Union Of India vs Jalyan Udyog on 14 September, 1993

Equivalent citations: 1994 AIR 88, 1994 SCC (1) 318, AIR 1994 SUPREME COURT 88, 1994 (1) SCC 318, 1993 AIR SCW 3519, (1993) 5 JT 266 (SC), (1994) 46 ECC 18, (1993) 3 SCJ 514, (1993) 49 ECR 7, (1993) 68 ELT 9

Author: B.P. Jeevan Reddy

Bench: B.P. Jeevan Reddy, S.P Bharucha

PETITIONER:
UNION OF INDIA

Vs.

RESPONDENT:
JALYAN UDYOG

DATE OF JUDGMENT14/09/1993

BENCH:
JEEVAN REDDY, B.P. (J)
BENCH:
JEEVAN REDDY, B.P. (J)
BHARUCHA S.P. (J)

CITATION:
1994 AIR 88 1994 SCC (1) 318
JT 1993 (5) 266 1993 SCALE (3)758

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by B.P. JEEVAN REDDY, J.-Leave granted in SLP (C) No. 2074 of 1993.

2.Civil Appeal No. 1104 of 1990, preferred by the Union of India, arises from the judgment of a Division Bench of the Bombay High Court allowing the writ petition filed by M/s Jalyan Udyog and M/s West Asia Shipping Co. (P) Ltd.' the respondents in this appeal. Rest of the appeals arise from a common judgment of another Division Bench of the Bombay High Court dismissing the writ

petitions filed by the ship-owners. The later Division Bench distinguished the decision in Jalyan Udyog1 and held in favour of the Union of India. The ship-owners have accordingly filed these civil appeals. The matters arise under the Customs Act, 1962.

3.In the year 1958, the Central Government issued a notification (exemption notification) being Notification No. 262-Cus. dated October 1 1, 1958 in exercise of the power vested in it by Section 25 of the Act. The notification read thus :

> "Exemption to ocean going vessels other than vessels imported to be broken up :
>
> Ocean going vessels other than vessels imported to be broken up, are exempt from the payment of Customs duty leviable thereon.
>
> 1 Jalyan Udyog v.Union of India,(1987) 32 ELT 697 (Bom) Provided that any such vessel subsequently broken up shall be chargeable with the duty which would be payable on her if she were imported to be broken up."

4.By a notification dated October 16, 1965 (Notification No. 162-Cus.) the Central Government substituted the proviso in the above said notification. The substituted proviso reads thus :

> "Provided that the duty of Customs shall be levied on the vessel if it is broken up as if it were then imported to be broken up."

5. So far as the factual aspect is concerned, it would be sufficient if we refer to the facts in Jalyan Udyog1 (The facts in the other appeals are substantially the same; only the dates differ) : On April 24, 1968 the Chairman of the Shipping Corporation of India wrote to the Government of India seeking its permission to purchase two second-hand ships for operating between India and the Gulf and other destinations as 'ocean-going vessels' (passenger ships). On June 1, 1968 the Government of India accorded the permission. Accordingly, two second-hand ocean-going vessels were purchased which arrived at the Bombay Port on August 14, 1968. No import duty was levied on the import of these ships in view of the aforesaid exemption notification. They were registered in India in the same year as M.V. Vijay Jiwan and M.V. Vijay Vaibhav and were operated as oceangoing vessels till 1980, in which year they were sold to Vijaya Lines Private Limited. Vijaya Lines operated them for sometime as ocean-going vessels and then sold them in the year 1982 to the second respondent herein viz., West Asia Shipping Company Private Limited, a company incorporated in India. The last voyage undertaken by these ships was in February 1982. In April-May 1983 both these ships were laid-up in the Bombay harbour inasmuch as they had become obsolete and unfit to ply (i.e. not seaworthy). In August 1983, the second respondent decided to scrap these ships but since the permission of the Director General of Shipping was required for scrapping, it sought such permission from the Director General of Shipping. On October 1, 1983 permission for scrapping was accorded. On September 12, 1984 the second respondent sold the said ships to the first respondent, M/s Jalyan Udyog, a partnership firm registered under the Indian Partnership Act.

6.On March 1, 1984 the Collector of Customs, Bombay issued a public notice prescribing the procedure for assessment of the value of Indian Flag Vessels meant for scrapping and other allied matters. The procedure prescribed in the public notice, in short, was to this effect : the valuation of Indian Flag Vessels cleared for breaking/scrapping will be on the basis of current import prices of similar vessels imported by MSTC (Metal Scrap Trading Corporation Limited), Calcutta for scrapping during the period of sale. The ship-owners have to approach the MSTC and obtain a certificate from the Corporation with respect to the value of the ship proposed to be scrapped. The ship-owners have also got to approach the customs authorities for taking inventory of movable gears and stores of the vessel which are sold along with vessel and for their valuation. A no objection certificate has also to be obtained from the Corporation which will be granted subject to the conditions prescribed therein. It would be appropriate to read the public notice in full :

> "New Custom House, Ballard Estate, Bombay-38.
>
> EXP. SUP. 258 INP. SUP. 260 SUPPLEMENT TO THE DAILY LIST OF IMPORT/EXPORTS, DATED 4/3/84 Dt. 1/3/84 PUBLIC NOTICE Sub : Assessment of Foreign Flag and Indian Flag Vessels for Scrapping/Breaking purposes Procedure Regarding It is notified for the information of all concerned including Indian Ship Owners and of Metal Scrap Trade Corporation Ltd., Calcutta that the following procedure is laid down for the clearance of Indian Flag Vessels sold for breaking/scrapping. The valuation of Indian Flag Vessels cleared for breaking/scrapping will be on the basis of Current Import prices of similar vessels imported by MSTC for scrapping during the period of sale. For this purpose, the ship owners will have to approach MSTC and obtain a certificate from them regarding the current import price of similar vessels imported by them. In addition to this, movable gears and stores on the vessels, which are to be sold with the vessels, are to be assessed on merits on their appraised value. For this purpose, the ship owners should approach the Customs Authorities for taking inventory of moveable gears and stores on the vessels and then a local invoice should be prepared.
>
> The MSTC shall also issue a No Objection Certificate for the sale of Indian Flag Vessels by the ship owners to the prospective buyers subject to the following conditions :
>
> (a)The ship owners shall be deemed to be the importers and the entire liability to pay the customs duty on the vessel shall rest (sic) Bills of Entry and undertake to collect a sum representing the estimated amount of duty determined by the Customs Authorities in lieu of the customs duty leviable on the ship before affecting delivery of the vessel;
>
> (b)The owner shall deposit the sum collected from the buyer with the Custom House on account of the ship sold;

(c)After the sum collected from the buyers has been deposited with the Custom House and an evidence to the effect produced to the MSTC, NOC will be issued by the MSTC for giving delivery of the vessel for scrapping;

and

(d)The Custom House thereafter shall assess the bill of entry and adjust the deposit already available with them towards the duty chargeable on the vessel and permit clearance.

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                ATTESTED
sd/-                                  sd/-
(G.M. REGE)                          (K. SRINIVASAN)
ASSTI7. COLLECTOR OF CUSTOMS,      COLLECTOR OF CUSTOMS
CORRESP. DEPTT.BOMBAY                  BOMBAY
A/1384. F. No. N/S-1486/83 (Pt.)
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               M/S 1459/83 J (Pt.)"
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7.The respondents-ship owners wrote to the Customs Authorities repeatedly asserting that the public notice aforesaid has no application to them inasmuch as the said ships were imported long prior to the constitution of the Metal Scrap Trading Corporation and the issuance of the public notice aforesaid. Not getting a favourable response, they approached the Bombay High Court by way of a writ petition being W.P. No. 2326 of 1984. As many as twelve reliefs were sought in the writ petition. In substance they were : (a) the respondents in the writ petition be directed to levy basic customs duty and auxiliary duty at the rate prevailing on and at the value at which the said two ships were purchased by the Shipping Corporation of India in August/September, 1968 and not at the rate and on the value prevailing on the date of their scrapping/breaking and (b) the requirements of obtaining the Valuation Certificate and a No Objection Certificate from the MSTC is not necessary in their case. Along with the writ petition, the respondents filed a miscellaneous application for an interim direction permitting them to crap/break the said ships on payment of the admitted duty. An interim direction was granted as prayed for on condition of paying the admitted duty and furnishing bank guarantee for the disputed amount.

8.Writ Petition No. 2326 of 1984 (filed by Jalyan Udyog1) was allowed by the Division Bench on October 9, 1987 applying the principle of the decision rendered by a Full Bench of that Court in Apar Private Limited v. Union of India2 and another unreported decision of a Division Bench Vishal Gomantak Shipping Corporation v. Union of India.3 The Division Bench held that inasmuch as MSTC was not the canalising agency in regard to ships imported prior to 1978, the authorities cannot insist upon the production of No Objection Certificate from the said Corporation for the purpose of grant of approval for disposal of ships for scrapping under section 42(1) of the Merchant Shipping Act. The Division Bench held that he said ships were imported in the year 1968 and not in the year 1983 or 1984 and, therefore, the value and the rate relevant for the purpose of levying duty is the value and the rate prevailing in the year 1968. The Bench directed (1985) 2 ELT 644 (Bom) Writ Petition No. 14 of 1985, decided on April 22, 1987 that the value of the ships be assessed on the basis that the said ships were imported in the year 1968 for the purpose of breaking up and that the value of the ships be determined in accordance with Section 14(1)(a) of the Customs Act, 1962.

9.After the decision in Jalyan Udyog1, a batch of writ petitions were placed for disposal before another Division Bench. Ship-owners therein relied upon the decision in Jalyan Udyog' and asked their writ petitions to be allowed on that basis. The Division Bench, however, distinguished the decision in Jalyan Udyog1 on the basis that in the writ petitions before it Bills of Entry were in fact filed when the respective ships last arrived into the Bombay harbour whereas in the case of Jalyan Udyog1 no such Bill of Entry was ever filed. The Division Bench held that by virtue of Section 15 the date of filing of the Bill of Entry is the date of import, relevant for the purpose of rate and valuation. Accordingly, the writ petitions were dismissed.

10.When these appeals came up for hearing, it was pointed out by the office that in Civil Appeal No. 1104 of 1990 (Union of India v. Ialyar Udyog) the second respondent viz., West Asia Shipping Private Limited has not been served and that only the first respondent was served and was represented. A doubt was raised whether the said appeal can be heard without effecting service upon the second respondent. The learned Additional Solicitor General, Shri Dwivedi stated that inasmuch as the second respondent had sold the said ships to the first respondent even prior to the filing of the writ petition and because the second respondent does not have and does not claim to have any subsisting interest in the said ships, it is not necessary to effect service upon the second respondent and that he proposes to go on with the appeal as it now stands. We are inclined to agree with him. In the writ petition, it is clearly stated that the second responder (second writ petitioner) has sold the said ships to and in favour of the fir! respondent (first writ petitioner) on September 12, 1984. It is not stated that the second respondent has any subsisting or other interest in the matter. It is true that the writ petition was filed by both these persons and both of them are respondents in these appeals but in view of the aforesaid circumstance we do not think that there can be any valid objection to the hearing of the appeal without effecting service upon the second respondent. So far as other appeals are concerned, there is no such objection; service is complete therein.

11.S/Shri Harish Salve and G.L. Sanghi, learned counsel for the ship owners urged the following contentions : a ship is imported only once into India. The import is when it first enters India and is registered in India according to law. It then becomes an Indian flag-bearing ship. There can be no second import of such ship into India. In Jalyan Udyog1, the import of the ships was in the year 1968. There was no re-import or second import in the year 1982, 1983 or 1984. The Customs Act fixes the stage at which the duty is leviable viz., the date of import. The imported goods have to be valued with reference to such date. The rate applicable is the rate prevailing on that date. The exemption notification does not and cannot in law alter or change the stage at which and the point of time with reference to which the duty is payable. It cannot treat the date of conversion as the date of import. The power conferred by Section 25 is a limited power. It has to be exercised subject to and consistent with the several provisions of the Act. The only power conferred upon the Central Government by Section 25 is to exempt, either absolutely or subject to specified conditions, the duty payable on imported goods. This power cannot be enlarged to affect Sections 14, 15 and 16 of the Act. Indeed, if the contention of the Union of India is to be accepted, a good amount of uncertainty and confusion will ensue. Question would then arise, which is the relevant date of import : is it the date of last voyage of the ships, is it the date on which the permission for scrapping/breaking was sought for, is it the date on which the permission for scrapping/breaking is granted or is it the date on which the ship is actually broken up. Neither the exemption notification nor the public notice

issued by the Collector of Customs, Bombay clarifies this aspect nor does the said notification or the public notice specify when the Bill of Entry in respect of such ship is to be filed. Further, the power under Section 25 is either to exempt the duty in full or to reduce the incidence of duty. The duty cannot be increased or enhanced under Section 25 but that is precisely the result brought about by the said exemption notification. If the exemption notification is read and understood as contended for by the Union of India, it would be void for being inconsistent with Section 25. The power of exemption under Section 25 is exercisable by the executive. The executive cannot enhance the duty over what is prescribed by the Act. Indeed, the acceptance of the contention of the Union of India would result in change of character of the duty itself; it no longer remains a customs duty. In any event, if there is an ambiguity with respect to the meaning and interpretation to be placed upon the exemption notification, it should be resolved in favour of the ship- owner. The ground upon which the later Division Bench of the Bombay High Court has distinguished the decision in Jalyan Udyog1 is unsustainable in law. Indeed, the view taken by the Bombay High Court in Jalyan Udyog1 is also the view taken by the Calcutta High Court; it is consistent with the scheme and spirit of the enactment. The object underlying the exemption notification would be better served by accepting the interpretation placed by the ship-owners upon the exemption notification. Shri Sanghi put forward a further submission that Section 15 applies only in the case of 'tariff valuation' referred to in sub-section (2) of Section 14 and not in the case of valuation contemplated by sub-section (1) of Section 14. Inasmuch as the valuation of ships in this case has to be made under Section 14(1) and not under Section 14(2), says Shri Sanghi, neither Section 15 nor Section 46 is attracted. This, according to learned counsel, is an additional ground for holding that the ships concerned in Jalyan Udyog' were imported in 1968 and for assessing the duty on the basis of the value and rate prevailing in that year.

12.Shri Dwivedi, learned Additional Solicitor General appearing for the Union of India disputed the correctness of the various submissions made by S/Shri Harish Salve and G.L. Sanghi. According to him, the exemption notification is neither ambiguous nor does it admit more than one interpretation. It clearly says that where a ship is imported as an ocean-going vessel it is exempt from duty but if such vessel is scrapped at a later point of time it would be subject to the duty on the basis as if it were imported for breaking-up on that date. He relied upon Section 15 and other provisions of the Act in support of his submission. He further submitted that the exemption notification was perfectly within the four corners of and is warranted by Section 25 of the Act. It deserves to be given full effect.

13.The Parliament enacted the Customs Act, 1962 with a view to consolidate and amend the law relating to customs. Section 2 of the Act defines certain expressions occurring in the Act. Clause (4) defines the Bill of Entry to mean a Bill of Entry referred to in Section 46. Clause (14) defines the expression "dutiable goods" to mean "any goods which are chargeable to duty and on which duty has not been paid". Clause (22) defines the expression "goods". The expression includes vessels, aircraft and vehicles. Clauses (23) and (25) define the expressions 'Import' and 'imported goods' respectively. They read as follows:

> "(23) 'import' with its grammatical variations and cognate expressions, means bringing into India from a place outside India; (25) 'imported goods' means any

> goods brought into India from a place outside India but does not include goods which have been cleared for home consumption."

Clauses (40) and (41) define the expressions "tariff value"

> and "value" to mean the tariff value and value fixed under sub-section (2) and sub-section (1) respectively of Section 14.

14.Section 12 is the charging section. Sub-section (1) says that "Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, on goods imported into, or exported from India." Subsection (2) says that the provisions of sub- section (1) shall apply in respect of all goods belonging to the Government as they apply in respect of goods not belonging to Government. Section 14 prescribes the manner in which the value of imported goods is to be determined. Sub-section (1) says that the value of imported goods "shall be deemed to be the price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation or exportation, as the case may be, in the course of international trade where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for the sale or offer for sale." Sub-section (2) speaks of fixed tariff values. Under this subsection "if the Central Government is satisfied that it is necessary or expedient so to do, it may, by notification in the Official Gazette, fix tariff values for any class of imported goods or export goods, having regard to the trend of value of such or like goods.....

15.Section 15 specifies the point of time with reference to which the rate of duty and tariff valuation of the imported goods is to be determined. In the case of goods entered for home consumption under Section 46, it is the date on which the Bill of Entry is presented and in the case of goods cleared from a warehouse under Section 68, it is the date on which the goods are actually removed from the warehouse. In the case of any other goods, the relevant date is the date of payment of duty. Having regard to its relevance, it would be appropriate to set out the Section in its entirety:

> " 1 5. Date for determination of rate of duty and tariff valuation of imported goods.- (1) The rate of duty and tariff valuation, if any, applicable to any imported goods, shall be the rate and valuation in force,
>
> (a) in the case of goods entered for home consumption under Section 46, on the date on which a bill of entry in respect of such goods is presented under that section;
>
> (b) in the case of goods cleared from a warehouse under Section 68, on the date on which the goods are actually removed from the warehouse;
>
> (c) in the case of any other goods, on the date of payment of duty: Provided that if a bill of entry has been presented before the date of entry inwards of the vessel by which the goods are imported, the bill of entry shall be deemed to have been presented on the date of such entry inwards.

(2)The provisions of this section shall not apply to baggage and goods imported by post."

16.Section 25 confers upon the Central Government the power to exempt goods either wholly or partly or either absolutely or subject to such conditions as it may specify in that behalf While sub-section (1) speaks of general exemption, sub-section (2) provides for exemption in certain specific cases. In either case, the power can be exercised only in public interest. Subsection (3) clarifies the ambit of the power conferred by sub-sections (1) and (2). Since the main submissions in these appeals revolve around Section 25, it would be appropriate to quote the section in full:

"25. Power to grant exemption from duty.- (1) If the Central Government is satisfied that it is necessary in the public interest so to do it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance), as may be specified in the notification goods of any specified description from the whole or any part of duty of customs leviable thereon. (2)If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by special order in each case, exempt from the payment of duty, under circumstances of an exceptional nature to be stated in such order, any goods on which duty is leviable. (3)An exemption under sub-section (1) or sub-section (2) in respect of any goods from any part of the duty of customs leviable thereon (the duty of customs leviable thereon being hereinafter referred to as the statutory duty) may be granted by providing for the levy of a duty on such goods at a rate expressed in a form or method different from the form or method in which the statutory duty is leviable and any exemption granted in relation to any goods in the manner provided in this sub-

section shall have effect subject to the condition that the duty of customs chargeable on such goods shall in no case exceed the statutory duty." [Note : Sub-section (3) along with the Explanation was inserted by the Amendment Act with effect from May 13, 1983.]

17.Section 46 provides for the bill of entry and the procedure according to which it has to be filed. Section 143-A occurring in Chapter 17 refers to deferment of duty. It provides for deferment of duty in the situation contemplated by it. Section 156 confers the rule-making power upon the Central Government to carry out the purposes of the Act while Section 157 empowers the Board to make Regulations for the same purpose but subject to the Act and the Rules. According to Section 159, notifications issued under Section 25, among others, have to be laid before the Parliament in the prescribed manner and for the prescribed period.

18.As mentioned hereinabove, the Central Government had issued an exemption notification under Section 25 of the Act being Notification No. 262-Cus. dated October 11, 1958. The said notification was amended by notification No. 162-Cus. dated October 16, 1965. As amended, the exemption notification reads as follows:

"Exemption to ocean going vessels other than vessels imported to be broken up:

> Ocean going vessels other than vessels imported to be broken up, are exempt from the payment of Customs duty leviable thereon. Provided that any such vessel subsequently broken up shall be chargeable with the duty which would be payable on her as if it were then imported to be broken up."

19.It is not disputed that it is this exemption notification which is applicable herein. Now what does the notification say? In our opinion, it is couched in simple and clear language. It admits of no ambiguity or doubt. It says that ocean-going vessels other than vessels imported to be broken-up are exempt from payment of customs duty leviable thereon. It then says that where any such ocean-going vessel is subsequently broken-up it shall be chargeable with the duty which would be payable if it were imported then for being broken-up. The idea behind the notification evidently was to encourage the import of ocean- going vessels. The notification also contemplates and provides for the situation where an imported ocean-going vessel becomes 'not seaworthy' after a few years and the ship-owner decides to scrap/break it. It provides that in such a situation it would be deemed as if the ship is imported for breaking-up when it is broken up and the customs duty is charged on that basis. The notification thus creates a fiction viz., the vessel must be deemed to have been imported for being broken-up when it is broken up, though as a matter of fact the import was at an earlier point of time. Ordinarily speaking, no doubt, customs duty is levied with reference to the date of actual import but the exemption notification says that if the ship imported is an ocean-going vessel it shall be exempt from customs duty on the date of its import but in case it is subsequently broken up the duty shall be paid as if it were then imported for being broken-up which necessarily means that duty will be levied on the value and at the rate prevailing on the date of breaking-up. Indeed, in our opinion, the notification was quite clear even before it was amended in 1962; at any rate it has become clearer beyond any doubt after the said amendment. By virtue of the fiction created by the proviso in the notification, the vessel is deemed to have been imported for breaking-up on the date it is broken-up. It is well settled that where a fiction is created by a provision of law, the court must give full effect to the fiction, and as is often said, it should not allow its imagination to be boggled by any other considerations. Fiction must be given its due play; there is to be no half-way stop. According to this notification, therefore, the date relevant for determining the value and rate of the customs duty chargeable in the case of two ships concerned in Jalyan Udyog' is the date on which they were broken-up.

20. We are, however, of the opinion that since the date of breaking-up is an uncertain event and may require an enquiry in each case and also because no ship can be broken-up or scrapped except under the prior permission granted by the Director General of Shipping, the date of breaking-up contemplated by the said proviso should be deemed to be the date on which the permission for scrapping/breaking is accorded by the Director General of Shipping. This clarification is made in the interest of certainty and to obviate avoidable controversy. It is with reference to such date that the value and the rate have to be determined. If on such date, any other procedural formalities prescribed by law are to be complied with, they too have to be complied with.

21.S/Shri Harish Salve and G.L. Sanghi, however, urged repeatedly that if the exemption notification is construed and understood in the above manner it would fall foul of Section 25. According to learned counsel, such a notification which shifts the date of import or provides for a

fictional date of import which is different from the actual date of import is beyond the purview of Section 25. The submission is that an exemption notification can merely reduce or waive the customs duty but it cannot alter the basic premises provided by Sections 12, 14 and 15. In other words, the argument is that the power of exemption cannot be employed for changing the date of import or for altering the date with reference to which the value and the rate of duty has to be determined nor is the power of exemption available for enhancing the duty chargeable. We are not prepared to agree. Section 25 has already been set out hereinabove. A proper analysis of sub- section (1) of Section 25 shows that the power of exemption can be exercised (a) where the Central Government is satisfied that in the public interest it is necessary to either waive or reduce the duty chargeable on any goods, (b) it can do so by way of a notification published in the Official Gazette, (c) such exemption, however, must be a general one, (d) the exemption granted may be an absolute one or subject to such conditions, as may be specified in the notification and (e) the conditions, if any, specified may be conditions to be fulfilled before the clearance of goods or after the clearance of goods, as the case may be.

22.The above analysis of sub-section (1) shows inter alia that an exemption granted may be an absolute one or subject to such conditions, as may be specified in the notification and further that the conditions specified may relate to a stage before the clearance of goods or to a stage subsequent to the clearance of goods. Section 25(1) is a part of the enactment and must be construed harmoniously with the other provisions of the Act. The power of exemption is variously described as conditional legislation [see Jalan Trading Co. Pvt. Ltd. v. Mill Mazdoor Sabha4 and Hamdard Dawakhana v. Union of India5] and also as a species of delegated legislation. Whether it is one or the other, it is a power given to the Central Government to be exercised in public interest. Such a provision has become a standard feature in several enactments and in particular, taxing enactments. It is equally well settled by now that the power of taxation can be used not merely for raising revenue but also to regulate the economy, to encourage or discourage as the situation may call for, the import and export of certain goods as also for serving the social objectives of the State. [Vide Elel Hotels and Investments Ltd. v. Union of India6, Sri Srinivasa Theatre v. Government of T.N.7 and Subhash Photographic v. Union of India8.] Since the Parliament cannot constantly monitor the needs of and the emerging trends in the economy and is in no position to engage itself in day-to-day regulation and adjustment of import-export trade accordingly, power is conferred upon the Central Government to provide for exemption from duty of goods, either wholly or partly, and with or without conditions, as may be called for in public interest. We see no warrant for reading any limitation into this power. If the public interest demands that the exemption should be absolute, the Central Government can do so. Similarly, if the public interest demands that exemption should be granted only subject to certain conditions it can provide such conditions. Then again if the public interest demands that conditions specified should relate to a stage subsequent to the date of clearance it can do so. The guiding factor is the public interest. The power given by Section 25 to the Central Government to specify conditions which may even relate to a 4 AIR 1967 SC 691 : (1967) 1 SCR 15 : (1966) 2 LLJ 546 5 AIR 1960 SC 554 :(1960) 2 SCR 671 : 1960 Cri LJ 735 6 (1989) 3 SCC 698 7 (1992) 2 SCC 643 8 1993 Supp (3) SCC 323 : JT (1993) 4 SC 116 stage subsequent to the clearance of goods clearly shows that the power of exemption can be used even for altering the relevant date prescribed by Section 15. It is this very position which has been clarified by sub-section (3) introduced in the year 1983. In our opinion, sub-section (3) does not provide anything new. It

merely elucidates and makes express what is implicit in sub-sections (1) and (2). Sub-section (3) says that a notification under sub-section (1) or (2) may provide "for the levy of a duty on such goods at a rate expressed in a form or method different from the form or method in which the statutory duty is leviable". It further says that "any exemption granted in relation to any goods in the manner provided in this sub-section shall have effect subject to the condition that the duty of customs chargeable on such goods shall in no case exceed the statutory duty". The explanation to sub-section (3) explains the words "form or method" occurring in the sub- section. It says that the form or method in relation to the rate or duty of customs means the basis of duty viz., valuation, weight, number, length, area, volume or other measure with reference to which duty is leviable.

23.We are equally unable to agree that a legal fiction can be created only by a legislature and not by the executive. Here the Central Government is exercising a power conferred upon it by the Parliament. The provision conferring such power does contemplate and empower the Central Government to create such a fiction, as explained hereinabove. Sub- section (1) as well as sub-section (3) place the matter beyond any doubt. To repeat, the nature of power under Section 25 is conditional legislation or a species of delegated legislation; in exemption notification under Section 25 is not an executive act. No decision has been brought to our notice in support of the said contention which is raised only in the written submissions.

24.For the above reasons, we see no reason to hold that the said notification travels beyond the four comers of Section 25. It is perfectly within the ambit of Section 25.

25.We are equally unable to agree that by virtue of the fiction contained in theexemption notification. the ship- owners are being made to pay a higherduty than the statutory duty. By a fortuitous combination of circumstances, it so happens that the value of the ship when it was imported in 1968 as an ocean-going vessel happens to be less than the value of the ship today when it has become junk and fit only for scrapping/breaking. On account of the steep rise in the prices of steel, such an unusual situation has come about but this circumstance in no way affects the validity of the notification. The notification shifts the date of import in the case of a ship which is imported as an ocean-going vessel but is subsequently broken-up from the actual date of import to the date of breaking-up by creating a legal fiction. Once it is held that it is open to the Central Government to impose such a condition or to create such a fiction, as the case may be, the condition or the fiction has to be given full effect to. It must be deemed that the ship is imported on the date it is broken-up (as explained hereinabove) and its value and rate of duty should be determined with reference to such date. By doing this, the duty chargeable by virtue of the exemption notification is not going beyond the statutory duty payable on such deemed date.

26.The learned counsel for the ship-owners sought to construe the proviso in the notification to mean that the duty will be payable as if the ships were imported for breaking-up on the date of its actual import. In other words, according to the learned counsel, in Jalyan Udyog the ships must be deemed to have been imported for breaking-up in the year 1968 itself and the value and the rate must be determined on that basis. This is the view taken in the order under appeal and also in a decision of the Calcutta High Court in Union of India v. Sri Ramnivas Chaudhury9. We do not think that the plain words of the proviso are capable of any such interpretation apart from the patent

incongruity of the said submission. To repeat, the main limb of the notification says that ocean-going vessels other than vessels imported to be broken-up are exempt from the payment of the customs duty leviable thereon but if such a vessel is subsequently broken-up it shall be chargeable with the duty payable as if it were then imported to be broken-up. If the intention behind the notification was to say what the learned counsel for the shipowners contend, the proviso should have read like this : "Provided that any such vessel subsequently broken-up shall be chargeable with the duty which would have been-payable on her if she were imported to be broken-up on the date of its import." Indeed, when the notification was issued the Central Government could not have contemplated that the prices of steel would go up steeply in future and that a situation would arise when a junk ship would carry more value than what an ocean-going vessel cost, say, 15 or 20 years ago. The Government must have presumed that the value of ocean-going vessel would necessarily be higher than the vessel which is to be broken- up. The notification was thus intended as a concession an encouragement to the acquisition and import of ocean-going vessels. The principle of the notification is "no duty on import of such vessels but when after plying for a number of years, they are scrapped, pay duty on the supposition that it is imported for breaking-up on the date it is broken-up". But for the fortuitous and enormous increase in the prices of steel worldwide, the roles would have been reversed :

> what is now contended by the Union of India would have been the contention of the ship-owners if the Union of India were to take the opposite stand. The said fortuitous circumstance cannot, indubitably, make any difference to the interpretation to be placed upon the notification. We cannot, therefore, agree with the reasoning in the judgment under appeal or in the judgment of the Calcutta High Court in Ramnivas Chaudhury9.

27.Both the learned Additional Solicitor General and the learned counsel for the ship-owners cited certain decisions which may briefly be referred. It must, however, be stated that there is no decision of this Court directly on the point. The only decisions are that of the Bombay High Court in Jalyan Udyog1 (under appeal) and that of the Calcutta High Court in 9 (1987)30 ELT 118(Cal) Ramnivas Chaudhury9. In this sense, none of the decisions have a direct bearing on the question at issue. Even so, a few of them may be noticed.

28.In Bharat Surfactants (P) Ltd. v. Union of India1O a Constitution Bench of this Court held that by virtue of the proviso to Section 15(1), the date of 'entry inwards' of the vessel would be the date on which it was given a berth and 'entry inwards' registered by the customs authorities. It was a case where the bill of entry was filed on July 9, 1981 i.e., before the arrival of the vessel. The ship in question arrived at Bombay on July 11, 1981. The port authorities were, however, unable to allot a berth to it. The vessel then left Bombay for Karachi for unloading other cargo intended for that port and then came back to Bombay on July 23, 1981. In the Register of Inward Entry, the date of arrival of the vessel was recorded as July 23, 1981 and ,entry inward' granted and registered as July 31, 1981. The customs authorities imposed duty on the import of edible oil @ 150% which was the rate prevailing on July 31, 1981. The case of the importers, however, was that the rate of duty should be the rate prevailing on July 11, 1981 when the vessel had actually arrived and registered in the port of Bombay. Their contention was that the vessel had actually entered the territorial waters of India on

July 11, 1981 and, therefore, that is the date of import of goods relevant for the rate of duty. The mere fact that a berth was not available for it on the earlier occasion on account of which it had to leave the port and come back, they said, is not material. The contention was rejected by this Court. It was held that by virtue of the provisions in Section 15, where the bill of entry is presented before the date of 'entry inwards' of the vessel, it would be deemed to have been presented on the date of such entry inwards. Accordingly, it was held that the rate of import duty and tariff valuation shall be those in force on July 31, 1981.

29.In Jain Shudh Vanaspati Ltd. v. Union of India11 a Division Bench of the Delhi High Court held that the rate of duty shall be the rate in force on the date specified in Section 15 and not the date when the ship entered the territorial waters. To the same effect is the decision of the learned Single Judge of the Kerala High Court in Aluminium Industries Ltd. v. Union of India' 2.

30.A Division Bench of the Madras High Court has also taken a similar view in M. Jamal Co. v. Union of India13. It held that the chargeability of duty is determined when the goods are imported into the territory of India within the meaning of Section 12(1) of the Act. The Bench expressed certain other views which it is not necessary to notice for the purpose of these appeals.

31.The counsel for the ship-owners stated that the principle of the Full Bench decision of the Bombay High Court in Apar2 is not relevant herein 10 (1989) 4 SCC 21 11 (1983) 14 ELT 1688(Del) 12 (1984) 16 ELT 183 (Ker) 13 (1985) 21 ELT 369 (Mad) and that they place no reliance thereon. For this reason, we need not refer to the said decision or express any opinion on its correctness.

32.In Prakash Cotton Mills Pvt. Ltd. v. B. Sen14 it was held by this Court that where the goods are imported and stored in warehouse and the rate of duty is increased before the goods are cleared from the warehouse, the duty chargeable would be the one in force on the date of clearance of goods from the warehouse.

33.The learned counsel for the ship-owners cited certain decisions holding that the rules must be consistent with and must operate within the four comers of the Act. Since there can be no dispute with the proposition, we do not think it necessary to refer to the decisions cited in that behalf. They also relied upon the decision of this Court in Orient Weaving Mills (P) Ltd. v. Union of India15 to contend that the power of exemption cannot be employed for changing the character of tax. Since the character of tax cannot be said to have undergone a change in the present case, we do not think it necessary to discuss the said decision in any detail.

34.The decision of the House of Lords in Chertsey Urban District Council v. Mixnam's Properties Ltd.16 was relied upon in support of the proposition that the conditions imposed by the subordinate legislating authority cannot be ultra vires the Act nor be derogatory to the object of the enactment. While the principle is unexceptionable its applicability to the facts of this case is not.

35.For the above reasons, we are of the opinion that the decision under appeal in Jalyan Udyog1 is unsustainable in law. The Civil Appeal No. 1104 of 1990 is accordingly allowed and the judgment and order of the Bombay High Court is set aside. For the same reasons, the other civil appeals are

dismissed though not for the reasons assigned in the judgment under appeal therein. No costs.

36.Inasmuch as the ships concerned in all these appeals have been broken-up either under the interim order of this Court or after paying the duty as demanded by the customs authorities (in which cases the refund is asked for), there is no question of complying with the public notice dated March 1, 1984 at this stage. It is, therefore, not necessary for us, in these appeals, to examine the legal sanctity behind the said public notice. If, in any case, valuation has to be done of any ship on the date of grant of permission for breaking-up, the same may be done by the Collector, Customs, if necessary, in consultation with MSTC. Besides the above, no further directions are called for except to say that in cases where the ships have been scrapped/broken on payment of a lesser duty pursuant to the interim orders of the courts, duty will be payable at the value and at the rate in force on a date on which permission for their breaking-up was accorded by the Director General of Shipping. The authorities shall verify the said date in each case 14 (1979) 2 SCC 174: (1979) 2 SCR 1142 15 1962 Supp 3 SCR 481 : AIR 1963 SC 98 16 (1965) AC 735 :(1964) 2 All ER 627 (HL) and calculate the duty on that basis and recover the same in accordance with law. It shall also be open to the authorities to encash the Bank guarantees furnished by the ship-owners/writ petitioners pursuant to the orders of the Court. In case where the duty as demanded by customs authorities has already been paid, there is no question of any refund. It is equally unnecessary for us to express any opinion at this stage on the plea of unjust enrichment raised by the Union of India. If any ship-owner feels that he is entitled to any refund on the basis of this judgment, he is free to lay a claim in that behalf which shall be examined by the customs authorities and appropriate orders made thereon according to law and in the light of this judgment.