

(1979) 05 CAL CK 0010
In the Calcutta High Court
Case No : C.R. No. 3433 (W) of 1973

Harchand

APPELLANT

Vs

Additional Collector of Customs and Others

RESPONDENT

Date of Decision : 03-05-1979

Acts Referred:

Constitution of India, 1950 — Article 226, 226(I)
Criminal Procedure Code, 1973 (CrPC) — Section 476, 479A
Customs Act, 1962 — Section 155, 160, 161, 5, 6
General Clauses Act, 1897 — Section 6, 6(4), 6(5), 6(6), 6(7)
Penal Code, 1860 (IPC) — Section 193
Sea Customs Act, 1878 — Section 13, 137, 15, 160(3), 163(37)
Tariff Act, 1934 — Section 2

Citation : (1981) 8 ELT 699

Hon'ble Judges : M.N. Roy, J

Bench : Single Bench

Advocate : R.N. Bajoria, S.K. Bajoria and Amiya Narayan Mukherjee, for the Appellant; G.P. Kar and S.N. Banerjee, for the Respondent

Final Decision : Allowed

Judgement

M.N. Roy, J.—This Rule was obtained on September 24, 1973, against certain orders made upto revision under the Customs Act, 1962 (hereinafter referred to as the said Act) in respect of two consignments as mentioned hereinafter, meant for export out of India.

2. The petitioner, Harchand, has stated to have carried on business, at all material times, under the name and style of Harchand Jawharmal. He has claimed to be the sole proprietor of the firm as mentioned above and has also stated to have carried on such business at premises No. 65, Chittaranjan Avenue, Calcutta. In the Rule, the orders made after revision, in respect of two sets of cases have been impeached. The first case relates to nine consignments under nine shipping bills and the second one relates to four consignments under four shipping bills. So far as the first case is concerned, the relevant orders

would be Order No. 21 dated February 18, 1967, as passed by the Additional Collector of Customs, Calcutta; Order No. 492 of 1969, viz., the appellate order made in the connected appeal by the Central Board of Excise and Customs and Order No. 6A of 1971, which was the revisional order made by the Government of India. The orders relevant for the second case are Order No. 20 dated February 18, which was an order passed in the connected appeal the Central Board of Excise and Customs and Order No. 4A dated January 25, 1971, being the revisional order by the Government of India. For the purpose of effecting the shipments of the concerned consignments, the petitioner appointed one S.A. Wahab, as clearing agent who again has been stated to be associated with one Sri Narayan Ghosh, a licensed Customs House Clearing Agent.

3. The material facts, relevant for the connected cases would be available from the facts as stated hereafter. By the said two consignments, the petitioner intended to ship out of India by "S.S. Siao" ivory art wears and ladies' plastic hand bags. He has stated that in or about the third week of May 1960, he intended to export out of India, the consignment as mentioned hereinbefore to Malaya. It is his case that for such purpose, on or about May 25, 1960, 25 cases containing such goods were made ready for shipment by the vessel in question. It is his case that for those 25 cases, he prepared 9 shipping bills, particulars whereof are available from the petition and the entries as made in those shipping bills have also been stated to be correct. The petitioner has stated that for effecting the shipments, he presented 9 shipping bills in duplicate to the Export Department of the Calcutta Customs House and obtained an order from them through the Preventive Officer, attached to the concerned vessel for examining the consignments in question and to pass them for shipment, if in order. It is also his case that on May 23, 1960, he applied to the Commanding Officer of the concerned vessel, requesting him to receive on Board the said 25 cases governed by the shipping bills in question and in accordance with the current practice the said cases were brought alongside the vessel on or by May 25, 1960. He has alleged that on May 26, 1960, the Customs Officer attached to the vessel, had sample checking of some cases out of the said 25 cases and found the consignments in question to be in order. Accordingly, it has been stated that the Customs Officer concerned, allowed the cases covered by those shipping bills to be shipped on the vessel, on duly passing necessary orders on the shipping bills. Thereafter, it has been alleged that necessary documents containing the formal permission issued by the Customs Department, were presented by the petitioner's clearing agent as mentioned above, to the ship's Officer and then the said 25 cases were taken on board the vessel in accordance with the procedure followed for loading cargo in export vessels. The petitioner has stated that in the matter of examination and passing the consignments, he had nothing to do and in fact he did not handle them. He has alleged further that on or about June 2, 1960, the Customs Officers opened and re-examined on board the vessel, in the presence of the ship's officers and his representatives as mentioned hereinbefore, those cases as covered by the shipping bills in question

and on such examination, the cases as shipped on board, were found to contain saw dust only. The petitioner has stated that the cases which were placed alongside the vessel by him, contained the goods as mentioned in the several shipping bills and not saw dust, as has been alleged now to be containing. The petitioner expressed his surprise as to how on the subsequent checking saw dust could be found out in those cases contained in the 25 consignments, when at least 9 of them were checked and found to be in order by proper Customs Officers.

4. Thereafter, the petitioner was served with 9 notices, all dated 24th September, 1960, alleging that he had grossly misdeclared the description of the goods in the said consignments and as such, he had contravened the provisions of Section 137 of the Sea Customs Act, 1878 (hereinafter referred to as the Act), which is to the following effect :-

"137. No goods, except passengers" baggage, shall be shipped or water-borne to be shipped for exportation until-

(a) the owner has delivered to the Customs collector, or other proper officer, a shipping bill of such goods in duplicate, in such form and containing such particulars in addition to those specified in Section 29 as may from time to time be prescribed by the Chief Customs Officer ;

(b) such owner has paid the duties (if any) payable on such goods ; and

(c) such bill has been passed by the Customs Officer :

Provided that the Chief Customs officer may, in the case of any customs port or wharf, by notification in the Official Gazette, and subject to such restrictions and conditions, if any, as he thinks fit, exempt goods or any specified goods or any specified person or class of persons, from all or any of the provisions of this Section." and would be punishable under Sections 167(3) and 167(37) of the Act. In terms of Section 167(3), if any person shipped or laid goods in the shipment or landing of goods or knowingly keeps or conceals or knowingly permits or procured to be kept or concealed any goods shipped or landed or intended to be shipped or landed, contrary to the provisions of the Act, would be liable to penalty not exceeding one thousand rupees and in terms of Section 163(37), if it is found, when any goods are entered at, or brought to be passed through, a Customs House, either for importation or for exportation that (a) packages, in which they are contained, differ widely from the description given in bill of entry or application for passing them; or (b) the contents thereof have been wrongly described in such bill or application as regards the denominations, characters or conditions according to which such goods are chargeable with duty or are being imported or exported ; or (c) the contents of such packages have been mis-stated in regard to sort, quality, quantity or value; or (d) goods not stated in the bill of entry or application have been concealed in or mixed with, the articles specified therein or have apparently been packed so as to deceive the officers of the Customs and such circumstance is not accounted for to the

satisfaction of the Customs Collector, the packages together with the whole of the goods contained therein, shall be liable to confiscation and every person concerned in any such offence shall be liable to a penalty not exceeding one thousand rupees.

5. By the notices in question, the petitioner was asked to explain the matter in writing within the stipulated time and to show cause why the goods should not be confiscated and penal action should not be taken against him. In the notices it has further been alleged that the cases covered by the concerned shipping bills, were taken out from the vessel in question and were opened and examined on board, in the presence of the ships's officers and the petitioner's representatives and as mentioned hereinbefore, were found to contain saw dust only. The answers to these notices were given by the petitioner on March 14, 1961, stating, inter alia, that since the consignments in question were physically examined by the Customs Officers, who were satisfied as to the nature and correctness of the export and thereafter, permitted them to be shipped on board the vessel "Siaoe", there was no cause or any occasion for issuing those notices against the petitioner and on the grounds as alleged. It was also contended by the petitioner that after the goods had been passed by the Customs Officers, he never handled them nor had he any occasion to do such handling when the goods were taken on board the vessel in question. These apart, the petitioner has contended that in the matter of having the goods shipped, he has duly and faithfully followed the normal procedure and practice. In short, he has alleged that he was not liable or responsible for any substitution and in fact, substitution, if any, was made without his knowledge or permission and the consignments containing saw dust did not belong to him. The petitioner further desired to be heard in person and also required the presence of the Customs Officers who passed the goods for export, at the time of such personal hearing, so that he could cross-examine them. He also stated that his representative, who handled the export, would be produced at the time of such hearing so that the officers could be satisfied about the correctness of the statement made by him. Thereafter, personal hearing was given to the petitioner in respect of the notices in question. The petitioner has stated that the proceedings relating to the concerned notices of show cause were thereafter concluded. It is his case that in the course of such proceedings, correspondence was exchanged between him and the Customs authorities, relating to the personal hearing and other matters connected with the said notices. It has been stated by the petitioner that although the proceedings as mentioned hereinbefore were concluded yet he was surprised to receive from the Central Board of Excise and Customs, the Respondent No. 2, a notice dated September 13, 1961, on September 20, 1961, whereby a fresh notice to show cause was given to him in respect of the self-same shipping bills and consignments as mentioned above. He has alleged that the earlier adjudication on the basis of the notices to show cause dated September 24, 1960, had been concluded, although the necessary order was not passed and as such the subsequent initiation by fresh notice, has been claimed

by him to be without jurisdiction, illegal and irregular In reply, the petitioner, on October 4, 1961, duly lodged his protest at the procedure followed by the Customs Officers as such steps as taken subsequently, were detrimental to his interest and contrary to the principles of natural justice. Without prejudice to such contentions, the petitioner requested for a certified copy of the statement alleged to have been made by one Srilal Poddar and for the disclosure of all the evidence in the case and for confirmation that the evidence, on which the findings would be based had been or would be communicated to him and no other statements, which have not been disclosed to him, would be taken into consideration. By an order, bearing Nos. 106-114 dated May 3, 1962 made in respect of matters governed by the 9 notices to show cause, as mentioned hereinbefore, the Additional Collector of Customs, Calcutta, the respondent No. 1, held and found the petitioner to be guilty of the contravention of the provisions of Sections 167(3) and 167(37) of the Act and imposed personal penalties of the concerned amount of Rs 18,000 with a further fine of Rs. 25/- in respect of the consignment covered by each of the said shipping bill in lieu of confiscation u/s 163(37).

6. In respect of the second consignment, the particulars of the orders which have been mentioned herein before, it is stated that in or about May 1960, the petitioner intended to export out of India 22 cases of ladies' plastic hand bags, for supply to Messrs. General Trading Company of Kuala Lumpur, Malaya. It has been stated that to complete the transaction the petitioner gave instructions to the office staff, to make necessary arrangements for the concerned export. It is his case that on or about May 27, 1960, 22 cases were made ready for shipping by S.S. Siao'e's and in respect of those cases, he prepared or caused to be prepared 4 sets of shipping bills as mentioned in the petition. It has been stated that entries in the different shipping bills as made by or on his behalf, are correct. The petitioner has stated that he had instructed his clearing agent, whose particulars have been mentioned herein before, that if shipment of 22 cases of goods could not be completed on or before May 31, 1960, the clearing agent should first refer the matter to him for further instructions. It is his case that on or about May 27, 1960, the relevant documents and shipping bills were presented to the Export Department of the Customs House, for processing and on that date, an order was given to the Preventive Officer attached to the concerned vessel to the effect that a total of 9 cases should be opened and he was further directed by the Customs House to send samples for inspection. The petitioner has stated that on or about May 31, 1960, the Customs Officer attached to the concerned vessel, had the necessary checking of the 9 cases as mentioned in the petition out of the 22 cases and the samples which were drawn therefrom, were sent to the Customs House for the purposes as mentioned above. It is the further case of the petitioner that the 22 cases of goods were lying in a lighter, because the concerned vessels were lying berthed at Moorings. The petitioner has stated that meanwhile it was discovered by him that instead of the cases which were actually meant for shipment in the manner as indicated,

his staff, by mistake, delivered a number of wrong packages from the godown and the cases which had been sent out of the godown bore completely different marks and in fact those packages had nothing whatsoever to do with the concerned shipment. This mistake, the petitioner has stated, was discovered on June 1, 1960 and immediately, orders were passed for withdrawal of those goods from shipment, and necessary instructions to that effect were also given to the clearing agent for bringing the concerned cases to the petitioner's office at 65, Chittaranjan Avenue, Calcutta. It has been alleged that on or about June 1, 1960, the Export Appraiser of the Customs House, gave orders to the officer attached to the concerned vessel that he should open case Nos. 114, 128 and others, out of the said 22 cases and check the contents thereof. The said officer was further instructed that if the particulars did not agree with the covering invoice, then the entire consignments would have to be checked. It should be noted that before such checking could be done, 22 cases as involved, had already been removed in the manner as indicated above. It appears that on June 1, 1960, some Customs Officers attended the petitioner's office at 65, Chittaranjan Avenue, and removed 24 packages bearing marks, numbers and contents and the petitioner has alleged that in fact in excess of the total number of the cases which he had intended to ship, had been removed and that too without making any inventory. Thereafter, the petitioner was served with 4 notices dated September/24, 1960, alleging that he had misdeclared the quantity and value of the goods in the shipping bills and as such, he had contravened the provisions of Section 137 of the Act and would be liable for punishment u/s 167(3) and Section 167(37) and he was further asked to explain the matter in writing within the stipulated time as to why the concerned goods should not be confiscated and penal action should not be taken against him. In the notices as mentioned above, it was alleged that the petitioner was responsible for unauthorised removal of the goods, which were water-borne for shipment, after the same had been tendered for shipment under the concerned shipping bills in the manner as disclosed hereinbefore. In reply, the petitioner on October 13, 1960, requested for supply of all the evidence in connection with the cases which were proposed to be taken into consideration against him. In particular, the petitioner asked the authorities concerned to furnish certified copies of the statement, if necessary, made by Srilal Poddar and S.A. Wahab, apart from asking for inspection of all the documents relating to the matter. It was his further case that the said 22 packages had been delivered from his godown inadvertently and as soon as, such fact was made known to him, the petitioner took steps to have those errors or defects rectified. He has stated that in the matter of acting in the manner as stated hereinbefore there was no bad motive or ill intention. It has further been alleged that although the petitioner was allowed visual examination of the cases removed by the Customs Department, he was not permitted to examine the contents thereof. He has also claimed that on examination, it appeared that the cases, which were so taken away by the Customs Officers were not only not uniform in size but also the marks and numbers also differed widely from the marks and numbers that some cases bore

marks to the effect that they were sent from Bombay office to Calcutta and in fact some of the cases did not even bear any marks at all. These facts, the petitioner has alleged, should have been duly pointed out by the authorities concerned. It is also his further allegation that the examination of the cases in the custody of the Customs Department, differed from the particulars shown on the cases themselves.

7. In view of the above, the petitioner denied that there was any contravention of any of the provisions of the Act, as alleged. In any event, he desired to be heard in person and asked for fixation of a date for that purpose. Such personal hearing appears to have been given to the petitioner and he has alleged that thereafter, proceedings relating to the said notices were concluded.

8. In view of the above, the petitioner has stated that he was surprised to receive 4 notices dated August 25, 1961, whereby fresh notices to show cause were issued to him in respect of the self-same shipping bills and consignments and adjudication whereof, according to the petitioner, was concluded on due submission of explanation by him and on personal hearing given to him. In these subsequent notices, it has been alleged that after samples had been drawn from the consignments, the goods which were on the cargo boat, were found to be missing and enquiries made revealed that the cases had been removed by one Srilal Poddar, an assistant of S.A. Wahab and the said cases had been made over to the petitioner at 65, Chittaranjan Avenue, Calcutta. In fact, it has been alleged that subsequently the concerned cases were made over to the Customs authorities and they were removed to the Customs House. It is further alleged that the contents of the cases, on examination, in the presence of the witnesses were found to be ladies' plastic hand bags, much less in quantities than what was declared in the shipping bills and in invoices. As such, the petitioner had misdeclared the quantity and value of the goods in contravention of Section 137 and would be punishable u/s 167(3) and 167(7) as mentioned above. It has also been alleged that on the basis of the contention of the petitioner and the recovery of the cases, prima facie, established the fact that they were tendered for shipment and thereafter, removed without proper permission and were, while water-borne, brought to the office of the petitioner with the alleged object of unnecessarily delaying and/or in fact the shipment of the goods were in contravention of the provisions of Section 167 of the Sea Customs Act read with Section 167 (31) of the same. Section 77 lays down that all goods, water borne, for the purpose of being landed or shipped, would be landed or shipped without any unnecessary delay and Section 167(31) postulates that if goods are, without permission, shipped or water borne, to be shipped or are landed except from or at a wharf or other place duly appointed for the purpose; or if goods, water borne, for the purpose of being landed or shipped, are not landed or shipped without unnecessary delay; if the containing such goods be found out of the proper truck between the vessel and the wharf or other proper place of landing or shipping and such detention be not accounted for,, to the satisfaction of the Customs Collector; or if goods are transhipped contrary to the provisions of

Section 78, such goods shall be liable to confiscation and the person, by whose authority, the goods are shipped, landed, water borne, and the person in-charge of the vessel employed in conveying them, shall each be liable to a penalty not exceeding dues the amount of the duty (if any), leviable on such goods.

9. In view of the above, the petitioner was asked to show cause within the stipulated time as to why penal action should not be taken against him under Sections 167(3), 167(31) and 167(37) as mentioned above. This notice to show cause was issued in supersession of the notice dated September 24, 1960. The petitioner by his answer dated September 2, 1961 stated to have raised protest at the procedure followed by the Customs House in the case and has contended that he was seriously prejudiced due to such procedure as followed. Without prejudice to such rights, the petitioner asked for confirmation of the evidence which were going to be laid.

10. It appears that by order Nos. 102 to 105, dated May 2, 1962, in respect of the four notices as mentioned above, the petitioner was found to be liable for punishment under provisions of Section 167(3) and 167(37) of the Sea Customs Act and personal penalty of the correct amount of Rs. 8,000/- was imposed on him, apart from a fine of Rs. 2,000/- each in respect of consignments covered by two of the shipping bills in lieu of confiscation u/s 167(37).

10 A. Against the determinations mentioned above, admittedly two applications under Article 226 of the Constitution of India were moved before this Court and Rules being Matter Nos. 158 of 1962 and 156 of 1962 were obtained. Those Rules came up for hearing before D.N. Sinha J. (as His Lordship then was) on December 19, 1963 and His Lordship was pleased to set aside the concerned orders with further directions on the respondents for rehearing of the matters concerned on the basis of an agreed procedure arrived at between the parties before him. It appears that while making such orders, His Lordship was further pleased to direct that the subsequent or fresh adjudication as mentioned, should be completed within 8 months from December 19, 1963. The respondents could not complete such adjudication within the time allowed and as such on November 20, 1964, made applications for extension of time. Those applications were allowed by B.N. Banerjee J. (as His Lordship then was). Against such determination, the petitioner preferred appeals which were ultimately dismissed and from such dismissals, applications for grant of certificate to appeal to the Supreme Court were also made and were dismissed. It further appears that the appeal Court extended the time for re-adjudication of the concerned proceedings till February 28, 1967.

11. After the above proceedings, the adjudication proceedings were held by the Additional Collector of Customs, respondent No. 1, in connection with the first set of notices, viz., 9 consignments and in the course of such proceedings, the petitioner admittedly cross-examined Sarvasri Srilal Poddar and S.A. Wahab, on whose statements, the respondents concerned have relied. According to the petitioner, those witnesses denied having made any statement or allegation

against him out of their free will. In fact, he has contended that those witnesses did not say anything on incriminating against him. In respect of these the first set of notices, the Additional Collector of Customs, the respondent No. 1, passed order No. 21 dated February 18, 1967, imposing thereby an aggregate penalty of Rs. 8,000/- and he found the petitioner guilty of the charges framed under Sections 167(3) and 167(37) of the Act. That apart, a penalty of Rs. 1,000/- under Section 167(3) and a further penalty of the equal amount u/s 167(37) of the Act was imposed in respect of each of the concerned 9 shipping bills. These determinations the petitioner has contended to be without any material or basis or evidence and he has claimed such determination to be made on mere surmises and conjectures and more particularly in view of the uncorroborated fact that the petitioner had substituted contents of the packages relating to the said shipping bills and such alleged substitution took place before the goods had been landed on board the vessel and after the ivory art wear and ladies' plastic hand bags had been passed for export. The order has in effect been contended to be perverse.

12. In respect of the notices dealing with 4 consignments, the Additional Collector of Customs, respondent No. 1, passed Order No. 20 dated February 18, 1967 and thereby, he imposed an aggregate penalty of Rs. 8,000/-, apart from a penalty of Rs. 1,000/- for each of the 4 consignments u/s 167(37) of the said Act and also an equivalent sum in respect of each of the consignments u/s 167(3) of the said Act. That apart, two cases of the goods, out of the 24 cases, which were contended by the petitioner to be wrongly and illegally taken away from his office and were also confiscated after giving him option to redeem the said goods on payment of a fine of Rs. 2,000/-. By this order, the Additional Collector of Customs, respondent No. 1, further held that as far as Section 167(31) was concerned, it was not necessary to record any finding as no penal action was attracted under the provisions, as the goods were not dutiable. It has been claimed by the petitioner that the said respondent No. 1, having found that no action could be taken against him u/s 167(31) as aforesaid, could not have imposed any penalty u/s 167(37) or 167(3) of the Act. That apart, it has been stated there was neither any material nor any evidence, on the basis of which the respondent No. 1 could hold that there was any contravention of any of the provisions of the Act, apart from contending the order to be perverse and based on surmises and conjectures.

13. Being dissatisfied and aggrieved by the orders as mentioned above, the petitioner preferred appeals before the Central Board of Excise and Customs, respondent No. 2. By Order No. 492 of 1969 dated January 15, 1970 in respect of the said consignments covered by Order No. 21 of 1967, the said respondent No. 2 apparently allowed the appeal of the petitioner directing that the penalty of Rs. 9,000/- imposed on him u/s 167(37) of the said Act in respect of the concerned 9 shipping bills, be remitted in full. It was however found and observed that the petitioner had contravened the provisions of Section 137 and as such, the imposition of penalty u/s 167(3) was held to be justified. This

determination, the petitioner has contended to be wrongful and illegal, apart from being without any evidence or material. In fact, he has contended that since there was no evidence that he had a hand in substituting the goods, the findings arrived at were also baseless and perverse. By another order No. 491 of 1969 dated January 15, 1970 the respondent No. 2 was also pleased to partly allow the concerned appeal against Order No. 20 dated February 18, 1967, In this order, the said respondent No. 2 has held and observed in respect of the two cases which had marks and numbers, that there was no doubt that their contents were misdeclared and as such the penal action taken in respect of them was justified u/s 167(37)(c) of the Act. While observing such, the said respondent No. 2 of course reduced the penalty as imposed from Rs. 4,000/- to Rs. 2,000/- and directed that balance being remitted. Regarding the penalty imposed u/s 167(3), the said respondent No. 2 gave; benefit of doubt to the petitioner and remitted the penalty in full. These determinations have also been claimed by the petitioner to be without any evidence or material and on mere surmises and conjectures, apart from the fact that they were baseless. It has been contended by the petitioner that the respondent No. 2 having found that there was no evidence to substantiate any charge against him u/s 167(3) and having remitted the entire penalty as imposed under that Section, could not have held him guilty of the contravention of Section 167(37) of the Act. The order in question has also been contended to be illegal on the face of it and vitiated by errors of law.

14. Against the orders as mentioned above and as passed by the Central Board of Excise and Customs, the respondent No. 2, the petitioner preferred revision application before the Union of India, the respondent No. 3. These revision applications were dismissed and rejected by the respondent No. 3 by Orders Nos. 6A of 1971 and 4A of 1971, all dated January 28, 1971.

15. The affidavit-in-opposition dated July 20, 1976 against the aforesaid facts and contentions, was filed by Sri Arun Kumar Dutt, the Additional Collector of Customs. The facts relating to the determination as mentioned herein-before are not in dispute. But the said deponent has denied the allegations of the petitioner that such determinations were perverse or of no materials or any evidence or the same was illegal and without jurisdiction. In fact, it has been contended that the orders, after the revision in respect of both the consignments, were passed after due opportunities to the petitioner of being heard and to have his cases represented and on due consideration of evidence as was available and on proper application of mind. This deponent has imputed bad motive against the petitioner in the matter of effecting the shipments and has also alleged manipulations by him in the matter of substituting saw dust for the goods as were sought to be or required to be exported. In respect of the consignments covered by the 9 shipping bills, the deponent has stated that they were prepared by one S.A. Wahab and were filed in the Export Department of Customs House, Calcutta through one Narayan Chandra Ghosh, a Customs House Clearing Agent. This Narayan Chandra Ghosh, the deponent has contended, had no authority from the petitioner or the said S.A"; Wahab to act on their behalf. It has been stated that

on May 26, 1960, the Customs Officer attached to the concerned vessel did not physically examine the concerned cases or that he found the said consignments duly covered by the shipping bills in question. It has been alleged that one Srilal Poddar, an assistant of the said S.A. Wahab who attended the passing of the consignments in question, inter alia, made a statement to the Customs authorities on June 4, 1962 and on that date the Customs Officer did not open any of the cases nor insisted to see the contents and the said officer thereafter, passed the necessary orders both on the boat notes as also on the respective shipping bills. He has further stated that after the alleged "allow orders" were given by the Customs Officer on May 26, 1960, the cases in question were loaded on board the vessel on May 28, 1960. It is his case that during this period from May 26, 1960 to May 28, 1960 the cases in question remained on the cargo boat No. 642 which was owned by S.A. Wahab, the agent of the petitioner. It has been denied that after the purported checking by the Customs Officer, the petitioner had no hand or control over the cases for shipment, as contended.

16. It has also been alleged that during material times the said S.A. Wahab did not have any clearing agent's licence granted by the Customs House, Calcutta and as such, he has been stated to have no locus standi in the Customs House. It is the case of the respondents that on June 2, 1960 the 25 cases in question were re-examined physically on board the vessel "S.S. Siao" by the Customs authorities, in the presence of ship's officers and also in the presence of S.A. Wahab and Narayan Chandra Ghosh, the alleged accredited agents of the petitioner and on such examination, which was duly held, the concerned cases were found to contain saw dust only. This fact has also been stated to be corroborated by the statements of Sarvasri S.A. Wahab and Narayan Chandra Ghosh, apart from the statement of Srilal Poddar, an assistant of the said S.A. Wahab. The passing of the "allow order" as mentioned hereinbefore, has been stated to be made without due physical verification and it has been stated further that during the transitory period, when the subject goods were under the control and custody of the petitioner through his agents, the substitution was effected and the same was duly revealed on further checking and re-examination on board the ship.

17. It has further been alleged that during the material time, the petitioner was granted import trade control licence under the export promotion scheme, to import certain specific goods on execution of some undertaking that he would export processed/finished goods of equal value of the import made against the licence in question within a period of six months from the date of importation and it has been stated that since the petitioner was granted licence under the said scheme, there could be none except him to resort to the tactics as referred to hereinbefore and that too for the purpose of getting import licence by exporting nothing in the manner as stated hereinbefore. The deponent has stated that personal hearing, as was asked for, was given to the petitioner and during the course of such hearing, it was disclosed to him that the goods in question which were received on board the concerned vessel were opened and re-

examined in the presence of his representatives as mentioned above amongst others and on finding that they contained only saw dust in place of ladies' plastic hand bags and ivory art wears, they were off loaded and removed to the Customs House. The petitioner of course, during such personal hearing, disowned the ownership of the 25 cases which were so off-loaded. This off-loading has of course not been denied by S.A. Wahab who was present although there has been no denial by the said S.A. Wahab that cargo boat as mentioned did not belong to him. The issue of fresh sets of show-cause notices dated September 13, 1961 regarding the same set of shipments were denied to be wholly without jurisdiction or illegal, as alleged. The show-cause notices have been claimed to be issued duly and with appropriate jurisdiction and as mentioned above, the deponent has further contended to be issued on due and on proper exercise of power and in compliance with the principles of natural justice.

18. In respect of the second set of cases consisting of 4 consignments, the deponent has stated that it is not known to the Customs House whether the petitioner had an intention to export out of India 22 cases containing ladies' plastic hand bags or whether he gave any instruction to his office-staff to make the necessary arrangements for such export. Such instructions have been alleged now to "be an after-thought and made with the intention of deceiving all concerned. The deponent has stated that these 22 cases were lying in the cargo boat No. C. 42 which belong to the said S.A. Wahab. It has been stated that the cases in question were carried to the concerned boat of the petitioner and tendered for shipments. It has been stated further that the customs officer attached to the on-carrying vessel opened and examined duly samples from 9 cases according to the directions contained in the shipping bills. The seals of these cases were also not found to be in order. The marks and numbers of the cases were of course found to agree with those declarations on the respective shipping bills. It has been alleged that subsequent to the examination as aforesaid, the cargo boat with 22 cases were removed by the petitioner and he thereafter, voluntarily made over 24 cases for shipment but marks and numbers on only 2 cases out of the said 22 cases were found to agree with the marks and numbers on the relevant shipping bills. In view of the above, the deponent has stated that the cases made over voluntarily, excepting the 2 as mentioned above, were not the cases tendered for shipment. It has been admitted that on June 1, 1960, the export appraiser passed necessary orders but before any check could be made according to such order, the petitioner removed the 22 cases in question without any information to the attached Customs Officer for such removal. The story that the 22 cases, which were removed, were loaded on the board by mistake, has been claimed to be a device for the purpose of misleading all concerned and resorted to with ill motive of substituting the goods sought to be exported by saw dust. This act of removing the goods without notice, knowledge or intimation to the appropriate officer has been claimed by the deponent to be improper, motivated and irregular. As such, the deponent has

stated that there was mis-declaration of the quantity and value of the goods sought to be shipped in the shipping bills.

19. The deponent has stated further that due opportunities and personal hearing having been given to the petitioner and since there was no violation of the principles of natural justice, the order as made after the review, was due, proper and bona fide.

It has been stated by the deponent that the penal action for violation of the provisions of the Act being inter-related, the actions in case of both the shipments were due, legal and proper. It is the further case of the respondents that the Sea Customs Act, 1878 has clearly enacted separate penal actions for violations of the provisions under separate Sections and as such, it would not be correct to say and suggest that inaction and non-operation of Section 167(31) of the Sea Customs Act, would have the effect of non-application of other Sections, viz., 167(37) and 167(3). That apart, it has also been contended that it is not a case where there was no evidence on material whatsoever, on the basis of which the petitioner could be held liable for contravention of the provisions of the Sea Customs Act. In fact, it has also been stated that the petitioner was duly found to be liable and guilty for substitution of saw dust in respect of the goods which were sought to be exported. It has also been stated that substitution in the facts and circumstances of the case could not have been done by anybody else excepting the petitioner and it is not also correct to say that the objections for contravention of Section 13 are exhausted by penal action taken u/s 167(37) alone and therefore no further action could be taken u/s 167(3).

20. The respondents have further pleaded the laches and unexplained delay to be a ground for holding the application to be not maintainable.

Before taking up the points which were argued for consideration. I must also have it on record Mr. Kar, who was appearing for the respondents, wanted to place and keep on record his written arguments, but I have not allowed them to be kept on record.

21. It is true that u/s 137 of the Act, no goods could be shipped or water-borne for exportation until the owner delivers to the Customs authorities or to the other appropriate officers, a Shipping bill for such goods in duplicate and in such form as prescribed, containing such particulars as required and he has also paid the duties, if payable on such goods and such bill has been passed by the Customs Collector. The allegations- from the pleadings appear that the petitioner had duly and in compliance with Section 137, taken the necessary and required steps and as such there was no violation or any infraction of the said Section. It is also true that Section 167 provides for penalty in respect of contravention of the provisions of Section 137 and under the Sub-Section (37) of Section 167, goods are liable to confiscation and the person concerned is liable to pay a penalty not exceeding Rs. 1,000/-, if it is found that goods have entered the Customs House for exportation with mis-statement in regard to sort, quantity or value and u/s

167(3), if any person has shipped goods or aided in shipment of them or knowingly kept or concealed any goods shipped or intended to be shipped, contrary to the provisions of the Act, then he shall be liable to penalty not exceeding Rs. 1,000/-.

22. In view of the above and the pleadings as mentioned, Mr. Bajoria appearing in support of the Rule contended that since there was no material or evidence, on the basis whereof, violation or contravention of Section 137 could be established, the petitioner was not liable to any action under Sections 167(3) and 167(37). In any event, he submitted that there was no contravention of Section 137, rather the requirements of the said Section were duly complied with and fulfilled by the petitioner. It was contended by him that no penalty u/s 167(3) could be imposed in this case for the alleged violation of Section 137, by the orders as mentioned above. He submitted further that for the contravention of Section 137, penalty could only be imposed u/s 167(37) and the respondents concerned having found the petitioner not guilty under that Section, could not authorisably uphold the penalty as imposed u/s 167(3) for the contravention of Section 137. The above grounds were put forward by Mr. Bajoria in respect of the 9 shipping bills in question and the orders passed in respect of them. In respect of the other shipping bills it was submitted by him that the orders made in respect of them were illegal" void and without jurisdiction. He submitted that the respondents concerned" having found that there was no sufficient evidence to hold the petitioner guilty of contravention of Section 167(3), could not have upheld the imposition of penalty u/s 167(37). These apart, Mr. Bajoria contended that in respect of either of the consignments there were no materials or any legal evidence for holding the petitioner guilty. He submitted that the fact of substitution as alleged, not having been proved by any legal evidence, should not have been believed or relied on, in the matter of making the determination in this case.

23. It was further contended by Mr. Bajoria that the act of confiscation being quasi-criminal in nature, the onus to prove the offence was on the Customs authorities and such onus has not been duly at all discharged. As such, he submitted that the orders as passed, cannot be sustained and that" too when, they have been passed, as mentioned above, on mere conjectures and surmises. On facts, Mr. Bajoria further contended that only motive against the petitioner has been imputed and there being no direct evidence of substitution as alleged, the order as made was improper, void and bad. In fact, he has stated that substitution by the petitioner has not been proved. Mr. Bajoria also contended that the effect of benefit of doubt, as given to the petitioner would mean that there was no offence made by him and as such, imposition of fines as made or the penal orders as passed, would be incompetent and unfounded. The delay in making the application has also been explained by Mr. Bajoria on a reference to the statements made in paragraph 27 of the petition which after hearing the learned Advocates appears to be reasonable and such, I hold that the petition would not be hit by the principles as urged by Mr. Kar and the same would be

maintainable and can be entertained.

24. On the question of onus and to establish his contention as mentioned above, and also the Sections as penal, Mr. Bajoria referred to the determinations of this Court in the case of Manicklal Sen and Another Vs. Additional Collector of Customs and Another, . In that case, it has been observed that...

"The Sea Customs Act deals with offences which carry punishment of confiscation or fine. The offences and the adjudication thereof, including conviction and punishment, are all of penal nature. Such proceedings are, therefore, in the nature of criminal proceedings. The general rule relating to all criminal proceedings is that a criminal charge has to be established by the prosecution to the hilt and the burden of proof is never on the accused. This fundamental principle of the burden of proof in criminal proceedings can only be varied by a statutory enactment. Under the Sea Customs Act, it has been varied by the introduction of Section 178A.

But where S. 178A is not applicable the burden of proof lies on the Customs authorities to prove that the goods have been illegally imported and are smuggled goods. The mere fact that the goods are of foreign mark is not sufficient to discharge the onus or shift the same upon the accused. If the Customs authorities discharge the initial onus of showing that the goods have been illegally imported, they can confiscate the goods. For purposes of penalty, they would have to go further and show that the accused was in possession of the goods with the knowledge that the goods were smuggled."

In the case, reference was made to another judgment of this Court in the case of Mangla Prasad v. V.J. Manerikar and Ors. AIR 1965 Cal 509, to which reliance was also placed by Mr. Bajoria. He further wanted to supplement his argument with reference to the determinations in the case of State Vs. Gulab Singh and Others, , where, in connection with Sections 476 and 479A of the Code of Criminal Procedure, 1898.

"it has been observed that in the absence of clear and explicit findings by Courts in terms of Section 479A(v), the Court has no jurisdiction to take action for prosecution u/s 193 of the Indian Penal Code and if a case falls u/s 479A, resort cannot be had to Section 476 as the specific provisions of Section 479A would override the general provisions of Section 476".

> The above case was further cited by Mr. Bajoria in support of his submissions that when the petitioner has been exonerated of the charges u/s 137, even on benefit of doubt, he could not be proceeded with or penalised under Sections 167(3) and 167(37). Since the proceedings in this case were of quasi-criminal nature, so on a reference to the determinations in the case of Shanti Prasad Jain Vs. The Director of Enforcement, , it was also contended by Mr. Bajoria that the prosecutor, viz., the authorities concerned in this case, were required to make out beyond reasonable doubt that there was violation of the law and such test not having admittedly been satisfied, the steps as taken against the petitioner,

were unauthorised. Dealing with the question of benefit of doubt or the effect thereof in this case, it was contended by Mr. Bajoria that in view of the admitted fact that the petitioner was given such benefit or advantage, the orders as made, cannot be sustained.

25. These apart, Mr. Bajoria contended that the orders as impleaded and more particularly the order on revision, not having duly dealt with or considered all aspects, they should also be quashed and set aside.

26. Mr Kar, appearing for the answering respondents after placing the cause title, the grounds and the reliefs claimed, contended that since the Sea Customs Act, 1878, after the incorporation of the Customs Act, 1962, has become non est, so no interference in these proceedings can or should be made. He also, as a preliminary point argued, that since the order of the Additional Collector concerned has merged in the orders by the Central Board and the Central Government and they were made at Delhi, i.e., outside the territorial jurisdiction Of this Court, so such orders cannot be interfered with by this Court. It was also contended by Mr Kar that since the determinations of the issues involved in this case, would require an investigation into disputed questions of fact or such questions, which would depend on evidence, so also this Court should not also interfere. In support of his contentions, Mr Kar relied on the determinations in the case of D.L.F. Housing Construction (P) Ltd. Vs. Delhi Municipal Corpn. and Others, , wherein it has been observed that-

In a case, where the basic facts are disputed and complicated questions of law and fact depending evidence are involved, the Writ Court is not the proper forum for seeking relief. The right course for the High Court in proceedings under Article 226 is to dismiss the petition on such preliminary ground without entering upon merits of the case. In the absence of firm and adequate factual foundation, it is hazardous to embark upon determination of points involved.

> Mr. Kar further contended that the petitioner should not have come to this Court under Article 226, particularly when, he has through the entire gamut of the proceedings and as mentioned above when the determination involves determination of disputed questions of fact. These submissions, Mr Kar contended that thus the grounds regarding Sections 167(37) and 167(3), would go out of consideration. It should also be noted that on the question of repeal of the Sea Customs Act, 1878 and the effect of the same, Mr, Kar relied on an unreported decision dated May 10, 1978, made in Suit No. 1252 of 1957 (Sm. Tribeni Debt and Ors. v. Union of India), by Padma Khastgir J. it was also contended by Mr. Kar that in view of the determinations of S.C. Ghose J. and in Matter No. 555 of 1969, which has again been approved in Appeal by an order dated February 8, 1979, in Appeal No. 215 of 1973, no interference should be made by this Court, as it has certainly no jurisdiction to sit in appeal over such determinations.

27. After the above arguments of Mr. Kar, on preliminary points regarding

maintainability of the petition and this Court's power of interference, Mr. S.N. Banerjee, appearing with him, with the leave of the Court, argued the case on merits. Mr. Banerjee, placed Sections 29 and 137 of the Sea Customs Act, 1878 which are to the following effect :

"29. On the importation into, or exportation from, and customs-port of any goods, whether liable to duty or not, the owner of such goods shall, in his bill of entry or shipping bill, as the case may be, state the real value, quantity and description of such goods to the best of his knowledge and belief, and shall subscribe a declaration of the truth of such statement at the foot of such bill.

In case of doubt, the Customs Collector may require any such owner or any other person in possession of any invoice, broker's note, policy of insurance or other document, whereby the real value, quantity or description of any such goods can be ascertained, to produce the same, and to furnish any information relating to such value, quantity or description which it is in his power to furnish, and thereupon such person shall produce such document and furnish such information :

Provided that, if the owner makes and subscribes a declaration before the Customs Collector, to the effect that he is unable, for want of full information, to state the real value or contents of any case, package or parcel of goods, then the Customs Collector shall permit him, previous to the entry thereof, (1) to open such case, package or parcel, and examine the contents in presence of an officer of Customs, or (2) to deposit such case, package or parcel in a public warehouse appointed u/s 15 without warehousing the same, pending the production of such information."

"137. No goods, except passengers' baggage, shall be shipped or water-borne to be shipped for exportation until-

(a) the owner has delivered to the Customs Collector, or other proper officer, a shipping bill of such goods in duplicate, such form and containing such particulars in addition to those specified in Section 29 as may from time to time be prescribed by the Chief Customs-officer ;

(b) such owner has paid the duties (if any) payable on such goods; and

(c) such bill has been passed by the Customs Collector :

Provided that the Chief Customs Officer may, in the case of any customs-port or wharf, by notification in the Official Gazette, and subject to such restrictions and conditions, if any, as he thinks fit, exempt goods or any specified goods or class of goods or any specified person or class of persons, from all or any of the provisions of this Section."

and contended after placing the impugned orders dated February 18, 1967, January 16, 1970 and February 16, 1971, that there was no compliance with the requirements of those Sections. That apart, Mr. Banerjee contended that the

provisions of Section 167(3) being in personem and those of Section 167(37) being in rem, the submissions of Mr. Bajoria, were of no or little substance. These implementations of certain provisions of the Sea Customs Act, 1878, the provisions whereof, even inspite of amendments incorporated by the Sea Customs (Amendment) Act, 1956, were found and considered to become obsolete. Section 160 of the Customs Act deals with repeal and savings and is to the following effect :-

"160. Repeal and savings.-(1) The enactments specified in the Schedule are hereby repealed to the extent mentioned in the fourth column thereof.

(2) In the Indian Tariff Act, 1934-

(a) for Section 2, the following Section shall be substituted, namely: -

"2. Duties specified in the Schedules to be levied.-The rates at which duties of customs shall be levied under the Customs Act, 1962, are specified in the First and Second Schedules."

(b) Sections 5 and 6 shall stand repealed.

(3) Notwithstanding the repeal of :any enactment by this Section,-

(a) any notification, rule, regulation, order or notice issued or any appointment or declaration made or any licence, permission or exemption granted or any assessment made, confiscation, adjudged or any duty levied or any penalty or fine imposed or any forfeiture, cancellation or discharge of any bond ordered or any other thing done or any other action taken under any repealed enactment shall, so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken unde the corresponding provision of this Act;

(b) any document referring to any enactment hereby repealed shall be construed as referring to this or to the corresponding provision of this Act.

(4) This Act shall apply to all goods which are subject to the control of customs at the commencement of this notwithstanding that the goods were imported before such commencement.

(5) Where the period prescribed for any application, appeal, revision or other proceeding under any repealed enactment had expired on or before the commencement of this Act, nothing in this shall be construed as enabling any such application, appeal or revision to be made on or a proceeding to be instituted under this Act by reason only of the fact that a longer period therefore is prescribed or provision is made for extension of time in suitable cases by the appropriate authority.

(6) The provisions of Section 65 shall apply to goods warehoused before the commencement of this Act if the operations permissible under that Section were carried on after such commencement.

(7) Any duty or penalty payable under any repealed enactment may be

recovered in a manner provided under this Act but without prejudice to any action already taken for the recovery of such duty or penalty under the repealed enactment.

(8) The mention of particular matters in Sub-Sections (4), (5), (6) and (7) shall not be held to prejudice or affect the general application of Section 6 of the General Clauses Act, 1897, with regard to the effect of repeals.

(9) Nothing in this Act shall affect any law for the time being in force relating to the Constitution and powers of any Port authority in a major port as denned in the Indian Ports Act, 1908."

On a reference to the concerned Schedule there is thus no doubt that subject to Section 160 (3) of the Sea Customs Act, 1878 as a whole has been repealed and Section 161 of the Customs Act also makes provisions for removal of difficulties. So the steps as taken or initiated under the Sea Customs Act, 1878, if they are not inconsistent with the provisions of Customs Act, 1962, should be deemed to have been done or taken under the corresponding provisions of the Customs Act. In this connection and in order to appreciate the argument as advanced, a reference to Section 6 of the General Clauses Act, 1897, which deals with affect of repeal and is to the following effect:-

"6. Effect of repeal-When this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not-

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid; any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

should be pertinent and necessary, so also the provision of Section 155 of the Customs Act, 1962, which deals with protection of action taken under the same and to effect that"

(I) No suit, prosecution or other legal proceeding shall lie against the Central

Government or any officer of the Government or a local authority for anything which is done, or intended to be done in good faith, in pursuance of this Act or the rules or regulations.

(2) No proceeding other than a suit shall be commenced against the Central Government or any officer of the Government or a local authority for anything purporting to be done in pursuance of this Act without giving the Central Government or such officer a month's previous notice in writing of the intended proceeding and of the cause thereof, or after the expiration of three months from the accrual of such cause."

28. The orders as impeached in this case were all made or passed after the incorporation and coming into force of the Customs Act, 1962 on February 1, 1963, and as such the initiation itself and the determinations that followed, have been appropriately contended by Mr. Bajoria to be a nullity. The filing of the suits appear to be not protected by the provisions in Section 155 but in my view, since the provisions of Section 155 have not and in fact cannot take away the jurisdiction and authority to challenge the validity of such proceedings in terms of the Constitutional guarantee, the more so when, such initiation could be claimed and established to be without jurisdiction, the challenges as thrown through this proceeding, would be maintainable and available to the petitioner and would not also be hit by the determinations in *Sm. Tribeni Debi and Ors. v. Union of India and Ors.* (Supra).

The plea of merger as taken and urged by the respondents, also appears to me to be without any basis or justification, in view of the provisions in Article 226(I) (a) of the Constitution of India and more particularly when, the orders complained of were communicated here within the jurisdiction of this Court. The fact that the petitioner had preferred the statutory reliefs to the Central Board and thereafter, to the Central Government, would not disentitle him to maintain this application here and that too in view of my findings as above.

29. There is no dispute or and can it be denied that disputed questions of fact cannot be gone into or considered in this jurisdiction. But when the very jurisdiction to initiate the proceeding or the authority of such initiation is under challenge, which is the case in this proceeding, an application would be maintainable. The determination in the case of *D.L.F. Housing Construction (P) Ltd. v. Delhi Municipal Corpn. and Ors.* (Supra), cannot thus be authoritatively applied in this case. I further hold that the provisions of Section 167(37) is not only in rem but the same is also in personem and the personal penalties, which are concerned in this proceeding, could not be given effect to, as the initiation itself was bad.

30. There was admittedly substitution of the concerned goods or consignments before they were shipped and the conduct of the petitioner and the dealing with the concerned shipments do, give rise to a suspicion against him. But since the suspicion is no proof of the commission of the offence and the offence in the

instant case not having been duly and legally proved or proved with any legal evidence, his case cannot be jeopardised or prejudiced on such suspicion, particularly when mere suspicion is no proof of the offence. In view of the above and more particularly when the proceedings for confiscation are of quasi criminal nature, the onus to prove the commission of the offence was on the respondents, and they have, in my view, failed to discharge such onus. In fact, however bad and improper the conduct of the petitioner may be, substitution said to be effected by him has not been proved or established beyond any reasonable doubt. I am also of the view that even if the petitioner is guilty of substitution of the goods, he was certainly aided, helped and assisted by the officers under the respondents. I further find that there was apparent fulfilment of the requirements of Section 137 and as such, ordinarily proceedings u/s 167(3) could not be maintained and no penalty could thus be imposed thereunder. This apart, when it has admittedly been found that the petitioner was not guilty of Section 137, he could not also be penalised u/s 167(37).

31. In view of the above, this application must succeed and I order accordingly. The Rule is thus made absolute. There will be no order as to costs.