking of ship.

7. Being dissatisfied, the appellant preferred an application under Section 129(B)(2) of the Act praying for rectification of mistakes in the order, dated 10th July, 1998, on the ground that the Tribunal had erroneously concluded that: (i) the goods manufactured in a customs bonded warehouse were similar to goods imported under the Act; (ii) the issue for determination before it was whether Notification No. 133/87-Cus was applicable or not, whereas the real issue for determination was whether the vessel was imported or indigenously manufactured; (iii) the customs duty under Notification No. 133/87-Cus was payable when Notification No. 118/59-Cus was applicable; (iv) since the vessel was subsequently being broken up, its clearance would be governed by Notification No. 262/58-Cus; and (v) the decision in Jalyan Udyog (supra) was applicable to the facts of the present case.

1 (1994) 1 SCC 318

8. Vide order dated 13th April, 1999, the Tribunal dismissed the said application on the ground that it is a settled position that goods manufactured in a customs bonded warehouse are treated akin to goods manufactured in a foreign country, and when the vessel was taken out of the country for plying as foreign going vessel, and subsequently, the said vessel is brought back to India for breaking purposes, it amounts to re-import.

9. Aggrieved, the appellant preferred yet another application under Section 129(B)(2) of the Act for rectification of mistakes in the order of the Tribunal dated 13th April, 1999 on the ground that in Union of India Vs. Baijnath Melaram2, this Court had affirmed the Bombay High Court’s decision wherein it was held that no customs duty was payable on vessels which are subject to breaking, if the said vessels had been manufactured in India. Vide order dated 8th October, 1999, the Tribunal dismissed the said application as well,

holding that it had correctly relied on the decision of this Court in Jalyan Udyog (supra).

10. Still aggrieved, the appellant preferred C.A. No. 1998 of 2000 before this Court. Vide order dated 30th August, 2001, this Court, while remanding the matter back to the Tribunal, observed thus:

> "It appears from the judgment of the Tribunal that the matter was argued without reference to facts which are now stated in the special leave petition, namely, that the vessel was built in India and excise duty was paid thereon at the time of its clearance. It was delivered to an Indian party. The contention on these facts is that this was not a transaction of export and import which would render the appellants liable to the payment of customs duty.
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> Reliance by the Tribunal upon the decision of this Court in the case of Union of India & Ors. vs. Jalyan Udyog & Ors. (1994 (1) S.C.C. 318) would be misplaced if these are, indeed, the facts for that was not a case that related to a vessel that was built in India and cleared for home consumption. We think it appropriate, in the circumstances, that the order under challenge should be set aside and the matter be remanded to the Tribunal to be considered afresh. In so doing, the Tribunal shall determine, first, the facts and then the law. The Tribunal may take note of the judgment of the Bombay High Court delivered on 5th February, 1992 in the case of M/s. Baijnath Melaram vs. Union of India & Ors. (Writ Petition No.1478 of 1983), special leave petitions whereagainst were summarily dismissed. It may be noted that we express no opinion on the merits of the case on either side."

It is plain from a bare reading of the said order that this Court had directed the Tribunal to first appreciate the facts of the case and then determine the question of leviability of import duty on an Indian built ship which was sold for breaking. It is evident from the afore-extracted paragraph that the Court had observed that reliance by the Tribunal on the decision of this Court in Jalyan Udyog (supra) would be misplaced.

11. Accordingly, the Tribunal re-considered the matter. As stated above, vide the impugned order, the Tribunal has dismissed the appeal, observing thus:

> "The fact that Notification No. 118/59-Cus. was not in

existence at the date on which the vessel was cleared by HSL having been superseded by Notification No. 163/65-Cus. came to light only on the submissions made by Shri Pundir. It would appear that at all times it was wrongly presumed that the earlier Notification was in existence. We do not see the revelation as bringing on record new facts. We see it as correction of the factual error, which had existed in the record at all times. We find no substance in the submissions of Shri Doiphode, that a new case is being made out by the Revenue at the present stage.

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14. It has been held by the Hon'ble Supreme Court that as far as facts are concerned, the Tribunal is the final authority and the Court would go into only the questions of law at the appeal stage. Therefore, the Tribunal would first record the correct facts and then in the factual perspective would locate and apply the relevant law.
15. When the fact is accepted that Notification 118/59-Cus. did not exist at the time of clearance of the vessel from the Shipyard, the persistent plea that the ship was manufactured in the warehouse and that it was manufactured in India and that it attracted excise duty alone need not be considered at all. Since on the date of such clearance, the notification in force was 113/83-Cus., the provisions thereof would apply and the duty would be payable in terms of the conditions in the said notification.
16. Since we have so held the question of the applicability of the High Court judgment in the case of Baijnath Melaram does not arise."

12. Hence, the present appeal.

13. Mr. Joseph Vellapally, learned senior counsel appearing on behalf of the appellant, strenuously urged that in the instant case the imported goods lost their identity when they were used in the manufacture of vessel along with domestically procured goods, and were cleared as such, and therefore, the revenue cannot claim on the one breath that the ship was "manufactured" in India and attracted excise duty at the time of clearance and on the other breath cannot contend that the ship was manufactured abroad and was exigible to levy of customs duty when it is to be cleared for breaking at an Indian coast. Learned counsel urged that once excise duty has been levied and paid on goods, there is no question of levy of customs duty under Section 3 of the Customs Tariff Act, 1975 as the latter is meant to neutralize the non-levy of excise duty.

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14. Learned counsel contended that Section 21 of the erstwhile Sea Customs Act, 1878 provided that when any article liable to duty

forms part or ingredient of a good, then such good would be liable to full duty as if it was entirely composed of such article. In the absence of such a charging provision in the Act, ships manufactured by Hindustan Shipyard in India cannot be subjected to customs duty at the time of clearance for home consumption. Relying on the decisions of this Court in The State of Tamil Nadu Vs. M.K. Kandaswami & Ors.3 and In Re. Sea Customs Act, 1878 S. 20.4, learned counsel submitted that no customs duty was chargeable in the instant case, in as much as the ship was not a "taxable good" as it was not imported as defined under Section 2(25) of the Act. Moreover, there was no "taxable event" as there was no import in the instant case, and the appellant being an auction-purchaser cannot be likened to an importer under the Act. Relying on the decision of this Court in Baijnath Melaram (supra), learned counsel urged that no customs duty can be levied on Indian built ships. Learned counsel asserted that the Tribunal had not complied with the order of this Court dated 30 th August, 2001 in as much as it has failed to consider the judgment of the Bombay High Court in M/s. Baijnath Melaram Vs. Union of India & Ors. (W.P. 1478 of 1983), nor has it determined the question of liability to import duty of an Indian built ship, after evaluating the factual background of the case as was specifically directed. Relying on the decision of this court in Hyderabad Industries Ltd. & Anr. Vs. Union of India & Ors.5, learned counsel urged that even if

3 (1975) 4 SCC 745

4 (1964) 3 SCR 787

5 (1999) 5 SCC 15

it is held that customs duty is payable in the instant case, no additional customs duty is leviable as excise duty had already been paid.

15. Per contra, Mr. Hairsh Chander, learned senior counsel appearing on behalf of the Revenue, while supporting the impugned judgment, contended that at the time of clearance of the ship, Notification No. 118/59-Cus was not in force, as the same had been

superseded by Notification No. 163/65-Cus. At the time the appellant presented the bill of entry, however, Notification No. 133/87-Cus was in force, as rightly concluded by the Tribunal.

16. Learned counsel urged that when a ship is manufactured in a bonded warehouse, for all purposes, it is deemed to be manufactured in a foreign country, and by virtue of Notification No. 133/87-Cus, a legal fiction is created whereby when the ship manufactured in a bonded warehouse is brought to India for breaking purposes, it is deemed to be manufactured in a foreign country and appropriate duty has to be paid for clearance for ship breaking. Learned counsel contended that the said Notification is clear, and admits of no ambiguity, and it is settled that when a fiction is created by law, the Courts must give full effect to the fiction. Learned counsel urged that in terms of the Notification and as was observed by this Court in Jalyan Udyog (supra), the date relevant for determining the value and rate of the customs duty chargeable is the date on which the ship is broken up, which should be reckoned as the date on which permission for breaking up is accorded by the Director General of

Shipping. Learned counsel submitted that the fact that the appellant was an auction-purchaser is inconsequential in as much as Notification No. 133/87-Cus was a conditional notification, viz. when the ship is broken, customs duty as prevalent on the date of breaking will have to be paid, and therefore, customs duty was required to be paid in terms of Sections 12 and 15 read with Section 68 of the Act. Learned counsel also argued that Section 68 of the Act makes it clear that when the importer of any warehoused goods intends to clear them for home consumption, then a bill of entry for home consumption has be to be filed, and the import duty leviable on such goods has to be paid by the importer, as was held in D.C.M. & Anr. Vs. Union of India & Anr. 6. Learned counsel submitted that Section 9 of the Act makes it clear that clearance from a Bonded warehouse is to be treated as an import into India. It was also

stressed that clearance of vessel was in terms of the exemption notification, which stipulated payment of appropriate customs duty prevalent at the time of its breaking. Reliance was placed on the decisions of this Court in Hansraj Gordhandas Vs. H.H. Dave, Assistant Collector of Central Excise & Customs, Surat & Ors.7; Novopan India Ltd., Hyderabad Vs. Collector of Central Excise And Customs, Hyderabad8 and Commissioner of Central Excise and Customs, Indore Vs. Parenteral Drugs India Ltd.9 to contend that the terms of an exemption notification have to be construed strictly.

6 1995 Supp (3) SCC 223
7 (1969) 2 SCR 253
8 1994 Supp (3) SCC 606
9 (2009) 14 SCC 342

17. Having bestowed our anxious consideration, we are constrained to hold that the impugned judgment deserves to be set aside on the short ground that while deciding the case, the Tribunal has ignored the specific directions issued by this Court, vide order dated 30th August, 2001. It is evident from the impugned order, in particular from paras 15 and 16 that the Tribunal has not appreciated the facts obtaining in the present case in their correct perspective, which has resulted in vitiating its decision on the question of leviability of import duty. Although, from para 14 of the impugned order it is evident that the Tribunal was conscious of the direction of this Court that it was required to first record the correct facts and then in the factual perspective locate and apply the relevant law, yet in the very next paragraph it proceeds to hold that when it is accepted that Notification No. 118/59-Cus. did not exist at the time of clearance of the vessel from the ship yard, the persistent plea that the ship was manufactured in a warehouse located in India and therefore, it attracted excise duty alone need not be considered at all. In our opinion, in light of the decision and directions of

this Court in C.A. 1998 of 2000, judicial discipline obliged the Tribunal to examine the entire legal issue after ascertaining the foundational facts, regardless of its earlier view in the matter. Therefore, the decision of the Tribunal cannot be sustained.

18. We are thus, convinced that it is a fit case which should be remanded back to the Tribunal for fresh adjudication and determination of the question of leviability of import duty on an Indian-built ship brought into India for breaking purpose. For the view we have taken, we deem it unnecessary to deal with other contentions urged by the learned counsel.

19. Resultantly, the appeal is allowed; the impugned order is set aside, and the matter is remanded back to the Tribunal for fresh consideration, in accordance with law, bearing in mind the observations of this Court in C.A. No. 1998 of 2000. There will, however, be no order as to costs.

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(D.K. JAIN, J.)

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(ASOK KUMAR GANGULY, J.)

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(H.L. DATTU, J.)

NEW DELHI;
FEBRUARY 28, 2011.

RS

ITEM NO.1A COURT NO.5 SECTION III
(FOR JUDGMENT)

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS
CIVIL APPEAL NO(s). 3788 OF 2003

M/S. MUSTAN TAHERBHAI Appellant (s)

VERSUS

COMMNR. OF CENTRAL EXCISE & CUSTOMS Respondent(s)

Date: 28/02/2011 This Appeal was called on for pronouncement of judgment today.

For Appellant(s) Mr. Ajay Sharma,Adv.

For Respondent(s) Mrs Anil Katiyar,Adv.

Hon'ble Mr. Justice D.K. Jain pronounced the judgment of the Bench comprising His Lordship, Hon'ble Mr. Justice Asok Kumar Ganguly and Hon'ble Mr. Justice H.L. Dattu, J.

The Civil Appeal is allowed in terms of the signed reportable judgment with no order as to costs.

(VINOD LAKHINA)
Court Master

(KUSUM GULATI)
Court Master

(Signed reportable judgment is placed on the file)