

(1964) 09 BOM CK 0005

In the Bombay High Court

Case No : Criminal Reven. Application No. 716 of 1964

Ambalal Chimanlal Chokshi

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 22-09-1964

Acts Referred:

Constitution of India, 1950 — Article 20
Criminal Procedure Code, 1898 (CrPC) — Section 162, 439
Defence of India Rules, 1963 — Rule 126L
Evidence Act, 1872 — Section 25

Citation : AIR 1966 Bom 243 : (1965) 67 BOMLR 54 : (1966) CriLJ 1385 :
(1965) ILR (Bom) 289

Hon'ble Judges : Tulzapurkar, J

Bench : Single Bench

Advocate : Poras Mehta, Krishnamurthi and H.G. Mehta, instructed by Gagrath and Co, for the Appellant; V.H. Gumaste, Addl. Govt. Pleader and P. Gandhi, for the Respondent

Judgement

[1] This revisional application raises a question of inadmissibility of certain statement made by the petitioners - accused to the Central Excise officers, on the ground of immunity claimed under sub - clauses [3] of Article 20 of the constitution of India. The relevant facts giving rise to the objection taken by the petitioner - accused admissibility of his certain statements under Article 20[3] of the constitution may be stated: The petitioners Ambalal Chimanlal Chokshi is b being prosecuted on a complaint b being filed on 19-12-1963 by the respondents [Shri H.R. Jokhi, Assistant Collector of central Excise, Marine and Preventive Division, Collector of Central Excise, Bombay], for an offense under Rule 126P of Part XII - A of the Defence of India Rules, 1963 [which part contains "Gold Control Rules"] and section 135[b] of the Customs act, 1962 [Act 52 of 1962]. The allegation made against the petitioners is that he had acquired possession and was concerned in carrying removing, harbouring, keeping, concealing and otherwise dealing with smuggled gold and that he had not made any declaration about the said gold and had no permit as required under the Gold Control Rules.

Before the complaint was filed on 19th December 1963, by the Respondents for the alleged offence said to have been committed by the petitioners, on 5th April 1963, written search Authorization [Ex. A] under Rules 126 [1] [2] of the Gold Control Rules was issued by the superintendent wags of the Central Excise, central Intelligence Unit, Bombay in Favour of Shri V.B. Rane, Deputy superintendent of Central Excise [Preventive and Marine Division, Bombay], Authorizes in the latters officer to enter and search certain premises b being the flat to enter and search certain premises latter b being the flat of the petitioners in building called "neeta" at 90 Marine Lines, behind Marine Lines Railway station Bombay for the said gold and if found to seize and produce the same before the superintendent and in pursuance of its search authorization, the aforesaid premises of the petitioners were raided to and during the course of outside such raid some gold was found on ledge outside the balcony of one Kotakm on the 1st floor and a bag containing currency notes and some other documents was found from the and some other documents was found from the balcony of the one Modi by the side of the balcony of the petitioner on the 2nd floor. A search of the petitioner flat was also conducted and some documents and the property along with the aforesaid gold and the bag of currency notes were seized under a panchnama [Ex. O], which was made at the Spot. It appears that the petitioners was interrogated by Shri Rane, Deputy superintendent of I respect of the said gold as also the bag of currency notes at the time of the making of the panchnama and the statements made by the petitioners were incorporated in the Panchnama. It may be stated at this stages that as regards the gold [12 slabs] found outside the Balcony of Kotakm on the 1st floor the petitioners stated that he same did not b being to him or any body in his house or family and that he did not know anything's about it., while regarding the currency notes found in a bag, which was recovered from the balcony of Modi which was by the said of the balcony of the petitioners, the petitioners claimed that the money belonged to him together with the other contents of the bag and the he further stated that the cloth bag had been put by him in his neighbor's flat across the balcony and with out the knowledge's of Mr. Modi when the officers went of search. Later on the Central Excise officers summoned the petitioner and detailed statement of his was recorded by Deputy superintendent parekh under instructions of superintendent wagh, who interrogated the petitioner under the power vested I by law, with regard to the gold and the bat containing currency notes, the petitioners gave his version in his detailed statement recorded in this occasion which was almost similar to that which he had given at the time of marking of the panchnama.

[2] After completing the investigation, the Respondents filed a complaint on 19th December 1963, against the petitioner for the alleged offenses mentioned above, b being Cases No. 62 / W of the 1964, the trial where of is b being conducted by the learned additional Chief Presidency Magistrates, 8th court, Esplanade, Bombay. After fully setting out the manner in which the search of the petitioners premises was carried out as also the circumstances in which the gold and the

bag containing the currency notes were recovered during the raid and the statement made by the petitioners, in connection therewith, the respondents categorically averred in his complaint as follows:-

"In view of all the premises aforesaid the complainant says that it was the accused who threw or caused to be thrown the said gold in the two bags into the said shaft with a view to avoid the finding and seizure of the said gold in his flat by the central Excise officers just as he admittedly threw that the [bag] containing the currency notes into the flat of Shri C.U. Mody with a view to avoiding the finding and seizure of the said currency notes in this flat by prays and that the necessary process be issued against he accused and that the accused be dealt with according to law".

It may be stated that the raid as not for the purpose of seizing the currency notes but admittedly was for the purpose of the seizing gold in respect and where of contravention of Gold Control Rules and Customs act, was apprehended and it will appear clear from the aforesaid averments made in the complaint that though the petitioners accused had disowned any connection with the balcony of Shri Kotakm the Respondents sought to establish petitioner's connection with the gold or rather his possession therefore in contravention of Gold Control Rules, by relying upon the Admitted conduct on the part of the petitioners of into the flat of shri Mody [which currency notes were claimed by him as his], currency, thus rendering highly probable a similar conduct on his parts in connection with the gold which he disowned. At the trial therefore the statement made by the petitioners and recorded in the panchanama [Ex., O] as well as the portion of his detailed statement recorded by Deputy Superintendent parekh were sought to be proved by tendering he same as in evidence and the petitioners objected to the admissibility of these statement. A three fold objection was raised by counsel on behalf of the petitioner before the learned magistrate. In the first place it was contended from the petitioner under completion at a time when he was accused of offences, under the Gold Control Rules and customs Act, could not be used in evidence against him and were barred under Article 20[3] of the constitution of the India and the petitioners was entitled to claim immunity under the Said provisions of the constitution in respect of was placed upon the recitals and the operative and part of the Search Authorization dated 5th April 1963 as well as the recitals in the panchnama to show that at the material in the time petitioner was accused of commission of offense under the Gold Control Rules, and customs act. Secondly it was contended that the Central Excise officers who recorded these statements made to them, therefore would not be admissible and in that behalf reliance was placed upon decision and the supreme court reported in Raja Ram Jaiswal Vs. State of Bihar, in which in an excise officer under the Bihar and orissa Excise act was held to be a police officer within the meaning of section 25 of the evidence act. Thirdly it, was urged that he statement in question would be hit by the provisions of section 162 of the criminal procedure code, because they were recorded by officers who were in the position of the police offices and had however of

investigation analogous to those in chapter 14 of the criminal procedure code. These objections were heard by the learned Magistrate in detail and by his order dated 24th July 1964, he overruled the objections and ordered the statement to be admitted in evidence. Regarding the first contention he took the view that at the time when the panchnama was drawn which incorporated certain statement of the petitioners as well as the time when the detailed statement of the petitioners had a formal accusation made against him for the first time when the complaint was filed against him by the Respondent on 19th December 1963, which resulted in proceedings being issued against him by the courts that, therefore the privilege contained in Article 20[3] of the constitution could not be claimed by him. With regard to the argument u/s 25 of the Evidence act he held that the statements of the petitioners in question did not amount to confession and at the highest the petitioners could be said to have made an admission of the grave incriminating fact and therefore the statements were not hit by section 25 of the Evidence act. As regards the bar of section 162 of the criminal procedure code he took the view that the Criminal procedure code he took the view that the central Excise officers, who had recorded the statement of the petitioner were not in the position of police officers nor was investigation carried out by them under Chapter 14 of the criminal procedure code and in that view of the matter, he held that the statement, in question was not rendered inadmissible u/s 162 of the criminal procedure code. Consequently he ordered that the statement objected to should be admitted in evidence. It is against this order of the learned Magistrate that the present revisional application has been preferred by the petitioner accused to his court.

[3] At the outset Mr. Gumstate, the learned additional Government pleader, raised a preliminary objection against the maintainability of the revisional application on the ground that the order complained of merely decides the question of admissibility of merely or otherwise of certain evidence at a trial which is still pending before the learned magistrate and he therefore urged that at such interlocutory stage this court shouldn't interfere with the order passed in exercise of revisional jurisdiction. He further pointed out that the order of the learned Magistrate dealt with procedural points by overruling the objections raised by the petitioners to the admissibility of certain statement and it would not only be open to the petitioner but would be proper for him to raise these points in appeal after the trial before the learned Magistrate is concluded. On the other hand Mr. Porus Mehta contended that one of the objections raised to the admissibility of the evidence pertaining to the fundamental right guaranteed to a citizen under article 20[3] of the constitution and therefore it was but proper for the petitioners to approach this court at the earliest possible opportunity for vindicating his said right. Mr. Mehta fairly conceded that the objections to the admissibility of the evidence and the statement in question u/s 25 of the Evidence act and section 162 of the Criminal procedure code, may be regarded as procedural and he would not be in position, to ask this court to interfere with the trial but could order on those grounds but since the objection to the

admissibility of the statements under Article 20[3] of the constitution had been raised before the court and had been decided against his client by the trial court he should be permitted by the argue that point and this court would be perfectly justified in deciding that point as in exercise of its revisional jurisdiction. I accepted the contention of Mr. Mehta in this behalf and I allowed him to argue of the point in so far as the objection the admissibility of evidence was based upon the provisions of article 20[3] of the constitution only. I must mention here that Mr. Mehta was not allowed by me to raise objections to the admissibility of evidence in question u/s 25 of the evidence act and section 162 of he criminal procedure code.

[4] In order to substantiate his contention that at the materiel time that is to say, when the statement of the petitioners were recorded the petitioner had been accused with the commission of an offence. Mr. Mehta strongly relied upon the recitals as well as the operative part of the search Authorization [Ex. A] issued on 5th April 1963 pursuant to which the premises of the petitioners were raised to which the central excise officers. He also relied upon the certain recitals which are to be found in the panchama [Ex. O] itself but before discuss the contents of these documents, it would be convenient to set out the provisions of Article 20 of he constitution and then to refer to the 3 decisions of the supreme court which are the importance and have a bearing on the correct interpretation of clauses [3] of the article 20 and which decisions also set out the conditions which must be fulfilled before the community or privilege contained in that Article could be invoked. Turning to the Article itself, the marginal note is "protection is respect in conviction for offences" and the 3 clauses run as follows:-

"[1] No person shall be convicted of any offence except for violation of law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than which might have been inflicted under the law in force at the time of the commission of the offence.

[2] No person shall be prosecuted and punished for the same offence more than once.

[3] No person accused of any offence shall be completed to be witness against himself".

[5] Reading the aforesaid Article 20 as a whole, it is clear that it is deals with and confers various of privileges upon a person either in the conduct of criminal proceedings itself or in respect of criminal proceedings and clauses [3] of he article clearly confers a privileges upon the an accused person that he shall not be compelled to be a witness against himself. In other words, it confers an immunity upon an accused person against the testimonial compulsion.

[5 - A] Turning to the decision of the supreme court, which have a bearing on the interpretation of clauses [3] of Article 20, there are 3 Decisions which were cited before me. The first one of the M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others, . In this case of Mr. Justice Jagannathdas,

while dealing with the provisions of clauses [3] of the Article 20 of the Constitution has made the following observations:-

"Analysing the terms in which this right has been declared in our constitution, it must be said to consist of the following components [1] it is a right pertaining to a person "Accused of an offence" [2] It is protection against "Compulsion to be a witness" and [3] it is a protection against such compulsion resulting in his giving evidence "against himself".

XX XX XX

Broadly stated the guarantee in Art. 20[3] is against "Testimonial compulsion". It is suggested that this is confined to the oral evidence of person standing his trial for an offence when called to the witness stand. We can see no reason to confirm the content to the constitutional guarantee to this hardly literal import. So to limit it would be to rob the guarantee of its substantial purposes and to miss the substances its for the sound as stated in certain American decisions. xx xx xx A person can be witness not merely by giving oral evidence but also by producing documents or making intelligible gestures in as the case of the dumb witness or the like. "To be a witness" is nothing more than "to furnish evidence" and such evidence can be furnished through the lips or by production of a things or of a document or in other modes. x x x x

The phrase used in art. 20[3] is "to be a witness" and not to "Appear as a witness. It follows that the protection afforded to an accused in so far as it is related to the phrase "to be a witness" is not merely in respect of testimonial compulsion in the court room but may well extend to completed testimony previously well extend to compelled testimony previously obtained form him. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been leveled which in the normal course may result in prosecution".

It is true that in the above a case the question which directly arose for consideration was whether search and seizure of documents upon a that search warrant having been issued was unconstitutional and the super court held that the same was no unconstitutional as that would not amount to compulsory production of incriminating evidence. It may also be pointed out that in this case a regular first information report had already been lodged with the inspector General Delhi, special police Establishment by the Registrar of the joint stock companies, Delhi that Messrs. Dalmia Jain Airways Ltd., had committed various offences and then after obtaining permission from the District magistrate, Delhi for investigation in respect of some of the no cognizable offence in mentioned in the first Information report an application for issue of search warrant was made on the basis of the First Information Report, and pursuant to the search warrant issued, a search and had been made and documents seized and on those facts the court held that such search and seizure of documents was not unconstitutional as b being hit by the constitutional guarantee contained in

article 20[3] of the constitution, and in that case sense the observation which I have quoted above were really not necessary for the decision of the case. But, as I shall point out presently, in its two subsequent decisions the supreme courts quoted the above observation with approval though they were regarded as unnecessary for the decision of the case.

[6] The second decision of the supreme court cited was in *Mohamed Dastagir Vs. The State of Madras*, . In this case the facts were that the appellant went to the bungalow of deputy superintendent of police and offered him a bribe in a closed envelop with a request that the right drop action registered the fell down and was picked up by the appellants, later while the appellants was still in the bungalow he was asked by the police officer to produce the envelop which the latter has thrown down and the appellant took out of his pocket some currency notes and placed out of his pocket some currency notes and were seized by the police officer and his officer rubber stamp seal was placed on the envelope and his office trail of the offence offering a bribe, evidence of the police officer as to what transpired at this bungalow was given and the High Courts, after accepting the evidence convicted the appellant and in the appeal before the supreme court it was contended that on the aforesaid facts, the appellant must be regarded as person who was accused of an offence at the time the police officer asked him to produce the money and that the circumstances also showed that the appellant did so on compulsion. The contention was negatived by the supreme court on the ground that there was formal accusation against the appellant relating to the commission of the offence inasmuch as it did not appear from the evidence of the police officer that he had ever accused the appellant of having even if it were assumed that the appellant was a person accused of an offence, the circumstances did not establish that he was compelled to produce the money which he had on his person. It was observed that no doubt appellant was asked to do so but it was within his power to refuse to comply with the police officer's request. The court therefore held that on the facts established in the case the appellants accused had not been compelled to produce the currency notes and therefore to the provisions of Article 20[3] of the constitution urged on behalf of the appellant - accused reliance's urged was placed upon the observation of justice Jagannathdas, which I have quoted above in *Sharma's* and with reference to those observations the supreme courts said as follows:

"These observations were unnecessary in *Sharma's* case having regard to the fact that this court held that the seizure of documents on a search warrant was not unconstitutional as that would not amount to a compulsory production of incriminating evidence. In the present case, even on what was stated in *Sharma's* case there was no formal accusation against the appellant relating to the commission of an offence".

It will thus appear clear that the *Mohamad Dastagir's* Case 1963 3 SCR 116: AIR 1960 SC 756 the supreme court did not dissent from the observation of Mr. Justice Jagannathdas in *M.P. Sharma and Others Vs. Satish Chandra*, District

Magistrate, Delhi and Others, but proceeded to distinguish the instant case before it from M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others, but proceeded to distinguish the instant case before it from M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others, by pointing out that there was no formal accusation against Mohamad Dastagir relating to the commission of an offence as required under the observation of Mr. Justice Jagannathadas. In other words, Mohamed Dastagir Vs. The State of Madras, was decided on the peculiar facts obtaining in that case but there is no doubt that the observations which I have is quoted in that case. Further the supreme court has indicated what condition must be fulfilled has before Article 20[3] of the constitution could come into play by observing as follows:

"Before this provision of the constitution comes into play two facts have to be established [1] that the individual concerned was a person accused of the an offence and [2] that he was person competed be a witness against himself. It only one these facts and not the others is established, the requirement of Art. 20[3] will not be fulfilled.

The third decision of the supreme court is The State of Bombay Vs. Kathi Kalu Oghad and Others, . The question that arose in that case was whether by giving his specimen handwriting or impression of his fingers of palms or foot, the accused person could said to be furnished evidence against himself within the meaning of Art. 20[3] of the constitution and the majority judgment held that giving thumb impression or impression of foot or palm or fingers, or specimen handwriting or showing parts of body by way of the identification are not included in the expression "to be a witness" and it may be stated that the observation of justice Jagannathdas in M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others, were set out in extensor and approved. At the end of his judgment chief Justice sinha enlisted 7 conclusion to which he arrived after the considering the entire case law no the point and conclusion No. 7 which was material bearing on the question before me, was stated by him in the following words.

"To bring the statement in question within the prohibition of art. 20[3], the person accused must have stood in the character of an accused person at the time he made the statement. Itis not enough that he should become as accused, any time after the statement has-been made."

In view of the aforesaid decisions it will be clear that before art. 20[3] it is brought it into play, it must be shown that the person must be accused of an offence at time he made the statement and that he must have been compelled to make the statement. Therefore in order to sustain successfully, his objections against the petitioners in the present case will have to satisfy three condition [1] that at the time when he made those statement of there was a formal accusation of commission of an offence against him, [2] that he was compelled to make those statements, b being used that against him at the trial are incriminatory in

nature.

[7]At this stage, it will be convenient to refer to the relevant provisions of the Gold Control Rules, [Para XII - A of Defence of India] [Amendment] Rules 1963], and of the customs act, 1962. The relevant rules of the Gold Control Rules are Rules 126-I , 126-L, 126-M and 126-P. Reference was also made by Mr. Mehta to Rule 142 of the Defence of India Rules 1962, which contains a general provisions for punishing any person, who voluntarily obstructs or offers any resistances to or impedes or otherwise interferes with the performance of the duties by lawful authorities under the Said Rules. Rule 126- I deals with declaration as to possession of gold other than ornaments and sub - rule [1] runs as follows:

"Every person, a dealer or a refiner required to apply for a license, or licensed under this part, shall within thirty days from the commencement of this part, make a declaration to the board in the prescribed form as to the quantity, description and other prescribed particulars of gold [other than ornament] owned by him."

Then the material sub - rule is sub - rule [11] which runs as follows

"[11] Any person in possession or control of any gold, not being ornament, shall be presumed, until the contrary is proved to be the owner thereof".

It will be clear from the above provisions that every person [not being a dealer or refiner - and it is not the case that the petitioner accused is a dealer or a refiner - and as such is admittedly covered by this Rule) is bound to make a declaration within the prescribed period of 30 days in the prescribed and other particulars of quantity description and other particulars of gold which is owned by him, to the Gold Board constituted under the Rules and under sub - rule [11] every person who is in possession or control of any gold, unless the contrary is proved, shall be presumed to be the owner of such gold and as will be clear from Rule 126 - P which deals with penalties, possession of gold by a person without making declaration in that behalf has been made a penal offence. Then come rules 126-L which deals with powers of entry search, seizure, to obtain information to take samples and the relevant portion, therefore, which is material to the present case is rule 126- L [2] which runs as follows:

"Any person authorised by the Central Government by writing in this behalf may-

[a] enter and search any premises not being a finery or establishment referred to in sub - rule [1], Vaults, lockers or any other place whether above or below ground:

[b] Seize any gold in respect of which he suspects that any provision of this part has been or is being, or is about to be contravened along with the packages, covering or receptacle, if any, in which such gold is found and therefore take all measure necessary for their safe custody."

Sub -rule [3] of Rule 126 - L provides that the provisions of the Criminal

procedure code relating to search and seizure shall, so far as they are applicable apply in relation to search and seizure made under the this rule. sub - rule [4] of Rule 126 - L is very material and the same runs as follows:

"[4] Any gazetted officer authorised by the Board in this behalf may hold an inquiry for the purpose of ascertaining whether any contravention if any of the provisions of this part of has been is b being or is bout to be committed and shall for the purposes of such inquiry have power to summon any person whose attendance to produce any document or other things."

Sub - rule [5] of Rule 126 - L provides that the Gold Board may call for information from any person for the purpose of ascertaining whether or not there has been any contravention of any of the provisions of this part. Then there is not provisions of confiscation of the gold seized and adjudication in the matter of such a confiscation which is to be found in Rule 126 - M. Under sub - rule [1] of Rule 126 - M any gold seized under Rule 126 - L is liable to confiscation, while under sub - rules [2] a provision has been made for adjudication of confiscation by the certain officers and an appeal has been provided to the Board against every adjudication of confiscation made under sub - rule [2] and sub -rule [4] states that ever person adjudicating any confiscation under this rule and the Board heading nay appeal against such adjudication shall have all powers of a civil court under the CPC in respect of he matter of like summoning and enforcing attendance of witness, requiring and discovery and production of any documents, requisitioning any public of record, receiving evidence affidavits and issuing commissioners. Then the penalties have been provided by Rule 126 - P and the relevant provisions thereof may be set out:

"126 - P Penalties, 1. Whoever, -

[1] Fails or omits to make xx xx xx any declaration including a further declaration as required by Rule 126 - I without reasonable causes, or makes any statement in such return or declaration which is false an which he either known or believes to be false or does not believe to be true, shall be punishable with imprisonment for a term which may extent to one year or with fine or with both"

[2] Fails or omits to keep or to produce any account or other document or to furnish any information when required to do to under any provision of this part, shall be punishable with imprisonment for a term of not less than one month and not more than one years and shall also be liable to fine

[3] Whoever, - [1] x x x x x x

[ii] has in his possession or under his control any quantity of gold in contravention of any provision of this part.

[Iii] sells or otherwise transfers or agrees to sell or transfer, or expose of offers for sale or delivers or otherwise part with any gold in contravention of nay provision of this part.

[Iv] buys, or otherwise acquires, or accepts gold in contravention of any provision of this part. XXXXXXXX.

Shall be punishable with imprisonment for term of not less than six months and not more than two years and also with fine".

In the present case as I have stated above, the petitioner accused was charged for having committed an offence under Rule 126P [2] [ii] inasmuch as according to the prosecution he had acquired certain quantity to gold [12 slabs of gold weighing 6644 grams] in respect whereof no declaration had been made by him as required by Rule 126I [1] of the Gold Control Rules. As regard the alleged offence said to have been committed by the petitioners - accused under the customs act 1962 is concerned the allegation against him is that he had acquired possession and was concerned in carrying removing harbouring keeping, concealing and otherwise dealing with the said smuggled and gold, which he knew or had reason to believe to be liable to confiscation under S. 111 of Customs act 1962 and that thereby a he had committed as offence of punishable under S. 135 [2] of the customs act.

[8] In support of this arguments that the petitioners a was accused of an offence at the time when he made the statement is question, Mr. Mehta strongly relied upon the recites and the operative parts of the search authorization and dated 5th April 1962 [Ex. A] as well as on certain statements which are to found in that panchanama [Ex. O] that was made on that the date in the flat of the petitioners. The relevant portion of the search authorization No.11 of 1963, that was issued under the signature and seal of superintendent Wagh of the Central Excise may be quoted as follows:

"whereas there is reason to believe that gold, in respect of which provision of Part XIIA of the Defence of India Rules, 1963, have been, are b being or are about to be contravened, is secreted in the premises of.

Shri Ambalal Chimanlal.

Neeta No. 90, Marine xxxxxxxx Bombay.

Now, therefore, in exercise of the powers conferred on me by the central Government of by Notification No. XXXXXXXX dated 9th January 1963, I hereby authorise.

Shri V.B. Rane.

Dy. Supdt, of central Excise, xxxxx to enter and search the premises mentioned here in above for the aforesaid gold and if found to seize and produce the same forthwith before me."

Mr. Mehta also invited my attention to the following recitals which are to be found in the panchanama.

"The Cloth bags together with the 12 [twelve] slabs of yellow metal appearing to

be gold and the newspaper wrappings, paper slips, rubber band have been taken into his possession by superintendent Shri. J.S. Wagh of central Excise, under the reasonable belief that it is smuggled gold and also in respect of which the D. I. Rules have been contravened."

Mr. Mehta contended that in view of the languages used in the search Authorization under which the search was carried out and in view of the language of used in the carried recitals of the panchnama quoted above, it is clear that there was a formal accusation against the petitioner even at the time of that search. In the first place Mr. Mehta pointed out that under rule 126 [2] [b] even if the person authorised by the central Government in that behalf merely entertained a suspicion that any provisions of this part [meaning part XIIA] has been or was being or was about to be contravened, a search authorization to make entry search and seize could be issued but even then in the present case the search Authorization [Ex. A] was issued not on more suspicion but as the recital therein indicates, on the basis that there was no reason to believe that gold in the that there was whereof contravention of part of XIIA had been committed was secreted in the premises of the petitioners and Mr. Mehta urged that in the recital "whereas there is reason to believe" is stronger than mere suspicion that may be entertained by officer concerned in that behalf. Secondly Mr. Mehta contended that though the 3 alternative had been distinctively used with reference to apprehended contravention part XIIA of the Defence of India Rules, present tense had been expressly used in regards to the impugned gold by reciting in Ex. A as follows: "gold in respect of which xxxxxx is secreted in the premises xxxx xxx". Thirdly, Mr. Mehta pointed out that the operative part of the Search Authorization expressly authorizes Shri Rane, Deputy superintendent "to seize and produce" the said gold before the superintendent of the Central Excise. According to Mr. Mehta, these 3 aspects of the Search authorization [Ex. A] are clearly indicative of the fact that the petitioner was accused of commission of the offence of contravening the Gold Central Rules in respect of the gold that was said to have been secreted by him in his premises. Similarly since in the panchnama similar languages had been used to the effect that the gold in question was taken into his possession by superintendent Wagh "under reasonable belief that it is smuggled gold and also in respect of which D.I. Rules have been contravened", it would be clear that at the material time the petitioner was accused of an offence. Mr. Mehta however, fairly conceded that in terms the search Authorization was addressed by the superintendent of Central Excise Shri Wagh not to the petitioners but to Shri V.B. Rane, the Deputy superintendent of central Excise who was authorised to enter and search the premises of the petitioners for gold and to seize the same if found there but according part of the search authorization [Ex. A], it was clear that at the material time information had been of which the said officer had reason to believe that gold in respect of which provisions of a part XIIA had been contravened, was secreted by the petitioner in his premises and as such the languages of the search Authorization clearly implies that the petitioners was

accused of b being the possession of the said gold without making the necessary declaration under Rule 126I and that they had committed an offense under Rule 126P [2]. On the other hand, Mr. Gumaste the learned Additional Government pleader, contended that there as are 2 indications in the search Authorization itself which clearly show that the officer under whose signature of and seal the Authorization itself whose clearly show that the officer under whose signature and seal the Authorization was issued not certain whether there was positive contravention of Gold Control Rules on the part of the petitioners at that time. He pointed out that in the first place the recitals of the search Authorization, at that time. He point out that in the first place, the recitals of the search authorization which contain all the 3 alternatives in regard to the apprehended contravention of Gold Control Rule distinctively show that the officer was not sure whether in respect of the gold said to have been committed or was b being committed or was about to committed. Secondly he pointed out that the officer was not even sure whether the gold said to be secreted would be found in the premises of the petitioner and, therefore the operative part of the search Authorization stated that the said gold, if found should be seized and produced before the superintendent. He therefore contended that the mere use of a strong expression that there was reason to believe that gold was secreted should not lead to believe that gold was secreted should not learn to the inference that the petitioner had a formal accusation of the commission of offense the fact that throughout the search Authorization [Ex. A] it has nowhere been stated that the gold was secreted by the petitioner but all the that has been stated in that gold was secreted in the premises o the petitioner.

[9] In my view, in order to decide the question as to whether the petitioner was accused of an offense of at the time when the search authorization was issued and the search of his flat was made in pursuance thereof, not only the language of used in the search Authorization but has been framed will have to be taken in to consideration. The marginal note to Rule 126L, which is to the effect, "Power of entry , search, which seizure to obtain information and to take samples" clearly indicates that the provisions contained therein have been framed for the purpose of ascertainment of the fact of the whether any contravention of the any of the provisions of the part XII A, has been, or is b being or is about of to be committed by any person, in respect of gold. This is also clear from the contents of sub - rules 1, 2, 4 and 5 thereof. sub - rule [1] deals with the premises of a refiner or a licensed dealer in gold and under that sub - rules power to enter and search and refinery of a refiner or the establishment of licensed dealer is conferred upon an officer authorized by the Board of the in that behalf and power is also conferred upon such officer of seize and gold in respect of which he supports that any provision of this part has been, or is b being or is about to be contravened. sub - rule [2] deals with premises of any others person not b being a refiner or licensed dealer and under that sub - rules power is conferred upon on officer duly authorized in that behalf by the central Government to enter and search such premises and to seize from such preemies any gold in respect of

which such officer suspects that any provisions of this part has been or is being or is about to be contravened. The fact that both these sub - rules authorize seizure gold conferred for ascertainment of the fact and contravention. sub - rule [4] in terms says that the officer hold an inquiry for the purpose of ascertaining whether any contravention of any the provision of this part has been is being or is about to be committed" and such officer has been given the power to summon any person, either to give the power to evidence to produce any document for the purposes of such inquiry that is to day for the purposes as ascertaining the fact of such contravention. Similarly sub - rules [5] expressly states that the Gold Board and call for information whether or not there has been any contravention whether or not there has been any contravention of any of the provisions of this parts." In other words both the magical notes as well as the contents of sub - rules 1, 2 4 and 5 of Rule 126L clearly indicate that whatever steps or proceedings are taken under this rule they are for the purposes of ascertaining the fact any provisions of Part XII - A or not. In other words there has been any contravention of the any provisions of Part XII - A or not. In other words, in my view any step or proceedings including a search Authorization taken under rule 126L is of exploratory nature for the purpose of the ascertaining whether the any contravention of gold control rules has been committed or not and is not concerned with any accusation against the person, whose premises gold is directed to be seized under sub - rule [1] or sub - rule [2], or from whom information is sought by an officer under sub rules [4] or by the board under sub - rule [5],. It may be that as a result of such exploratory measures having been taken the facts ascertained might disclose some offence and the fact so ascertained might disclose some offence and the facts so ascertained might from the basis under Rule 126p but that would not make the step or proceedings taken under Rule 126L to be a step or proceedings amounting to an accusation of an offence. Having regard to the aforesaid object with which Rule 126L has been framed, therefore, with it is clear that the search Authorization [Ex. A] in this case, which has been expressly and its terms issued under the said rule, will have to be regarded as an exploratory step or proceedings taken with a view of ascertaining whether in respect of the gold which is said to have been secreted by the petitioner in his premises, the petitioner has committed or is committing or is about to commit a contravention of any provisions of part XII - A and that the same was not concerned with any accusation against the petitioner of actual a contravention.

[10] Turning to the language used in the Search Authorization [Ex. A] in my view that use of present tense to the effect "that gold in respect of which x x x x x x x is secreted" and the further fact that the same was authorized to be seized under Ex. A do not convert the search authorization into any accusation of commission of an offence against the petitioner, for under clauses [b] of sub - rule [2] of Rule 126L even where gold is secreted by a person and a mere suspicion is entertained that in respect of such gold, a contravention of any provision of part XII - A has taken place an authorization to seize such gold could be given and

the search Authorization in that behalf, will contain similar provisions as is to be found in Ex. A. I do not think that in Ex. A. Indeed of the recital where as there is reason to believe" the recital where "whereas there is reason to suspect" or "whereas it is suspected:" and the remaining portion of the Search Authorization was the same as is to be found in Ex. A, it could be seriously contended that such search authorization would amount to accusation of an offence against the petitioner. Therefore, merely because present is in respect of secretion of gold has-been used or merely because such secreted gold is directed to be sized it would not convert the search Authorization into any accusation of hand office. The only ground on which Mr. Mehta strenuously contended that the search Authorization in this case of the search Authorization [Ex. A] contained a stronger recital viz., "whereas there is reason to believe". There is no doubt that the words "believe" There is no doubt that the words "believe" is much stronger would than "suspect" and the recital in Ex. A is a strong would than because such recital is found in this search Authorization, there is an implied accusation of the commission of an offence of the part of the petitioner? Unfortunately the material on which Shri Wagh come to hold the reasonable belief that there might have been a contravention have not come on record. Further since all the 3 alternatives in regards to apprehended contravention have been disjunctively mentioned, it could be said that Shri Wagh had such materials before him that he could not positively say that there was in fact a positive contravention of the provisions of part XII-A on the part of the petitioners and if Shri Wagh himself was not sure in that behalf, he could never have thought of accusing the petitioners of such contravention. In any case of at the highest such recital would show that information or material placed before him was such that as a reasonable man he [Shri Wagh subjectively must have felt convinced that the secretion of the gold was in contravention of that the secreting of the gold was saying that the petitioners was accused of such contravention. All that the search authorization at the highest means is that according to the reasonable belief of the issuing office gold is secreted by the petitioner in his premises and it has been expressly so stated in the panchnama [Ex. O] but that does not amount to any accusation being made against the petitioners that he has contravened any provision of the part XII - A I do not think that the mere use of such recital in the Search authorization has the effect of converting it into the implied accusation of the commission of the offence on the part of the petitioner. I do not think that mere use of the such recital robs, the search Authorization of its exploratory character. Having regard to the object of the Rule 126L under which this search Authorization was issued and also the languages used therein, it is clear to me that it was not concerned with making any accusation against the petitioner.

[11] I may usefully refer to one decision of the Madras High Court in Bhagwandas Goenka Vs. Union of India (UOI), . No doubt it was a case under Foreign Exchanges Regulation Act of 1947 and the appellant Bhagwandas Goenka was convicted for contravening certain provisions of the said act but there the

accused unauthorizedly acquired dollars in the U.S" and on the basis of such information the Bank had "reversed information that the accused unauthorized acquired dollars the in bank had issued certain directives in the form in interrogatories to the accused head under S. 19 [2] of the said Act and the accused had given replies thereto and question arose and whether the said replies of the accused were inadmissible in evidence under Article 20 [3] and the courts held that the directives by the Bank of was of exploratory character of the were issued for ascertainties of facts and the there were no accusation made against the appellant and in as such replies made given were admissible in evidence. Head - note [d] of the report runs as follows:

"Even assuming that Art. 20[3] would be applicable not merely to judicial proceedings of any character, but to a multiplicity of the situations, in which judicial proceedings might be in prospect, it is still impossible to hold that the when certain facts are ascertained it may be under un obligations of t furnish an answer in order to explore and determine if the person had committed an offense, this exploration itself places him in the situation of virtually accused person, and thus renders his explanation of inadmissible in evidence. The directives of the Reserve Bank under S. 19, and the replies thereto are not inadmissible evidence under Article 20[3] of the constitution as incriminating answers furnished by a party in the virtual position of accused under testimonial compulsion. The statement which a party makes under fear the of penalties prescribed by the act, are not hit by Article 20[3] and cannot be excluded from b being used in evidence against him after the he has become is not in the position of he an accused when he furnishes replied to the directives under S. 19. The protection or immunity under art. 20[3] is available only to person against whom a formal accusation relating to the commission of an offense has been leveled."

In view of the aforesaid discussion, I am unable to accept Mr. Mehta's contention that at the material time i.e, when the panchanama was made or when the petitioners detailed statement made or when the petitioners detailed statement was recorded the petitioners was accused of any offence of there was formal accusation of the commission of an offense leveled against the petitioner.

[12] Mr. Mehta next contended that the petitioner was compelled to make those statements in question to the central Excise officers and in the behalf he fairly conceded that this was not a case where compulsion or duress in the sense of the threats of physical injury or bodily harm or actual beating had been administered to the petitioners before he made the statements in question. In fact he himself the pointed out that the end of the detailed statement of the petitioners, that was recorded by he Deputy superintendent parekh, under instruction of superintendent which on 6th April 1963 [Ex. Z - 10] the petitioners had stated that he had given the statement of voluntarily meaning thereby that there was no physical coercion exerted on him when he made that statement but Mr. Mehta contended that there was legal compulsion of upon the petitioner of to make those statement both at the time of making the panchanama of as also on

6th April 1963, when his detailed statement was recorded, inasmuch as having regard to the provision of Rule 126L [4] and Rule 126P [1] [ii], of if he did not make a statement or furnish information as required by their officers concerned when he was interrogated by them he was liable to be punished with imprisonment for a term of not less than 1 month and not more than 1 years and was also liable to be sentenced to pay a fine. In this behalf Mr. Mehta pointed out to me that the both these statements which were made by the petitioners first at the time when the panchanama was being drawn up and secondly when his detailed statement was recorded by the Deputy Superintendent Parekh, he was interrogated by the two officers, who acted under the powers vested in them by the defense of India Rules and the petitioners made these statements by stating that Superintendent Wagh of the Central Excise, who gave evidence at the trial on behalf of the prosecution, clearly admitted in his evidence that at the time of making of the panchanama, he questioned the petitioners with regard to the gold that was found in the pit [on the ledge] and he also questioned the petitioner about the currency notes and the other things found in the bag in Mody's house and these items of property that were seized in pursuance to his questions similarly Superintendent Wagh further that he questioned and interrogated the petitioner accused on 6th April 1963 that and the petitioner accused gave replies. Statement of Superintendent Wagh has further clarified the interrogation and recording of the statement made of the petitioners was done under the powers vested in the officers by virtue of the Gold Control Rules. This is what Superintendent Wagh stated in his evidence in that behalf.

" I acted in this case under the powers of the Gold Control Rules and the Customs Act. All the enquiries of substances to the seizure of gold were conducted in this case under Gold Control Rules. Under the powers of Gold Control Rules, I questioned the accused myself. He did give me replies to my question. After this interrogation I asked Dy. Superintendent Parekh to record his i.e., accused statement. Xxx x xx In the course of enquiries in this case of under the gold control rules I questioned Kotakm and Mody also."

The evidence of Superintendent Wagh makes it amply clear that it was as a result of the interrogation that was done by the Central Excise officers in exercise of the powers vested in them by virtue of Gold Control Rules, that the statements of the petitioners accused both in the panchanama as well as in his detailed statement, came to be recorded and Mr. Mehta has contended that under the relevant provisions of Rules 126-L and 126 - P the petitioners accused were legally bound to make by the Central Excise officers and therefore and therefore there was legal compulsion on the petitioner - accused to make those statements and as such those statements cannot be used in evidence against the petitioners accused in the case. I find considerable force in this contention of Mr. Mehta sub - rule [4] of the Rule 126 - L empowers any gazetted officer duly authorized to summon any person whose attendance he considers necessary either to give evidence or to produce any document for the purpose of such inquiry to be produced or fails to furnish any information when required to do so

under any provisions of this part [which would obviously include S. 126L [4] he is liable to be punished with imprisonment of for a term mentioned therein and also liable to be pay fine. Mr. Gumaste the learned Additional Government pleader contended that sub - rule[4] of Rule 126L authorizes tended that sub - rules [4] of Rules 126L authorize a gazette officer of who is holding an inquiry to summon any person to give evidence or to produce any document or other things and as such will not apply to a case of the person to do to d under any provisions of the this part as is contemplated under S .126P [1] [ii]. He further pointed out that there are other provisions to furnish information and as an instance he pointedly brought to my notice the provision he of sub - rule [5] of Rule 126L itself, which provided that the Gold Board may call for information from any person for the purpose of ascertaining whether that or not there has been any contravention of any provision of this part of according to Mr. Gumaste, it was only any when a person was required "to furnish information " either by the Board as per sub - rules [5] of Rule 126L or by any other officers, who has been empowered to call for information, that he come with the mischief of Rule 126P [1] [ii] I doe not think that the expression "to give evidence" has been used in sub - rules [4]of Rules 126L in the narrow technical sense of giving evidence on oath either that affidavits or making statement on oath but that expression has been used in wider sense of as to include that act of the furnish the statement of information. This is clear from the that sub - rules [4] not only use the expression "to give evidence" but also the further expression " or produce any document or thing a person furnished information to the office concerned. The marginal not of Rule 126L, the officer o the duly autodialing in that behalf who is holding an inquiry for the purpose of the provisions of this part has been or is being or in about to be committed is authorised to collect or gather information by means for obtaining statement or documents. In its view of the matter it is clear that the penal provisions of Rule 126 - P [1] [ii] would be attracted if a person fails to furnish to information bo omitting to make a statement of when he in interrogated, y the officer clear that the since the petitioners accused in the present case as were conducting the inquiries under powers vested in the them by virtue of Gold Control Rules and was bound to give answers or replies of the such interrogation he was legally completed to make the statement of in question Central Excise of officers any by Article 20[3] of the constitution of the applicability of thereof could be said to have been fulfilled in this case.

[13] on the point as to whether the statement in question which are b being used against the petitioners at the trial, are self - incriminatory or not, I do not think that the there would be any doubt that these statement, which are begin sought to be proved against the petitioners are self - incriminatory. It was urged by Mr. Gumaste that actually in his statement, the petitioner had completely disowned any connection with the gold in respect of whereof he is b being prosecuted, while in regard to the currency notes, in respect whereof there is no charge leveled against him the petitioner has his statement claimed that he money belonged him and stated that the cloth bag which contained the currency

notices has been put by him in his neighbours flat across the balcony with the knowledge's of that neighbour and that , there fore it could not be said that the petition statement it were self incriminatory. It is difficult to accept Mr. Gumstates contention in is behalf. It is true that in regard to gold in question the petitioners in regard to the gold in question, the petitioners disclaimed any connection with the same but the latter part of he petitioners" statement in regard to the currency notes wherein he state before the officers that the had put the cloth bat containing the aid notes in his neighbors knowledge"s is b being expressly relied upon by the prosecution for the purposes of rendering highly probable a similar conduct on the part of the petitioners in regard to the gold in question, for it is the prosecution case that just as he put the cloth bag containing the currency the petitioners must have also thrown the gold in question on the ledge outside the balcony of another neighbor of his viz., Mr. Kotakm and in fact as I have indicted earlier in the compliant that has been lodged by the respondent against the petitioner in this case it is the manner that the possession of gold wit the petitioners in contravention of Gold Control Rules is sought to be established by the prosecution. [See paragraph 16 of the compliant quoted above.] There could be no doubt that this conduct of the part of the petitioners in throwing the bar containing the currency notes [which money is claimed by him as has] into his neighbors flat across the balcony which emerges from the statement made by him to the Central Excise Officers, is gravely incriminating and it is clear that this statements which contain an admission on this conduct will have to be regarded as self - incriminatory statement. I may holding that the statement of the accused in question did not amount to a confession under S. 25 of the Evidence act, took the view that those statement contained as admission of a gravely, incriminating fact. There is no doubt, therefore, that the statements in question will have to be regarded as self - incriminatory.

[14] Since, however I have held that the petitioner was not accused of an offense at the material me when the statement in question were made by him to the central Excise Officers, were may by him to the privileges or the immunity claimed by the petitioner cannot be availed of by him. The statement in question, therefore, can not be regarded as inadmissible of in evidence under Article 20[3] of the constitution.

[15] The rule in the revision application is, therefore discharged.

[16] Application dismissed.