

(1956) 11 MAD CK 0020

In the Madras High Court

Case No : Writ Appeal No's. 120 of 1955 and 53, 55 and 89 of 1956

Collector of Customs, Madras

APPELLANT

Vs

A.H.A. Rahiman

RESPONDENT

Date of Decision : 16-11-1956

Acts Referred:

Constitution of India, 1950 — Article 226

Sea Customs Act, 1878 — Section 167, 167(8), 182, 183

Citation : AIR 1957 Mad 496 : (1957) ILR (Mad) 642 : (1957) 70 LW 328

Hon'ble Judges : Rajamannar, C.J.; Panchapakesa Ayyar, J

Bench : Division Bench

Advocate : Advocate General and Special Govt. Pleader, for the Appellant; V.C. Gopalaratnam, L.V. Krishnaswami Aiyar, Sundararajan and Sivaswami and V. Thiagarajan, for A.R. Krishnaswami, for the Respondent

Judgement

Rajmannar, C.J.—These four appeals were heard together because they raise certain common questions of law. Apart from these questions, each case has been argued on the merits also. We shall first set out the facts in each case.

2. Writ Appln. No. 120 of 1955 is an appeal against the Judgment of Rajagopala Aiyangar J., in W. P. 381. of 1953. The Collector of Customs, Madras, is the appellant. The respondent is a merchant carrying on business, in Madras in piecegoods. He filed Writ petition in the following circumstances. In June 1948, he presented through his customs broker, one Siddique Sahib, a shipping bill dated 14-6-1948 in respect of 100 bales of handloom piece-goods intended to be shipped to purchasers in Pakistan. From this consignment the Customs authorities detained 7 bales, bearing Nos. 3201, 1202, 1203, 1204, 834, 842 & 843 as they suspected that they contained power-loom goods, the export of which was prohibited at the time.

On examination by the authorities one of these bales alone, namely, that bearing No. 1202, was found to contain powerloom goods. The others contained handloom goods as regards which there was no prohibition. The Customs

authorities thereupon confiscated the said bale No. 1202 but directed that it would be returned to the party on payment of a penalty of Rs. 50. The respondent alleged that he directed his broker Siddique Sahib to pay the said penalty from and out of moneys belonging to him in the agent's hands and expected that in the normal, course the agent would pay the penalty and take back the said bale.

He also expected the broker to clear the other six bales. Actually, however, all the said bales including bale No. 1202 continued to remain on the premises of the Port Trust without being cleared. The penalty of Rs. 50 apparently was not paid by Siddique Sahib. In the first week of July 1948 the said broker Siddique Sahib represented on behalf of the respondent another shipping bill for six bales of piece-goods and it is now admitted that bale No. 1202 was one of them, and along with the other five bales it was despatched.

The respondent wrote to the Assistant Collector of Customs, Madras, on 21-1-1949 mentioning that the penalty of Rs. 50 imposed in respect of bale No. 1202 had not been paid and that he was prepared to pay it, that bale No. 1202 was shipped by mistake by his clearing agent along with the other bales, and requested that the ignorance on his part may be viewed leniently and a nominal penalty imposed. The respondent again wrote on the same lines on 24-5-1949 and another letter on 16-6-1949. He also asked for release of the bales which had not been taken delivery of. No reply however was given by the Customs authorities to these letters.

On 7-3-1950 the respondent again wrote to the Collector of Customs again expressing regret for the error in shipping bale No. 1202 and re-requesting delivery of the six bales still remaining in the harbour. To this also there was no reply. But on 22-4-1950 the Collector of Customs passed an order, the material part of which runs as follows:

"In July 1948, the same broker presented on behalf of the same exporter another shipping bill (No. 3381 dated 28-7-1948) for six bales (Nos. 1201 to 1203, 834, 842 and 843) handloom piece-goods and managed to ship five bales, leaving out bale No. 834 which was missing. The clearing agent in collusion with the exporters thus managed to ship bale No. 1202. This bale contained powerloom goods which had been confiscated by Government and the export of which without a licence was prohibited. An offence u/s 19, Sea Customs Act, punishable u/s 167 (8) *ibid* is therefore disclosed.

ORDER

The clearing broker and the shippers are the only persons who knew of the identity of the detained goods including the bale containing prohibited powerloom goods, viz., 1202 and the fact of their having mentioned this bale on the shipping bill *prima facie* suggests that their intention was to ship the bale. This combined with the fact that the prohibited goods were actually shipped, clearly establishes the exporter's *mala fides*. I therefore impose a penalty of Rs.

10,000 (Rs. ten thousand) only on the exporters u/s 167 (8) of the Sea Customs Act."

3. Against this order the respondent filed an appeal to the Central Board of Revenue, New Delhi, u/s 188 of the Sea Customs Act. The Advocate for the respondent wrote to the Board requesting a personal hearing. But the Board did not grant the request. On 8th August 1952 the Central Board of Revenue dismissed the appeal by an order which runs thus :

"The only persona who stood to gain by shipping the prohibited goods were the exporters. The clearing agent affirms that the second shipping bill for six bales which was filed in accordance with exporters' instructions specifically included the running number of the confiscated bale. The Collector was therefore correct in holding the appellants to be equally culpable. The appellants' contention that the amount of penalty imposable u/s 167, Clause 8 of the Sea Customs Act is Rs. 1,000 is not correct. The Board is also satisfied that in the circumstances of the case the penalty imposed is not excessive."

4. Thereupon the respondent filed the aforesaid W. P. No. 381 of 1953 praying that this Court may be pleased to issue a writ of certiorari or such other appropriate writ to quash the Order of the Collector of Customs as confirmed by the Central Board of Revenue inflicting a penalty of Rs. 10,000, against him. One of his main grounds urged against the order of the Collector of Customs was that it contravened rules of natural justice in that no hearing or opportunity to be heard was afforded to him. The respondent also attacked the validity of the order of the Central Board on his appeal.

He stated that the refusal of the Central Board of Revenue to give a personal hearing to the respondent's advocate was illegal, ultra vires and against natural justice. In the counter affidavit filed on behalf of the Collector of Customs by the Assistant Collector, he did not expressly deny the allegation that no opportunity was given to the respondent to be heard. An objection was raised that as the final order in the matter was passed by the Central Board of Revenue at New Delhi, this Court had no jurisdiction to issue any writ or directions to quash the order of the Central Board, presumably because this Court could not issue a writ to go outside the limits of its territorial jurisdiction.

The writ petition was heard by Rajagopala Aiyangar J. Before the learned Judge it was admitted that the Collector before passing the Impugned order imposing the penalty did not give any notice to the petitioner to show cause why a penalty should not be imposed, and of course, there was no enquiry in regard to the matter. The learned Judge overruled the preliminary objection raised on behalf of the Collector of Customs. He held that the order of the Collector of Customs was a nullity because rules of natural justice were not followed, and as it was a nullity it could not be a subject of confirmation by the appellate authority.

He did not indicate what his view would have been if the order of the Collector was not a nullity. The learned Judge however expressed serious doubts as to

whether the theory or merger of an original order in an order of appellate authority had any application to the orders of quasi-judicial Tribunals such as the Collector of Customs and the Central Board of Revenue. In the result the learned Judge quashed the order of the Collector of Customs on the ground that the respondent was not given any notice to show cause, or an opportunity to prove his innocence before the penalty was imposed.

5. W. A. No. 53 of 1956 : This is an appeal against a judgment of Rajagopalan J., in W. P. No. 327 of 1954 filed by the respondent who is a merchant carrying on business in gunnies at Nagapattinam. In the affidavit in support of his application he alleged that to collect the money which was due to him from one Radhakrishnan who was at Penang, requested a friend of his at Penang to despatch to him 50 bags of inferior quality betel nuts belonging to Radhakrishnan and accordingly the goods were exported to him through his principals, the Arasan Trading Co.

The respondent however, did not have the necessary licence to import betel nuts into India from Penang, and stated that he was not aware of the rules and regulations which require a licence. He requested the authorities to take a lenient view. But the customs authorities ordered confiscation of his goods u/s 167 (8) of the Sea Customs Act read with Section 3 (2) of the Imports and Exports (Central) Act, 1947. The order passed by the Collector of Central Excise, Madras, runs thus:

"On 21st May 1953, Mr. N. M. Nagarajan of Nagapattinam imported at the Nagapattinam Port 25 bags of red split betel nuts and 25 bags of Lankat whole betel nuts from Penang. As he did not produce the requisite I. T. C. licence, the betel nuts were detained by the Customs Collector, Nagapattinam and the importer was called upon to show cause for importing the betel nuts without an I. T. O. licence.

2. The importer in his reply to the show cause memo issued by the Customs Collector stated that one Radhakrishnan in Malaya owed him an amount of Rs. 2,500 that he made arrangements with Messrs. Arasan Trading Co., Penang, to realise the amount from Radhakrishnan, and that since the latter was having only some stock of betel nuts with him, he (the importer) requested Messrs. Arasan Trading Co., Penang to ship the betel nuts in question to him. He pleaded that he was not aware that an I.T.C. licence was necessary for importing betel nuts into India.

3. The importer's plea of ignorance of rules cannot be accepted. Messrs. Arasan Trading Co., Penang, who sent the betel nuts to the importers are established merchants in Imports and Exports and they have a branch office, at Nagapattinam also. The importer Mr. Nagarajan who was in touch with the above branch office at Nagapattinam for importing the betel nuts from Penang should have been aware of the requirement of an I. T. C. licence for the import of betel nuts into India,

The import of the betel nuts except under an I. T. C. licence is prohibited under the Government of India, Late Commerce Department Notification No. 23 LT.C./43 dated 1st July 1943 issued under the Defence of India Rules as contained in force by the Imports and Exports (Control) Act, 1947 any contravention of which is punishable under the Sea Customs Act.

Order : 4. I therefore confiscate the 50 bags of betel nuts u/s 167 (8) Sea Customs Act read with Section 3 (2) of the Imports and Exports (Control) Act. 1947."

Against this order there was an appeal by the respondent to the Central Board of Revenue. But that appeal was dismissed because the Board saw no reason to interfere with the order passed by the Collector of Central Excise, Madras, as the importation was clearly unauthorised. In the affidavit of the respondent he asserted that as a matter of fact there is no branch of the Arasan Trading Co., in Nagapattinam. In the counter affidavit filed by the Collector of Central Excise the respondent's statement that Arasan Trading Co., had no branch at Nagapattinam was not contested.

An objection was raised that as the order of the Collector of Central Excise had merged with the order of the Central Board of Revenue on appeal, a writ could be filed only against the Central Board, but as the Board was outside the Jurisdiction of this Court, the writ petition was not sustainable. Rajagopaia J., overruled the preliminary objection with the brief statement that in spite of the appellate order, the validity of the order of the Collector could be challenged in proceedings under Article 226. The learned Judge held that the order of the Collector was vitiated by an assumption which was conceded to be erroneous, namely, that there was a branch of the Arasan Trading Co., at Nagapattinam, The learned Judge observed:

"To what extent this wrong assumption affected the exercise of his discretion it is not possible for me to gauge or decide. But it would certainly appear to be a case of failure to exercise a jurisdiction vested in him, a jurisdiction to exercise his discretion u/s 183 of the Sea Customs Act, whether the goods should be confiscated or whether a fine in lieu of such, confiscation should be sufficient. Since such a discretion was not exercised at all, I think the rule nisi should be made absolute, which would mean that the matter would have to be gone into afresh by the appropriate authority."

He therefore allowed the petition. The Collector of Central Excise is the appellant before us.

6. W. A. No. 55 of 1956 : This is an appeal against the Judgment of Rajagopalan J., in W.P. No. 161 of 1954 filed by the respondent, a merchant at Nagapattinam who imported a consignment of gum benzoin from Singapore. He made a declaration of the value of the goods on the basis of the invoice price which worked out to Rs. 223 per cwt. But the Customs authorities were of the opinion that the goods had been undervalued and that the real value would be about Rs.

338 per cwt. On the ground that there had been a misdeclaration, the Assistant Collector of Customs issued a notice to the respondent on 20-1-1953 to show cause why the goods should not be confiscated and a penalty imposed u/s 167 (37) of the Sea Customs Act.

He was required to state whether he wished to be heard in person". On 21st January 1953 the respondent submitted a written representation In which he specifically asked for an oral hearing. On the same day the Assistant Collector of Customs passed the following order:

"Messrs. O. D. NaJayappan, Madras filed a bill of entry for 3 bundles. Eagle Globe gum benzoin on behalf of their clients Hajee K.M. Maha-med Tahmbi Nagapattinam, and declared its value for purposes of assessment as Rs. 1596-7-0 which was based on the value shown in the relative invoice. The value declared worked out to Rs. 223 per cwt. It has been ascertained that the price ruling in the country of export at the time of shipment was Rs. 335 per cwt. This is a mis-declaration which if undetected would have resulted in a loss of duty of Rs. 303.

Order: The goods are confiscated u/s 167 (37) of the Sea Customs Act, but may be cleared into town on payment within four months of a fine of Rs. 300 (Rs. three hundred only) imposed u/s 183 ibid in lieu of confiscation."

7. Against this order of the Assistant Collector the respondent filed an appeal to the Collector Customs, Madras. But that appeal was dismissed. There was further revision to the Government of India and that was also dismissed. Thereupon the respondent filed the aforesaid writ petition for the issue of writ of certiorari or other appropriate writ to quash the order of the Assistants Collector of Customs dated 21st January 1953.

One of the objections taken was that the order sought to be quashed had been carried up in appeal and revision and there was no prayer to quash the orders of the appellate and revisional authorities. That objection was overruled by the learned Judge. He held that the respondent had not been given a real and effective opportunity to defend himself against, the charges made against him in the notice dated 20th January 1953 and there had been, therefore, a violation of the principle of natural Justice.

On this finding he set aside the order of the Assistant Collector. The Assistant Collector of Customs. Madras, is the appellant before us.

8. W.A. No. 89 of 1956: This is an appeal against the judgment of Rajagopalan J. in W.P. No. 643 of 1954 filed by the respondents who are a firm of importers and exporters. They exported 75 cwts of coffee seeds to Ceylon from Tuticorin in October 1950. Admittedly the respondents did not obtain the authorisation of the Indian coffee Board as prescribed by Section 20 of the Coffee Market Expansion Act, VII of 1942. Before exporting the Coffee, the respondents sought the advice of the Superintendent of Central Excise, Tuticorin, who informed them on

18-10-1950 that coffee was one of the items released from export control.

On a 22-8-1951 the Superintendent of Central Excise, Tuticorin, issued a notice to the respondents why the firm should not be punished u/s 167(8) of the Sea Customs Act for having exported the coffee without a permit. Though the respondents urged that they had been advised by the Superintendent of Central Excise himself that no permit was required, the firm's explanation was not accepted and the Collector of Central Excise levied a penalty of Rs. 5200 on the respondents by his order dated 1-5-1952.

The respondents filed an appeal to the Central Board of Revenue but that appeal was rejected in limine because the respondents had not deposited the amount of penalty, levied on them, which is a condition precedent for the appeal to be entertained. There was a further revision to the Government, but that also failed. The respondents then filed the above writ petition, for the issue of a writ of certiorari or other appropriate writ to quash the order of the Collector of Central Excise dated 1-5-1952.

In this case also an objection was taken that the order of the Collector had merged with the appellate order against which no application under Article 226 would be maintainable and therefore the petition itself was not sustainable. This objection was overruled by the learned Judge on the ground that the appeal to the Board of Revenue was never entertained at all but was rejected in limine as the amount levied as penalty had not been deposited. He found on the merits that the Collector of Central Excise had failed to take a very relevant fact into account, namely, that the Superintendent of Central Excise himself had given the assurance which was acted upon by the respondents, and that such failure vitiated the exercise of a statutory power by the Collector. Though the doctrine of equitable estoppel could not be applied to the case, it was sufficient to say that the exercise of the power conferred on the Collector u/s 167(8) of the Act was vitiated by the failure to give due weight to the fact that they had been advised by the Superintendent of Central Excise, Tuticorin. He therefore allowed the petition and set aside the order of Collector levying a penalty of Rs. 5200.

The Collector of Central Excise, Madras, is the appellant before us.

9. The learned Advocate General who appeared for the appellants in all the appeals raised two common "questions of law. He first contended that the several orders sought to be quashed in the writ petitions were in the nature of administrative orders not liable to be quashed by writs of certiorari. This question does not appear to have been raised before either Bajagopalan J. or Rajagopala Aiyangar J. He relied upon the ruling of the Calcutta High Court in the Collector Customs v. Shewpujanrai, (Compilation of Judgments in Customs Cases, 1953, compiled by the Central Board of Revenue). The learned Judges in that case discussed the question whether the Collector of Customs while adjudging confiscation or imposing a penalty under the Sea Customs Act is a Person entrusted by statute with judicial or quasi-judicial functions and held that he was

not, and therefore neither a writ of certiorari nor a writ of prohibition could lie in respect of such an order. They came to this conclusion partly because of certain Observations of Bhagwati J. in the decision of the Supreme Court in *Maqbool Hussain Vs. The State of Bombay*, , and partly on a consideration of the nature of the act of the Collector in passing an order of confiscation or an order imposing a penalty. The observations in the Supremo Court Judgment referred to by the learned Judges are as follows:

"All these provisions go to show that far from being authorities, bound by any rules of evidence or procedure established by law and invested With power to enforce their own judgments or orders, the Sea Customs authorities are merely constituted administrative machinery for the purpose of adjudging confiscation, increased rate of duty and penalty prescribed In the Act."

It was contended before them that these observations were in the nature of obiter dicta; but they repelled that contention. With great respect to the learned Judges, we are clearly of opinion that the observations should be read in the light of the facts of the case before the Supreme Court. The only question in that case was whether an accused who had been charged in the Chief Presidency Magistrate's Court, Bombay, with an offence u/s 8 of the Foreign Exchange Regulation Act, could successfully raise a Pica under Article 20(2) of the Constitution based on the fact that there had been an order of confiscation u/s 167 (8) of the Sea Customs Act, It was held that the accused could not rely on that provision because it could not be said that there was a prosecution and punishment in respect of the same offence before a court of law or a Tribunal required by law to decide matters in controversy judicially on evidence on oath which it must be authorised by law to administer. In. holding that the Collector of Customs was not such a court of law or a Tribunal, it was observed that it was a tribunal which entertained a departmental or an administrative enquiry and which was not required to proceed on legal evidence given on oath. We do not think that the Supreme Court intended to lay down that no order of the Collector of Customs under the Sea Customs Act was amenable to the jurisdiction of the High Court under Article 226 of the Constitution. The learned Judges then mentioned four elements which should exist before an order or act could be deemed to be quasi-judicial, namely:

- (1) There must be a body of persons not a court in its strict sense.
- (2) The body of persons must have legal authority to decide.
- (3) The legal authority must extend to a determination of questions affecting rights of subjects.
- (4) The body of persons must be under a duty to act Judicially.

Evidently the learned Judges were prepared to hold that, the first three elements were present in the act or the order of the Collector of Customs sought to be quashed; but in their opinion the fourth element was not present and therefore

the impugned order was an administrative order. We have carefully considered the several reasons which impelled the learned Judges to take to that view; but with great respect we do not think any of the reasons compels us to hold that the Collector is not under a duty to act judicially in ordering confiscation or imposing a penalty. We cannot agree with the learned Judges that the use of the word "adjudge" in Sections 182 and 183 of the Sea Customs Act does not involve the idea of judicial approach. In our opinion, neither the fact that the customs authorities can act on matters which are not legal evidence, nor the fact that they cannot administer oath, nor the fact that the customs authorities need not observe the rules of judicial Process, nor the fact that the customs authorities are not required to hear arguments on law or fact, nor the fact that the appeal and revision provided lie to the customs authorities and the Central Government and not to any judicial authority would have any bearing on the question whether an order of confiscation or penalty is or is not a quasi-judicial act. We are inclined to follow the earlier decision of the Calcutta High Court⁹ which Trevor Harris C. J. and Benerji J., were parties, namely, the Asst. Collector of Customs for Appraisalment v. Soorajmull Nagarmull, 56 CWN 452 : AIR 1953 Cal 656 (B). There the learned Judge held that the Assistant Collector of Customs was acting in a judicial or quasi-judicial capacity and, if we may say so with great respect, both the learned Judges have given excellent and convincing reasons for holding that in the matter of adjudication of confiscation and penalty, the customs authorities are under a duty to act judicially.

The learned Judges in the case first referred to, that is, Collector of Customs v. Shewpujaurai, thought that the authority of this decision had been shaken, if not wholly taken away by the decision of the Supreme Court in Maqbool Hussain Vs. The State of Bombay, . We do not think so. As already explained by us, the Supreme Court did not purport to lay down in that decision that an order of confiscation or penalty passed by a Collector of Customs cannot be quashed by a writ of certiorari under Article 226 of the Constitution, The first question of law raised by the learned Advocate-General must therefore be answered against him.

10. The second contention of the learned Advocate-General has considerable force. It is this. In every one of the appeals except possibly one, the order of the Collector of Customs had been carried up in appeal to the Central Board of Revenue or in revision to the Government of India and, therefore, it is the final order of the superior authority that is the only subsisting order, as the order of subordinate authority must be deemed to have merged in the order on appeal or revision.

Now admittedly these authorities, that is, the Central Board of Revenue and the Government of India are beyond the territorial jurisdiction of this Court and no writ under Article 226 can be issued to them; vide Election Commission, India Vs. Saka Venkata Subba Rao and, . Both ran the argument.

11. There has been considerable divergence of judicial opinion on this question. In Election Commission, India Vs. Saka Venkata Subba Rao and, , this question

was referred to in passing and left undecided. Patanjali Sastri C. J., said :

"Our attention has been called to certain decisions of High Courts dealing with the situation where the authority claiming to exercise jurisdiction over a matter at first instance is located in one State and the appellate authority is located in another State. It is not necessary for the purposes of this appeal to decide which High Court would have jurisdiction in such circumstances to issue prerogative writs under Article 226."

12. The learned Advocate-General relied on certain observations in a recent decision of the Supreme Court which he contends are decisive on the point. They occur in *A. Thangal Kunju Musaliar Vs. M. Venkitachalam Potti and Another*, . That case arose out of a writ petition filed in the High Court of Travancore-Cochin for a writ of prohibition or any other appropriate writ or direction prohibiting the Income Tax officer on Special Duty, Trivandrum, and the Indian Income Tax Investigation Commission from holding any enquiry into the cases registered as Evasion Cases Nos. 1 and 2 of 1125 (M. E.) on the file of the Income Tax Investigation Commission. Travancore.

A preliminary objection to the jurisdiction of the High Court to entertain the writ petition was raised on the ground that the Court was not competent to Issue a writ against the second respondent, that is, the Income Tax investigation commission, which being outside the territory of the State was not amenable to its jurisdiction, and the first respondent, the Income Tax Officer was a mere subordinate of the second respondent. This objection was overruled by the High Court which held that the Income Tax Officer was resident within the State and the action complained of was confined to the State and a writ issued against him was sufficient to give relief to the petitioner, and therefore it was unnecessary to decide whether or not a writ could be issued so far as the Commission was concerned.

A writ Of prohibition was issued eventually against the Income Tax Officer. There was an appeal to the Supreme Court and the learned Attorney General again pressed this objection. He contended that the Investigation commission had its office in New Delhi and the Income Tax Officer was functioning under Its directions. The Supreme Court also overruled the objection. In support of his contention the learned Attorney; General cited certain, decisions and it is in dealing with these decisions that Bhagwati J., who delivered the judgment of the Court made the following observations :

"Our attention was drawn by the learned Attorney General in this connection to three recent decisions, of the High Courts of Allahabad, Nagpur and Pepsu which, according to him, supported his contention, viz., *Azmat Ullah and Others Vs. The Custodian, Evacuee Property, U.P., Lucknow*, , *Burhanpur National Textile Workers Union, Berhampur v. Labour Appellate Tribunal of India*, (S) AIR 1955 Nag 148 (F), and *Joginder Singh Waryam Sing v. Director Rural Rehabilitation, Pepsu*, (S) AIR 1955 Pepsu 91 (G). These decisions, however, are clearly not in

point for, in each of them, the order passed by the authority within the territories and accordingly within the jurisdiction of the High Court concerned and merged in the order of the superior authority which was located outside the territories and was, therefore, beyond the jurisdiction of that High Court.

In that" situation, a writ against the inferior authority within the territories, could be of no avail to the petitioner concerned and could give him no relief for the order of the superior authority outside the territories would remain outstanding and operative against him. As, therefore, no writ could be issued against that outside authority and as the orders against the authority within the territories would, in view of the orders of the superior authority, have been infructuous, the High Court concerned had, of necessity to dismiss the petition. Such, however, was not the position in the present petition before the High Court of Travancore-Cochin. There was here not question of merger of any judicial order of respondent 1 (income tax Officer) into the judicial order of respondent 2 (Investigation Commission)."

13. To understand the scope of these observations it is necessary to refer to the three decisions above-mentioned. In *Azmat Ullah and Others Vs. The Custodian, Evacuee Property, U.P., Lucknow*, , the facts were: On 3-9-1949 the Deputy Custodian of Evacuee Property, Gonda, in the exercise of powers vested in him under the United Provinces Administration of Evacuee Property Ordinance, 1949, declared certain persons to be evacuees and their property to be evacuee property. The petitioners before the High Court claimed to be sub-tenants of the evacuee and were allowed by the Assistant Custodian to remain in possession.

The Assistant Custodian subsequently formed the opinion that the petitioner's claim to be subtenants was fictitious and he made a report to that effect to the Deputy Custodian who, on 10th May 1952, passed orders directing the petitioners to be evicted from the property. Against these orders applications in revision were filed by the petitioners before the Additional Custodian of Evacuee Property. By an order dated 29th July 1952 both applications were allowed and possession was directed to be restored to the petitioners.

The matter then went to the Custodian General who by an order dated 21-11-1952 quashed the order of the Additional Custodian and restored the two orders of the Deputy Custodian dated 10-5-1952. The petitioners thereupon filed a petition under Article 226 of the Constitution. The only person made respondent was the Custodian, Evacuee Property, U, P., Lucknow. Inter alia the petition prayed for a writ, direction or order to be issued quashing the order of the Custodian General so far "as it related to the applicants. A preliminary objection was taken that as the Custodian General had his office at New Delhi and the order which the petitioners sought to have quashed had been passed in Delhi, the Court had no Jurisdiction to issue the writ prayed for. Thereupon the following question was referred to a Full Bench of the Court ;.

"Where the relief claimed is a writ of "mandamus" relating to property situate

within the jurisdiction of one High Court directed to an officer residing within the jurisdiction of that Court and it was that officer who and whose subordinates also residing within the jurisdiction of the same High Court, originally passed the orders complained of but the writ cannot issue without setting aside, in exercise of the power of "certiorari" the order passed in appeal or revision by an authority residing outside the jurisdiction of that High Court and within the jurisdiction of another High Court, which is the High Court competent under Article 326 of the Constitution to issue the writ."

14. The petition came on before a Bench of five Judges. The learned Chief Justice at the outset pointed out that the question as pronounced was not the real question which arose, but the real question was whether that Court could Issue a writ of mandamus to the Custodian of Evacuee Property, U. P., who was the only respondent, commanding him to treat as a nullity an order made by the Custodian General in New Delhi in the existence of his revisional powers. The Full Bench held that both on principle and authority the answer to the question must be in the negative. The reasoning of the Full Bench Was as follows:

""In our opinion it is no less clear that we cannot do indirectly what we have no power to do directly. We have no power to set aside the Custodian General's order; it is so far as this Court is concerned, a final order. If we examine the grounds of that order for the purpose, should We find the order to be invalid, of declaring it to be a nullity, we are in effect doing indirectly what We cannot do directly.

Until the Custodian General's order be qua-shed or set aside by a Court competent to do so, this Court must deem the order to be a valid order, and there is consequently no material upon the basis of which We can issue the "mandamus" which the petitioners seek."

15. Reliance was placed before the Pull Bench on two cases of the Rajasthan High Court, one of which was Barkatali Vs. Custodian General of Evacuee Property of India, Dealing with these cases, the learned Chief justice said :

"In each of these cases, the order of a subordinate officer within the jurisdiction of the High Court had been confirmed by the higher authority outside the Jurisdiction. The Court in each case held that in these circumstances the real order against which relief was sought was the order of the subordinate officer, and that order the Court had jurisdiction to quash under Article 226, This Court has however held in Hafiz Mohammad Yusuf Vs. The Custodian General, Evacuee Properties, New Delhi and Others, , that an order of the Custodian General, even if it does no more than affirm the order of an Assistant Custodian, supersedes the latter order which becomes merged in the former.

16. This clearly is an obvious case because the order which the petitioners were aggrieved by was the order of the Custodian General who reversed the order of the Additional Custodian which was in favour of the petitioners. In (S) AIR 1955 Nag 148 (F), the Nagpur High Court had to deal with a petition for a writ of

certiorari or Mandamus sought against the Labour Appellate Tribunal at Bombay, the Provincial Industrial Court, Nagpur and others. The petitioner was a registered Trade Union.. The Petitioner applied to the Registrar of Trade Unions, Nagpur, for recognition as representatives of the employees of Burhanpur Tapti Mills Ltd., Bur-hanpur. The application was granted.

Another union called the Tapti Mill Majdgor Sangh appealed against this order to Provincial Industrial Court at Nagpur which dismissed the appeal. Subsequently the Majdobr Sangh filed an application before the Registrar of Trade Unions, Madhya Pradesh, for cancellation of the recognition given to the petitioner. That application was rejected, by the Registrar of Trade Unions. An appeal was taken to the Industrial Court; but it was dismissed. Again the Majdoor Sangh filed another application for cancellation of the recognition of the petitioner and that was again rejected. An appeal was filed against the order before the Provincial Industrial Court which this time decided in favour of the Majdoor Sangh and an enquiry was ordered. The petitioner appealed to the Labour Appellate Tribunal, Bombay, against the order of the industrial. Court.

The Appellate Tribunal dismissal the appeal and confirmed the order of the Industrial Court. The petitioner then filed the writ petition for bringing up the order of the Appellate Tribunal as well as that of the Industrial Court for consideration by the High Court. A preliminary objection was raised that since the appellate Tribunal was not situate within the territorial jurisdiction of the Court no writ could go to it. The objection was upheld. The learned Judges held that the Nagpur Court did not possess jurisdiction to interfere with the decision of the Appellate Tribunal whose seat was in Bombay, and as no writ could run to the Appellate Tribunal and its decision could not be interfered with, it would be improper to interfere with the order of the Industrial Court because that would be doing indirectly what the Court cannot do directly. The learned Judges also pointed out that by quashing the. order of the Industrial Court only they would be Placing that Court on the thorns of a dilemma.

Under the Act the Industrial Court would be bound by the order of the Appellate Tribunal and they would also be bound to give effect to the order of the High Court, In (S) AIR 1955 Pepsu 91 (G), a person was allotted some agricultural land which had been, declared evacuee property but the allotment was cancelled by the Director of Rural Rehabilitation, Patiala. Against the order of the latter, a revision petition was filed before the Custodian General at Delhi; but the petition was dismissed. Thereupon the party filed a writ petition in the High Court.

It was contended that as the office of the Custodian. General was situated in Delhi, no writ could issue against him and though the subordinate authorities were within the jurisdiction of the High Court, as their orders had been merged in the order of the. Custodian General, no writ could issue even against the subordinate authorities.

The learned Judges pointed out what was pointed out by the learned Judges of

the Nagpur High Court in the Case cited above, that In case a writ is issued to the local tribunal, it will be faced with two contradictory orders, one made by the Custodian General and the other by the High Court. They followed the ruling of the Allahabad High Court in Hafiz Mohammad Yusuf Vs. The Custodian General, Evacuee Properties, New Delhi and Others, . It may be mentioned here that the Custodian General merely Confirmed the orders of the local tribunal. The learned Judges did not find any difference between an order passed on appeal & an order passed on a revision petition.

17. Having regard to these three decisions expressly mentioned in the decision of the Supreme Court, the observations cited above do not admit of any doubt as to their import. Wanchoo O. J., who had taken a contrary view in Barkatali Vs. Custodian General of Evacuee Property of India, , changed his view after the above decision of the Supreme Court in Dungardas and Another Vs. Custodian Rajasthan and Another, .

In that case it was held that the Rajasthan High Court had no jurisdiction to pass an order against the Custodian General, New Delhi, and where the order of the Deputy Custodian, Ganga-nagar, who was within the jurisdiction of the said High Court had been upheld and confirmed by the Custodian General, Delhi, in revision, the High Court would not issue a writ to the Deputy Custodian as that would not be of any help to the applicant. The learned Chief Justice was of the opinion that the observations of Bhagwati J., which we have extracted earlier on in this judgment were very specific and dear cut and in view of those observations the view taken in Barkatali Vs. Custodian General of Evacuee Property of India, , could no longer be sustained.

18. Learned counsel for the respondents invited us to hold that the said observations of Bhagwati J., were in the nature of obiter dicta. It is true that the question which arises in the cases before us did not directly arise in the case before the Supreme Court; but we find it impossible to get over the fact that the Supreme Court approved, the decisions of the Allahabad, Nagpur and Pepsu High Courts cited above, and laid down" a proposition which is of general application.

We are bound to apply the law as enunciated by the. Supreme Court. It is, therefore, unnecessary to discuss the question as if it were res Integra. We agree with the learned Advocate-General's contention that the general rule is that when an order of an inferior Tribunal is carried up in appeal or revision to a superior tribunal and the superior tribunal passes an order confirming, modifying or reversing the order of the Inferior tribunal and a writ cannot issue from this Court to the superior tribunal because It is not situated within the territorial "jurisdiction of this Court, in such a case no writ can equally Issue against an inferior tribunal though situate within the jurisdiction of this Court.

19. Having dealt with the two general questions of law, we shall now deal with each of the appeals and the special contentions raised in each of them.

20. W. A. No. 120 of 1955 : The main, if not the only ground passed upon us in

this case was that no notice was issued to the appellant before proceedings were taken to impose the penalty and the appellant was not given an opportunity to show cause why the penalty should not be imposed, and even if it should be imposed, the circumstances which should be taken into account in determining the quantum.

21. That this is so is clear from the record. The learned Advocate-General urged that the appellant was aware of his offence and indeed admitted it and was willing to pay a penalty. But it must not be overlooked that what he wanted was to be let off with a nominal penalty because according to him, he was not aware of the shipment of the prohibited bale. If the Collector of Customs had accepted this plea and proceeded to impose a nominal penalty, then we agree that the appellant could have no reason to complain.

But that was not what the Collector of Customs did. He found that the offence had been committed with full knowledge and deliberation and evidently on that basis imposed a very heavy penalty. It is clear that no opportunity was ever given to the appellant to make good his contention that the offence was committed unwittingly and by inadvertence. We agree with Rajagopala Aiyangar J., that the impugned order was passed, without notice and without enquiry and therefore passed contravening every principle of natural justice.

22. Mr. V. C. Gopalaratnam, learned counsel for the respondent, contended that in a case like this the order must be deemed to be a nullity and the fact that there was an appeal to the Central Board of Revenue which refused to interfere would not prevent this Court from quashing the order of the Collector. He submitted that this case would fall outside the scope of the rule of merger which was laid down by the Supreme Court in *A. Thangal Kunju Musaliar Vs. M. Venkitachalam Potti and Another*, . We agree with this contention. As Scrutton L. J., said in *Rex v. North; Ex parte, Oakey*, 1927 1 KB 491 (K),

"To order a man to pay what is in the nature of a penalty for an offence without first giving him notice that an application for such an order is going to be made, is both contrary to the general law of the land, and is so vicious as to violate a fundamental principle of justice."

The proceeding of the Collector was, therefore, void ab initio. When, an order of an inferior Tribunal is a nullity, the order on appeal there from cannot be of greater validity. In *Barnard V. Nationaj Dock Labour Board*, 1953 2 QB 13 (L),. the facts were as follows : By the Dock-workers (Regulation of Employment) Order, 1947, the National Dock Labour Board were required to delegate to local boards all appropriate functions including disciplinary functions. The London Dock Labour Board, a local Board, purported to delegate those disciplinary functions to the port manager who suspended certain registered dock workers from work and pay.

They appealed to the appellate Tribunal set up under the Order; but their appeals were dismissed. It was held by the Court of Appeal that the suspension order by

the port manager was unlawful and void because the delegation of disciplinary functions to him was ultra vires. Dealing with the decision of the appellate tribunal Denning L. J., observed thus:

"So far as the decision of the appeal Tribunal is concerned, it seems to me that, once the port manager's order is found to be a nullity, it follows that the order of the appeal Tribunal is also nullity. The appeal Tribunal has no original jurisdiction of its own; it cannot itself make a suspension order ; it can only affirm or disaffirm a suspension order which has already been made. If none has been made because it is a nullity, the Tribunal can do nothing. It cannot make something out of nothing any more than anybody else can."

We agree with what Rajagopala Aiyangar J., has said in the judgment, under appeal, namely,

"If the order of the Collector was one passed with jurisdiction then there might be some the argument that it got merged in the appellate order. But if that order was a nullity in that procedure dictated by natural Justice was not followed, there was no order which could be the subject and confirmation by the appellate authority.""

In the result W. A. No. 120 of 1955 is dismissed with costs. Advocate's fee Rs. 250.

23. W. A. No. 53 of 1956: This case is directly governed by our decision regarding merger of the original order of the Collector of Central Excise in the order of the Central Board of Revenue on appeal. This Court has no Jurisdiction to quash the order of the Central Board of Re-venue and it follows that it cannot quash the order of the Collector. We do not think that this case falls within the exception which we recognised in W. A. No. 120 of 1955 because the order of the Collector cannot be held to be a nullity. The proceedings of the Collector were properly initiated after notice to the respondent. The only ground on which Rajagopalan J., set aside the order of the Collector was that it was vitiated by a wrong assumption that Arasan Trading Co., had a branch at Nagapattinam.

This circumstance itself would not make the order a nullity. The appeal must be allowed and W. P. No. 327 of 1954 dismissed. There will be no order as to costs. We may, however, observe that as the order of the Collector at least to a certain extent was passed on the assumption that Arasan Trading Co. had a branch at Nagapattinam land, that assumption has been admitted by the Collector to be wrong, the Collector should in fairness suo motu reopen the matter and deal with it on the merits.

24. W.A.NO. 55 of 1956: The doctrine of merger applies to this case also. The ground on which Rajagopalan J. set aside the order of the Assistant Collector of Customs was that the respondent had not been given a real opportunity to defend himself against the charges made against him and therefore there was a violation of the principle of natural Justice. Here again we cannot say that the

proceedings of the Assistant Collector were void ab initio because there was no proper Initiation after notice to the respondent.

It cannot be said that the Assistant Collector was bound under law to grant the respondent an oral hearing. There was his written representation. The finding of the Assistant Collector that the price ruling in the country at the time of export was Rs. 335 per cwt. is a finding of fact, and even if it was erroneous, it would not affect the jurisdiction of the Assistant, collector to pass the order u/s 167 (37) of the Sea Customs Act. The appeal is allowed and W.P. No. 161 of 1954 is dismissed. Here too there will be no order as to costs.

25. W.A.No.89 of 1956: In this case the doctrine of merger can have no application. The appeal filed by the respondent to the Central Board of revenue was rejected in limine. The respondents had not deposited the amount of penalty levied on them, which was a condition precedent for the entertainment of the appeal. The "principle laid down by the Privy Council in *Chandri Abdul Majid v. Jawahir Lal*. ILR 36 All. 350: AIR 1914 PC 66 (M) applies to this case. In that case there was a suit on a mortgage and a decree. The question which arose was as to the date from which the period of limitation would count for an order for making the decree for sale absolute. From the preliminary decree of the High Court there was an appeal to the Privy Council.

But that appeal was dismissed for want of prosecution. The decree-holder contended that time ran from the date of the dismissal of the appeal by the Privy Council and not from the date of the decree of the High Court, on the ground that the decree of the High Court became merged in the order of the Privy Council.

Their Lordships of the Privy Council refused to accept the contention. They held that the" order dismissing the appeal for want of prosecution did not deal judicially with the matter of suit and could in no sense be regarded as an order adopting or confirming, the decision appealed from. The appellant before the Privy Council had not complied with the conditions under which the appeal was open to him and therefore he was in the same position as if he had not appealed at all. In the present case also because the condition precedent, namely, the deposit of the penalty, was not satisfied, the position was as if he had not appealed at all to the Central Board of Re-venue.

26. On the merits, Rajagopalan J. held that the exercise of the power conferred on the Collector was vitiated by his failure to give due weight to the fact that it was on the advice of the Superintendent of Central Excise, Tuticorin, that the coffee was exported without a permit. We do not agree with the. Learned Judge that this circumstance was not known to the Collector. If in spite of this he imposed a penalty, it would amount at the most to a harsh treatment of the respondents" case, but it would not make his order any the less valid.

27. Mr.v. ThiagaraJan, learned Counsel for the respondents, contended that the fine could not exceed in any event Rs. 1000. This contention is based on an

interpretation of the language of the third column of Section 167 (8) which runs thus:

"Any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods or not exceeding Rs. 1000."

Learned counsel wanted us to read the word "or" as "and". Such a contention was negatived by the Bombay High Court in *Mohandas Issardas and Others Vs. A.N. Sattanathan and Others*, , the provision in Section 167 (8) of the Indian Sea Customs Act was apparently based on the corresponding provision in 39 and 40 Vict. Ch. 36, Section 186. The material part of that section is as follows :

"shall for each such offence forfeit either treble the value" of the goods, including the duty payable thereon, or ? 100 at the election of the Commissioners of Customs.

28. In our opinion, the omission of the words "at the election of the Commissioners of Customs" makes no difference. We entirely agree with the following observations of Chagla C. J. on this point:

"In our opinion, our Legislature rightly thought that the words "at the election of the Commissioner" as mere surplusage in view of the fact that they had used the disjunctive word "or". In our opinion, the effect of the language used by our legislature in item (8) is the same as the effect of the language used in the English statute. The word "or" makes it perfectly clear that the Customs Authorities are given the alternative and it is left to them to impose a penalty which satisfied either the first condition, or the second condition.

Therefore, if a penalty does not exceed three times the value of the goods, it is a penalty which in law can be inflicted by the Customs Authorities although that penalty may exceed Rs, 1000. On the other hand, it would be open to the Customs Authorities to fall back upon the second alternative and impose a penalty which may not exceed Rs. 1000, that penalty would be irrespective of the value of the goods."

A stray sentence from the judgment of Bhagwati J. in *Maqbool Hussain Vs. The State of Bombay*, was relied on, namely,

"Even though the customs officers are invested with the power of adjudging confiscation, increased rates of duty or penalty, the highest penalty which can be inflicted is Rs. 1000. With great respect we cannot agree that Bhagvati J. by this sentence meant to decide the question which now falls for decision, In the case before the Supreme Court no question even arose with regard to the interpretation of Section 167 (8). The sentence occurs in that part of the judgment in which the scheme of the Sea Customs Act is described. We therefore hold that the amount of Rs. 1000 is not the maximum limit of the penalty which can be imposed by the Customs Authorities.

29. We cannot refrain from remarking that the Collector might well have taken a

more lenient view of the respondents' case having regard to the fact that they were misled by the advice of the Superintendent of Central Excise. The appeal is allowed and W.P.No. 642 of 1954 is dismissed, but in the circumstances, there will be no order as to costs.