

(1982) 06 AP CK 0010

In the Andhra Pradesh High Court

Case No : Writ Petition No. 892 of 1980

Innovation, Secunderabad and Another

APPELLANT

Vs

Central Board of Excise and Customs and Another

RESPONDENT

Date of Decision : 07-06-1982

Acts Referred:

Constitution of India, 1950 — Article 226

Customs Act, 1962 — Section 100, 101, 102, 103, 104

Citation : (1984) 15 ELT 91

Hon'ble Judges : B.P. Jeevan Reddy, J

Bench : Single Bench

Advocate : V.R. Reddy, for the Appellant; K. Nagaraja Rao, Addl. Central Government Standing Counsel, for the Respondent

Judgement

1. This writ petition is directed against the order of the Central Board of Excise and Customs, subsequently confirming the adjudication order passed by the Collector, Customs and Central Excise, Hyderabad. The Collector by his order dated 25-5-1977 confiscated the goods seized from the petitioners u/s 111(d) and Section 111(p) of the Customs Act, 1962 and also imposed a penalty of Rs. 25,000 u/s 112 of the Act. On appeal the Board confirmed the order of the Collector, except in the matter of penalty. It reduced the penalty to Rs. 5,000.

2. In the writ petition Sri. V. R. Reddy, the learned counsel for the petitioners, raised four contentions viz. (i) that the search which led to the seizure and ultimately to the adjudication and confiscation was conducted by a person not competent in law to do so and, therefore, all subsequent steps, viz., the seizure, adjudication and confiscation are void; (ii) that the person conducting the search had not formed a reasonable belief as contemplated by Section 105 of the Act and this reason too, the search is illegal; (iii) in this case, the goods seized are of three categories, viz goods notified u/s 123, goods notified u/s 11, and thirdly other categories of goods. The burden of proof varies in each of these categories of goods. The respondents however have not kept this distinction in mind, and

have vitiated their orders; and (iv) that, the authorities have not determined the value, nor the duty payable, as required by Section 112, read with Section 122, of the Act, with determination was essential for assessing the penalty to be levied. For a proper appreciation of these contentions, it is necessary to set out the facts of the case clearly, which facts are found stated in the order of the Collector, I may state that no dispute has been raised with reference to the correctness of the facts as stated in the Collector's order, nor, indeed, any such dispute can be entertained in this writ petition.

3. On 26-6-1973, the Superintendent of Customs and Central Excise I.D.O. II, Hyderabad with his Staff visited the petitioner's shop "M/s. Innovation", at No. 62, Mahatma Gandhi Road, Secunderabad, for the purpose of collecting a sum of Rs. 2,200 being the penalty imposed upon the petitioners in an earlier proceeding. In that connection, there appears to have been an exchange of hot words between the 1st petitioner, and the Superintendent. Be that as it may, the Superintendent while in the shop, noticed goods of foreign origin exhibited in the show cases in the shop. The Superintendent called upon the petitioner to produce the register of notified goods, required to be maintained u/s 11-E of the Act, and the requisite vouchers relating to the said goods. According to the respondent, the 1st petitioner did not produce the register, nor was he able to produce any vouchers relating to those goods. He, however, produced certain documents, which on comparison, were found not to relate to those goods. Thereupon, the Superintendent seized 110 items alleged to be foreign goods, under a panchanama of the same data and prepared goods did not satisfactorily agree with the documents produced by the 1st petitioner. It is stated further that Sri T. N. Khambati (1st petitioner) refused to give a statement immediately after the seizure. Summons were issued by the detecting officer u/s 108 of the Act, on 2-7-1973, to the 1st petitioner, Sri T. N. Khambati, to appear before the Superintendent of Excise on 5-7-1973 in connection with the enquiry regarding the goods seized; but the 1st petitioner failed to appear. The petitioners' advocate, however, addressed a registered letter dated 30-7-1973 to the Deputy Collector of Central Excise, Hyderabad contending that the several goods seized were not of foreign origin and that, the seizure was not in good faith. The respondents say that the goods seized were verified by another Superintendent, who reported that all the goods seized are of foreign origin.

4. A show cause notice dated 10-12-1973 was issued by the Collector of Central Excise to the 1st petitioner calling upon him to explain why the goods should not be confiscated u/s 111(p) and Section 111(d) of the Act, read with Section 3(2) of the Import and Export (Control) Act, 1947, and as to why penalty should not be levied u/s 112(b) of the Customs Act. In this show-cause notice, it was alleged that, of the 110 items of goods seized from the petitioners, items 1, 3, 7 etc., in all 48 items are goods notified u/s 11(D) of the Customs Act, while certain other items (specified in the notice) are prohibited goods u/s 123 of the Act. It was indicated that in the case of prohibited goods, the burden of proving that they are not smuggled goods lies upon the petitioner. The action proposed

to be taken was also indicated, and it was stated that the show-cause notice was based upon the panchanama dated 26-6-1973 and five other documents mentioned therein.

5. After receiving the show-cause notice, the 1st petitioner requested for copies of the documents upon which the show-cause notice was said to be based and also the statements of the witnesses examined, if any, during the course of investigation. In August 1975 copies of the documents referred to in the show-cause notice were supplied whereafter the 1st petitioner submitted his explanation dated 12-9-1975. In this explanation, the 1st petitioner submitted, in the first instance, that the Superintendent of Customs & Central Excise had no legal authority to collect the amount of penalty allegedly due from the petitioner, nor had the authority to search the premises. It was denied that the Superintendent merely inspected the goods put on display. It was submitted that the search and seizure were illegal, being not authorised by any search-warrant, that the entire search and seizure was affected in the absence of the alleged panchas and that the signatures of the alleged panchas were obtained on the foot-path outside the premises after everything was over. It was submitted alternatively that the Superintendent had no reasonable belief warranting the search and seizure and that the goods seized agreed with the documents produced by the petitioner. The 1st petitioner justified his refusal to give a statement immediately after the seizure on the ground that the seizing officer had no legal competence under the Act to record a summary statement from any person, without serving a statutory summons u/s 108 of the Customs Act. It was also submitted that the other Superintendent who is said to have checked and examined the goods and found them of foreign origin, had no legal competence or jurisdiction to do so. It was submitted that the verification by the other Superintendent (Sri C. Vishwanadam) was ex-parte and without notice to the petitioners. A doubt was also expressed whether the goods which were verified by Sri Vishwanadham were the same goods which were seized from the petitioners. It was denied that many of the goods indicated in the show-cause notice were of foreign origin, and submitted that the burden of proving the same lies upon the Department. It was denied that the goods alleged to be goods notified u/s 11(B) of the Act were in fact such notified goods. So far as the goods covered by Section 123 of the Act are concerned, the 1st petitioner submitted that he would discharge the burden that lay upon him, at the personal hearing which the petitioner requested. Ultimately, he submitted that a personal hearing may be given to him and that, the Superintendent who seized the goods, and the two panchas to the panchanama and the persons who gave the trade-opinion be kept present at the personal hearing to enable the petitioner to cross-examine them. The 1st petitioner denied that there are any grounds either for confiscation, or for levying penalty.

6. In pursuance of the 1st petitioner's request, a date of hearing was fixed and intimated to him. On the adjourned date of hearing, the 1st petitioner appeared and in his presence, witnesses were examined, who were also cross-examined by

the 1st petitioner and/or by his counsel, as the case may be. Eight documents were also filed by the 1st petitioner in support of his case, comparing of 7 bills issued by "Mogwa & Company, Tawai (NEFA)" and the Customs notified items register for the year 1973-74. Since the foreign origin of the goods was disputed by the petitioners the Collector decided to settle the said dispute by physical examination of seized goods. He intimated the 1st petitioner, on 20-3-1976 that the goods would be examined on 23-3-1976 at 3.00 P. M. On that day, the 1st petitioner, Sri T.N. Khambati. Intimated the Collector in writing that he had no objection to the goods being inspected by the Collector in the petitioner's absence. Accordingly the Collector examined the goods, and found that all the goods except item No. 26 (2 sarees) were unmistakably of foreign origin.

7. After the enquiry was closed, information was received by the Collector that "Mogwa & Company, Tawai" whose bills were produced by the petitioner was a fictitious firm. Accordingly the Collector sent registered letters to "Mogwa & Company" and Sri B. B. Mogwa of the said Company to be present personally at the hearing before the Collector to answer the questions as may be put by him and by the petitioner. A registered letter to the same effect was also sent to the 1st petitioner, Sri T. N. Khambati. In this letter addressed to the 1st petitioner, it was stated that in connection with the goods seized from the petitioner premises, certain further enquiry is proposed to be held and certain witnesses are also likely to be examined on 29-3-1977. The 1st petitioner was asked to be present at the time of the enquiry to cross-examine the witnesses, if he so desire. It was also intimated that if he fails to be present at the enquiry, the matter will be proceeded with ex-parte. The letters addressed to "M/s. Mogwa & Company" and Sri B. B. Mogwa, were returned by the postal authorities with the endorsement "not known" while the letter addressed to the 1st petitioner Sri T. N. Khambati was returned with an endorsement "addressee absent continue 7 days at delivery time". It may be stated that according to the information received by the Collector, Tawai where the office of M/s. Mogwa & Company was said to be situated is very small village situated in a hilly area far from Tezo, the Headquarters town of Lohit Division in NEFA now called the "State of Arunachal Pradesh" and that the said place is four or five days march on foot through hill tracts from Tezo, at an approximate distance of 200 kilometers. It was also reported that Tezo is not accessible at all in rainy season. The Deputy Commissioner of Tezo further seems to have reported that there is no merchant at Tawai. The return of the letters with the aforesaid postal endorsements, along with the said report, led the Collector to conclude that no such firm exists and that it was a fabrication and creation of the petitioners to mislead the adjudicating authority. Another fact, to be noticed in this connection is that when the aforesaid registered letters were sent to the 1st petitioner (which were returned by the postal authorities with the aforesaid endorsement) a warrant of arrest and detention was in force against the 1st petitioner and he was absconding. Probably, that is the reason the notice could not be served and he did not attend on the notified date of hearing.

8. The Collector recorded the following findings in his order : (i) the Superintendent of Customs and Central Excise found certain foreign goods exhibited and displayed in the shop. Accordingly he called upon the 1st petitioner to produce the register and the relevant documents pertaining to them. Certain documents were produced but, on comparison, the goods did not agree with these documents. Those goods which were found not to be backed by relevant documents, were seized. The Superintendent was acting under a reasonable belief that the goods on which customs duty was not paid must be deemed to be smuggled goods. There was no ulterior motive on his part. Accordingly it cannot be said that there was no reasonable belief on the part of the officer when he seized the said goods; (ii) no attempt has been made by the petitioners in this case to establish that the seized goods are in fact covered by relevant documents. The documents produced by the petitioners at a late stage are bogus. Further, on the day of seizure, the 1st petitioner himself stated that they had not maintained the register as per Section 11-E of the Act. The register produced at a later stage is clearly a belated attempt to cover up the default, and can be given no credence; (iii) that, this was not a case of search and seizure but one of inspection of foreign articles and verification whether the goods so displayed were backed by requisite documents; and (iv) even the goods which are not notified u/s 11-E are, undoubtedly, foreign goods, and unless the contrary is established the department is justified in presuming that they are smuggled goods.

9. On these findings the Collector found that there has been a violation of Sections 11-D, 11-E and 11-F of the Act and that therefore the goods are liable to be confiscated u/s 111(d) and Section 111(p) of the Customs Act, 1962. Accordingly the order of confiscation and penalty was passed.

10. The appellate authority observed that the goods seized were undoubtedly of foreign origin which is established by the very attempts made by the petitioners to produce documents covering them. It justified that seizure on the ground that the record produced by the petitioners did not satisfactorily account for the goods. The appellate authority further observed that the goods were all banned for importation and it was the petitioners' responsibility to ensure illicit acquisition, in view of the likely mischief u/s 112 of the Act. The appellate authority rejected a contention raised by the petitioners viz., that since the firm was not made a party to the said proceedings, the whole proceedings are void. It observed that since the Managing Partner was made a party, the proceedings are quite proper and valid.

10A. The Customs Act, 1962 was enacted to meet the problems confronting the nation's economy on account of smuggling operations. Section 2 defines the several expressions employed in the Act, of which reference need be made only to a few. The expression "proper officer" is defined in clause (34) in the following words :-

"Proper officer" in relation to any functions to be performed under this Act means

the officer of Customs who is assigned those functions by the Board of the Collector of Customs".

The expression "prohibited goods" is defined in clause (33) to mean "any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with".

Section 11, which is the only Section in Chapter IV, empowers the Central Government to prohibit, by notification in the Official Gazette, either absolutely or subject to such conditions as may be specified in the notification, the import or export of goods of any specified description.

Chapter IVA contains several provisions relating to detention of illegally imported goods, and prevention of the disposal thereof. Chapter IVA was introduced by an amendment in 1969.

Section 11-A defines certain expressions used in the Chapter. "Intimated place" is defined by clause (b) to mean "a place intimated under subsection (1), sub-section (2) or sub-section (3) as the case may be, of Section 11-C". The expression "notified goods" is defined in clause (d) to mean "goods specified in the notification issued u/s 11-B".

Section 11-B empowers the Central Government to notify the goods. It says :

"If having regard to the magnitude of the illegal import of goods of any class or description, the Central Government is satisfied that it is expedient in the public interest to take special measures for purpose of checking the illegal import circulation or disposal of such goods or facilitating the detection of such goods it may, by notification in the Official Gazette, specify goods of such class or description."

11. Section 11-C obliges every person who owns, possesses or controls any of the notified goods, to intimate to the proper officer the place of their storage. It is further provided that none of the notified goods shall be sold or transferred unless they are accompanied by the voucher referred to in Section 11-F. Section 11-D declares that no person shall acquire (except by gift or succession) any notified goods unless they are accompanied by the voucher referred to in sub-section (2) of Section 11-G or where the person has himself imported the goods, he is in possession of evidence showing clearance of such goods by the Customs authorities. He is also obliged to take reasonable steps to ensure that the goods acquired by him are not goods which have been illegally imported. Section 11-E obliges persons possessing notified goods to maintain accounts in the prescribed form. Section 11-F provides that no person shall sell or otherwise transfer any notified goods, unless it is evidenced by a voucher in the prescribed form, containing the requisite particulars.

12. Section 11-G declares that Sections 11-C, 11-E and 11-F do not apply to

goods for personal use.

13. Chapter XIII deals with searches, seizures and arrest. Sections 100 to 103 deal with search of persons while Section 104 deals with arrest. It is not necessary to refer to them for the purpose of this writ petition.

14. Section 105 deals with the power to search premises. Sub-section (1) thereof reads as follows :

"(1) If the Assistant Collector of Customs or in any area adjoining the land frontier or the coast of India an officer of Customs specifically empowered by name in this behalf by the Board has reason to believe that any goods liable to confiscation or any documents or things which in his opinion will be useful for or relevant to any proceeding under this Act are secreted in any place he may authorise any officer of Customs to search or may himself search for such goods, documents or things."

15. Section 106-A deals with the power to inspect. This Section may also be set out in full :

"106-A : Any proper officer authorised in this behalf by the Collector of Customs may, for the purpose of ascertaining whether or not the requirements of this Act have been complied with, at any reasonable time, enter any place intimated under Chapter IVA or Chapter IVB as the case may be and inspect the goods kept or stored therein and require any person found therein who is for the time being in charge thereof, to produce to him for his inspection the accounts maintained under the said Chapter IVA or Chapter IVB, as the case may be, and to furnish to him such other information as he may reasonably require for the purpose of ascertaining whether or not such goods have been illegally imported, exported or are likely to be illegally exported."

16. Section 110 deals with seizure of goods, documents and things. It says that if proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods.

17. Chapter XIV contains provisions relating to confiscation of goods, and imposition of penalties. Section 111 provides for confiscation of and Section 112 for imposition of penalty for improper importation of goods. Clauses (d) and (p) of Section 111 under which the goods in question have been confiscated may now be set out :-

"111. Confiscation of improperly imported goods etc. - The following goods brought from a place outside India shall be liable to confiscation, -

* * * * *

(d) any goods which are imported or attempted to be imported or are brought within the Indian Customs whether for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other Law for the time being in force;

* * * * *

(p) any notified goods in relation to which any provisions of Chapter IV Act of any rule made under this Act for carrying out the purposes of that Chapter have been contravened."

18. Section 112 provides for levy of penalty in addition to confiscation of goods u/s 111.

Section 122 provides for adjudication of confiscation and penalties. It says that in every case under Chapter XIV in which anything is liable to confiscation, or any person is liable to penalty, such confiscation or penalty may be adjudged by a Collector of Customs or a Deputy Collector of Customs, or where the value of the goods liable to confiscation does not exceed Rs. 25,000/- by an Assistant Collector of Customs. Where the value of the goods liable to confiscation does not exceeds Rs. 2,500/- any Gazetted Officer of Customs lower in rank than an Assistant Collector of Customs is also empowered to adjudicate.

19. Section 123 which deals with burden of proof in certain cases, is relevant for the present purposes and must be set out in full :-

"123. Burden of proof in certain cases. - (1) Where any goods to which this Section applied are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be, -

(a) in a case where such seizure is made from the possession of any person -

(i) on the person from whose possession the goods were seized; and

(ii) if any person other than the person from whose possession the goods were seized, claims to be the owner thereof also on such other person;

(b) in any other case, on the person if any, who claims to be the owner of the goods so seized.

(2) This section shall apply to gold, diamonds, manufacture of gold or diamonds, watches and any other class or goods which the Central Government may, by notification in the Official Gazette, specify."

20. Now in the light of the above provisions, let me deal with the contentions urged by the learned counsel for the petitioners. The first contention, as already noticed, pertains to the competency of the officer who is said to have searched the premises and seized the goods. The contention is that he was not empowered to do so u/s 105 (Searches) and Section 110 (Seizure). This contention has been raised in paragraph 6 of the writ petition. In paragraph 6 of the counter-affidavit it is stated that the Superintendent of Central Excise was vested with powers u/s 110 of the Act and further that, this was not a case of "search" within the meaning of Section 105. It is stated that since the Superintendent found that the goods exhibited in the petitioner's shop were

liable to confiscation and also because the 1st petitioner was not able to produce the register to be maintained u/s 11-E of the Act, nor the vouchers which he was bound to maintain u/s 11-F of the Act, he seized the goods. I have already set out the factual situation, which bears out the respondents' contention that it was not a case of "search" within the meaning of Section 105. The Supdt. of Central Excise went there to collect certain arrears due from the petitioners, and he found several goods which he believed to be of foreign origin, displayed in the show-cases in the petitioner's shop. Whether as a result of exchange of hot words, or otherwise it is really immaterial the Superintendent called upon the 1st petitioner to produce the register and vouchers relating to those goods. The 1st petitioner, it stated, that no register as such was maintained, but produced certain vouchers and documents which, on comparison, were found not to tally with the goods. Thereupon the Superintendent seized those goods. What the Superintendent did, properly falls within the purview of Section 106-A which Section empowers the proper officer to enter any place intimated under Chapter IVA or Chapter IVB, and inspect the goods kept or stored therein, for the purpose of ascertaining whether or not the requirements of the Act have been complied with, and in that connection, to require any person found therein to produce for his inspection the accounts maintained under Chapter IVA or Chapter IVB, as the case may be, and to furnish such other information as may reasonably be required for purpose of ascertaining whether or not such goods have been illegally imported. Thus, this is not a case of search and seizure but of inspection and seizure. The learned Standing Counsel for the Central Government has placed before me a copy of the authorisation dated 1-2-1963, issued by the Collector of Customs and Central Excise, Hyderabad empowering all officers of Customs to exercise the powers under Sections 100, 106 and 110 of the Act. This authorisation does not refer to Section 105 or for that matter, to Section 106-A of the Act. Indeed this authorisation could not have referred to Section 106-A, inasmuch as Section 106-A was itself introduced into the Act by an amendment 1969 while the authorisation as stated above, is dated 1-2-1963. According to this authorisation it is obvious that while the inspection of goods by the Superintendent is not competent, the seizure of goods undoubtedly is. Sub-section (1) of Section 110 empowers the proper officer, if he has reason to believe that any goods are liable to confiscation under this Act, to seize such goods. The power of seizure is not predicated upon a valid search or inspection, as the case may be. All that is required by Section 110(1) is that the proper officer must entertain a reasonable belief that certain goods are liable to be confiscated under the Act; and thereupon he is entitled to seize the same. I am, therefore, unable to agree with Mr. V. R. Reddy, the learned counsel for the petitioners, that this is a case of search or that the seizure is invalid and/or illegal for the reason suggested by him. Further as held by the Supreme Court any invalidity affecting the search, does not vitiate the seizure and further investigation. In *State of Maharashtra Vs. Natwarlal Damodardas Soni*, the Supreme Court held following a catena of decisions, that even if the search is illegal it does not affect the validity of the seizure and further investigation by

the customs authorities, or the validity of the trial which followed on the complaint of the Customs Officer. On the same parity of reasoning, even if the inspection is invalid or incompetent, it does not vitiate the seizure which is, undoubtedly, by a competent Officer, nor does it vitiate the subsequent adjudication proceedings. The first contention is, accordingly rejected.

21. The next contention of Mr. V. R. Reddy is that, the officer (Superintendent of Central Excise) did not entertain a reasonable belief, as contemplated by Section 110 of the Act, when he seized the goods and that, therefore, the seizure is vitiated which, in turn, vitiates the adjudication order as well. Undoubtedly, both Section 105 (Search) and Section 110 (Seizure) require that the proper officer must have reason to believe either that the goods liable to confiscation are secreted in any place, or that certain goods are liable to confiscation under the Act, as the case may be, before he searches the premises or seizes the goods. It is well settled that the existence of this reasonable belief which is no doubt subjective - is a check upon or otherwise, unrestricted power vested in the executive officers. It is equally well settled that the officer cannot search any premises, or seize any goods, in the hope of ultimately discovering same basis on ground to justify the search or seizure, as the case may be, nor can they go on a fishing expedition to find out whether any irregularities are committed. They must first be in possession of information or material, as the case may be, to form the required belief reasonably, and then alone they can proceed to search or seize, as the case may be. But, in this case, it must be remembered that Section 105 - as already held by me hereinbefore is totally inapplicable. Another aspect of the matter is that Section 106-A (Power of Inspection) does not stipulate the formation or existence of a reasonable belief, as a pre-condition for inspection. The only question that therefore, arises is, whether the Superintendent of Central Excise did not entertain a reasonable belief that the goods in any question are liable to confiscation under the Act, when he seized the goods ? Now, it is recited in the panchanama - and also found by the adjudicating authorities - that when the Superintendent of Central Excise called upon the 1st petitioner to produce the register and vouchers relating to the goods found displayed in the show cases in the shop of the 1st petitioner, admitted that he did not maintain any register; that, the documents produced by him were found, on comparison, not totally with the goods in question and that, thereupon the seizure was effected. (I have observed already that the power to seize is not predicated upon a valid search or inspection). It is therefore difficult to hold that the officer did not form or entertain a reasonable belief that the goods in question are liable to confiscation under the Act, when he seized the same. It should be remembered that the formation of this belief is a subjective one. Both the adjudicating authorities have found, on the above material, that the Officer did entertain a reasonable belief, as contemplated by Section 110 of the Act; and I see no reason to interfere with their finding. It should also be remembered that this Court cannot sit as an appellate authority over the decisions of the adjudicating authorities, not can it go into the adequacy of

material upon which the reasonable belief was formed. In any event, the material in this case is certainly sufficient for any reasonable person to form the reasonable belief. The panchanama recites that the 1st petitioner admitted not maintaining the register as contemplated by Section 11-E. The register subsequently produced by him has been rejected by the adjudicating authority (Collector) as a fabrication. Moreover, the documents produced by him were also found not tallying with the goods in question. The above facts certainly constituted the relevant, and indeed adequate material, for forming the requisite belief, contemplated by Section 110(1) of the Act.

22. Learned Counsel for the petitioners relied upon the decision of the Supreme Court in *The Commissioner of Commercial Taxes and Others etc. Vs. R.S. Jhaver and Others etc.*, , in this behalf. That case arose under the provisions of the Madras General Sales Tax Act. Sub-section (1) of Section 41 of that Act provided that any officer empowered by the Government in that behalf may, for the purpose of the said Act, require any dealer to produce before him the accounts, registers, and records etc., relating to his business. Sub-section (2) provided that all such accounts, registers etc., maintained by the dealer in the course of his business shall be open to inspection at all reasonable times. The proviso to sub-section (2) however, provided that no residential accommodation (not being a place of business-cum-residence) shall be entered into and searched by such officer, except under the authority of a search warrant issued by a Magistrate and that all searches under the said sub-section shall, so far as may be, be made in accordance with the provisions of the Code of Criminal Procedure, 1898. Sub-section (3) provided that if any such officer has reason to suspect that any dealer is attempting to evade the payment of any tax, fee or other amount due from him under the Act, he may, for reasons to be recorded in writing seize such accounts, registers and documents etc., of the dealer. The officer seizing such documents was obliged to give a receipt, and not to keep them with him for more than 30 days at a time. Sub-section (4) empowered the officer to seize and confiscate any goods found in the office, shop etc., of the dealer, not accounted for in his accounts and records. It was provided that before passing an order of confiscation, an opportunity should be given to the person concerned. The constitutional validity of sub-sections (2), (3) and (4) of Section 41 was challenged. The Supreme Court however, held that sub-sections (2) and (3) do not constitute unreasonable restrictions on the right to hold property or carry on trade; but that sub-section (4) is liable to be struck down in its entirety, (for certain reasons which is not necessary to mention here). Having so held, the Supreme Court directed that the goods confiscated have got to be returned inasmuch as sub-section (4) was struck down in its entirety. With respect to the accounts books etc., which were seized from the dealer, the Court directed them to be returned to the dealer inasmuch as the safeguards provided by the Code of Criminal Procedure were not followed when the search was made. I am unable to see any relevance between the principles of the said decision and the contention which I am now dealing with.

23. Mr. V. R. Reddy next relied upon the decision of the Allahabad High Court in *The Collector, Central Excise, Allahabad and Others Vs. L. Kashi Nath Jewellers*, the facts of which case, according to the learned counsel bear a close approximation to the facts of the present case. It must, however, be remembered that, that was a case where the seizure was challenged by way of a writ petition. It was not a case where the matter came up before the Court after adjudication. The matter arose under the Gold (Control) Act, 1968, Section 66 whereof empowered any Gold Control Officer, if he has reason to believe that in respect of gold any provision of the said Act has been, or being, or is attempted to be contravened to seize such gold along with the package, covering or receptacle etc., in which the gold is found. The Court observed that the existence of a reasonable belief is a condition precedent for exercise of the power of seizure and that, this power cannot be allowed to be used indiscriminately with a view to fishing out material to form a belief and to justify the seizure on the basis of the material so discovered. There can be little quarrel with the above proposition. But, as I have held hereinbefore, the seizure in this case was preceded by a reasonable belief. Therefore there is no question of following the principle of the said decision and directing the return of the seized goods. Moreover, in this case, the adjudication proceedings have also been concluded.

24. Now coming to the third contention, the goods seized as pointed out by the learned counsel for the petitioners, fall in three categories viz., (i) goods specified in Section 123 of the Act; (ii) goods notified u/s 11-B of the Act; (iii) other goods not falling under categories (i) and (ii). So far as the first category of goods are concerned, it is not disputed that the burden of proving that they are not smuggled goods, lies upon the petitioners, which they sought to discharge by producing certain vouchers at the time of seizure, and certain bills issued by Mogwa & Company, during the adjudication proceedings. In so far as the vouchers produced at the time of seizure are concerned, the panchanama itself recites that they did not tally with the goods which were seized which fact has also been re-affirmed in the adjudication order of the Collector. This aspect of the matter has not been challenged before me. In so far as the bills issued by Mogwa & Company are concerned it was found on further enquiry that no such firm exists at the place where it was purported to be located. It is true that this aspect came to light after the enquiry was closed; but, as stated by me during the course of narration of facts, the adjudicating officer after receiving information about the bogus nature of the said firm, gave a notice to the petitioners intimating them that certain further enquiry is proposed to be held and certain witnesses are also likely to be examined on 29-3-1977; the 1st petitioner was asked to be present at the time of the such enquiry to cross-examine the witnesses, if he so desired. He was also told that if he failed to be present at the enquiry the matter will be proceeded with ex parte. At that time, it appears an order of detention was issued against the 1st petitioner and was in force, and he was absconding. Be that it may, the notice sent to him was returned with an endorsement that the 1st petitioner was absent at the said

address for continuous period of seven days. The notice sent to Mogwa & Company at the address mentioned by the petitioner on the bills was also returned with an endorsement "not known". Then there was information received by the adjudicating officer with reference to the place where the said firm was said to be located, its inaccessibility, and the absence of any merchant at that place. These circumstances led the adjudicating officer to the conclusion is not open to interference in this writ petition. Mr. V. R. Reddy however, contended that no proper or sufficient opportunity was given to the petitioner to meet, or disprove the allegation that Mogwa & Company is a non-existent firm. In the facts stated above, this contention cannot be acceded to.

25. It was then argued that merely because the letters sent to Mogwa & Company in 1977 were returned with the endorsement "Not Known", it does not follow that such a firm was not in existence even in 1973 when the bills produced by the petitioner from establishing the same, particularly when an opportunity was given to them by the adjudicating officer, to do so. It is no fault of the adjudicating officer that the notice sent to the 1st petitioner could not be served. The adjudicating officer was, therefore, right, in the above circumstances, in holding that with respect to the first category of goods, the petitioners have failed to discharge the burden that lay them by virtue of Section 123 of the Act.

26. Now coming to the second category of goods, i.e. goods notified u/s 11-B, the gravaman of the allegation made against the petitioner is that he failed to maintain the register as required by Section 11-E of the Act, and also failed to produce vouchers, which he was required to keep u/s 11-D of the Act. As stated hereinbefore (during the course of narration of facts), the 1st petitioner is stated to have admitted at the time of seizure that he did not maintain the register contemplated by Section 11-E, and the register produced by him during the course of adjudication proceedings, was rejected as subsequent fabrication. There are no reasons to interfere with this finding of fact, in this writ petition. With respect to vouchers, the panchanama recites that those produced on that occasion, did not agree with the goods seized; and the bills produced by the petitioner during the course of adjudication proceedings were all issued by Mogwa & Company, which aspect I have already dealt with in the preceding paragraphs. Whatever may be said about Section 11-D, there can be little dispute about the fact that there has been a violation of Section 11-E in this case, and that by itself is sufficient to sustain the order of confiscation and penalty.

27. Mr. V. R. Reddy argued that before directing the confiscation the adjudicating authority ought to have been satisfied and ought to have recorded a finding in terms of Section 11-D(ii). Section 11-D in so far as it is relevant, reads as follows :-

"11-D. Precautions to be taken by persons acquired notified goods. - No person shall acquire (except by gift or succession from any other individual in India), after the notified date any notified goods :

(i) unless such goods are accompanied by

(a) the voucher referred to in Section 11-F or the memorandum referred to in sub-section (2) of Section 11-G as the case may be, or

(b) * * *

[Sub-clause (b) omitted as unnecessary]

(ii) unless he has taken, before acquiring such goods from a person other than a dealer having a fixed place of business such reasonable steps as may be specified by rules made in this behalf, to ensure that the goods so acquired by him not goods which have been illegally imported."

While Section 11-F deals with sale of notified goods except under a voucher in the prescribed form, Section 11-D deals with purchase or acquisition of notified goods. It says that no person shall acquire notified goods unless they are accompanied by the voucher referred to in Section 11-F, and unless he has taken, before acquiring such goods from a person other than a dealer having a fixed place of business, such reasonable steps as may be specified by the Rules in this behalf, to ensure that the goods acquired by him have not been illegally imported. In other words, according to this Section, if the goods are acquired from a dealer having a fixed place of business, it is not necessary to take the prescribed reasonable steps before acquiring the goods, but if he is dealer having no fixed place of business, taking of such reasonable steps is obligatory. But in view of the finding recorded by the adjudicating authority in this case that the very firm from which the 1st petitioner claims to have purchased the goods, is a bogus firm, there is no scope for any further enquiry in this behalf. In any event, it was for the petitioners to prove that the said firm has fixed place of business and therefore it was not necessary for them to take the prescribed reasonable steps.

28. In these circumstances the question of burden of proof is really beside the point. The issue was whether there has been violation of Section 11-E and Section 11-D and after a proper enquiry it has been found there has been such a violation. Hence it is not possible to agree with the learned counsel that the order of confiscation in so far as the goods notified u/s 11-B are concerned, is bad in law.

29. So far as the third category of goods are concerned, undoubtedly the counsel for the petitioners is right in contending that the burden of proof proving that they are smuggled goods, lies upon the department. The adjudicating officer (Collector) has observed in so far as these goods are concerned, that the onus of establishing that these are not smuggled goods, merits to be shifted to the owner since they are prima facie foreign goods and also in view of the conduct of the 1st petitioner who was stated to be not averse to relying upon forged evidence. In my opinion, this part of the reasoning of the adjudicating officer is not correct. Merely because the 1st petitioner is unable to prove his case with

respect to notified goods, or merely because the notified goods are found liable to confiscation on account of violation of one or the other provision of Chapter IV-A of the Act, it does not follow that the third category of goods are also smuggled goods and are liable to be confiscated. Mere possession of goods of foreign origin is not a ground by itself warranting seizure, or confiscation, as the case may be. It must further be established that they have been imported contrary to the relevant provisions of the Act. In this case, the department has led no such evidence. The adjudicating officer has merely chosen to sustain the confiscation of this category of goods on the basis of a presumption drawn from the facts relating to other category of goods which, in my opinion, is not warranted or justified. It is therefore, directed that in so far as the third category of goods are concerned, the confiscation is bad and they are liable to be released and returned forthwith to the petitioner. It is for the adjudicating officer to determine after notice to the first petitioner, which of the seized goods fall within the third category and implement the above direction.

30. With respect to the fourth and the last contention, it is undoubtedly true that for levying the penalty it may be necessary to assess the value of the goods seized and confiscated, inasmuch as the penalty to be levied should not exceed five times, the value of the goods or Rs. 1,000/- whichever is greater, in the case of prohibited goods, while in the case of other dutiable goods, the penalty should not exceed five times the duty sought to be evaded on such goods, or Rs. 1,000/- whichever is greater. It is true that the value of the seized goods was not indicated in the show cause notice, nor is it determined in the adjudication order. In the counter affidavit in paragraph 21, it is merely stated that the value of the goods was shown in the F.I.R. as Rs. 29,739.50 being the market value. The ex-duty value was also shown therein as Rs. 9,332.78. But mentioning the value in a F.I.R. which F.I.R. does not appear to have been a part of the record before the adjudicating authorities (I find no reference to the F.I.R. in the adjudication order) is not a substitute for determination of the value of the seized goods. But the question is, whether it is worth-while to send the matter back on this aspect. The most important circumstance to be noticed in this connection is, that the penalty has been reduced by the appellate authority to Rs. 5,000/- only and having regard to the nature of the goods confiscated, it cannot be suggested reasonably that even if the value of or duty payable on the goods is determined afresh, the penalty levied would be more than the maximum limit prescribed by Section 112 of the Act. It must also be remembered that adjudication proceedings were taken by the Collector and not by a lower officer, which fact also indicates that value of the goods must have been above Rs. 25,000/-. I am therefore not inclined to interfere with this part of the order as well.

31. For the above reasons the writ petition is allowed in part, only in so far as the aforementioned third category of goods (i.e., goods other than those mentioned in Section 123, or notified u/s 11-B of the Act) are concerned. In all other respects the writ petition is dismissed. The respondents shall release and return forthwith the third category of goods aforesaid to the 1st petitioner, as

directed above. In the circumstances of the case, there shall be no order as to costs.