

(1982) 06 CAL CK 0012
In the Calcutta High Court
Case No : Civil Rule No. 5051 (W) 74

Kantilal Somehand Shah and Another	APPELLANT
Vs	
Collector of Customs and Central Excise and Another	RESPONDENT

Date of Decision : 03-06-1982

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 104, 110, 110(1), 110(2), 111
Sea Customs Act, 1878 — Section 180A, 188

Citation : (1985) 4 ECC 41 : (1982) 10 ELT 902

Hon'ble Judges : Manasnath Roy, J

Bench : Single Bench

Advocate : S.K. Roy Chowdhury, Jatin Ghosh, Roman Ghosh and Dilip Pal, for the Appellant; N. Roy Chowdhury, I.N. Mukherjee and S. Banerjee, for the Respondent

Judgement

Manasnath Roy, J.—The petitioners have claimed to be partners of the registered partnership firm M/s. Kantilal Chandulal and Company (hereinafter referred to as the said firm) which had and has the official place of business at 208, Jamunalal Bazaz Street, Calcutta-7. The petitioners have stated to be carrying on business as dealers in diamonds and other precious stones. It was their case that in course of such business, they were required to buy diamonds and jewellery from different parts of India and sell them to their customers at Calcutta. It was also stated by the petitioners that purchases made from the parties, were and are duly entered into the books of accounts of the said Firm and apart from purchase and sale of the materials as mentioned above, the petitioners used to receive diamonds and jewellery from various places, for the purpose of repairing and/or sale on commission basis. It has also been categorically stated by the petitioners that the parties, from whom they used to receive materials for sale and on the basis as mentioned above, do not like to disclose their names prior to completion of final transaction, for avoiding disclosure or exposure of their financial position and as such, some of the names of those parties, were not entered into the

books of accounts of the said Firms and such transactions were carried on with mutual trust and confidence.

2. It has been stated that on or about 2nd/3rd August, 1966, officers attached to the Preventive and Intelligence Unit of the Customs Department, conducted a search, which was claimed by the petitioners to be a roving one, from 4 p.m. on 2nd August, 1966 to 6 p.m. on the next day, at the residence of the petitioners, as well as their business place as mentioned above. The petitioners have alleged further that those officers did not find anything at their residence for seizure and in course of search at the business place as mentioned above and they seized several jewellerys fitted with precious stones, which were displayed at the show-cause and Indian currency notes worth Rs. 63,250/-, apart from seizing certain stones and jewellerys from a portfolio bag kept at the Gaddi, for inspection and approval by the jewellery experts. It would appear that in consequence of such search and seizure, the petitioners were arrested and produced before the learned Chief Metropolitan Magistrate, Calcutta, and were released on bail.

3. Thereafter, on or about 3rd October, 1966, the petitioners, by their letters as in, Annexure "B" to the petition and which were addressed to the Assistant Collector, Excise & Customs (Technical), West Bengal, stated in details, the relevant informations in respect of the concerned goods, which according to them, were seized illegally from their business place. It would further appear that on or about 28th January, 1967, the petitioners were informed by the Superintendent P. & T. Customs, West Bengal that the Collector of Customs, West Bengal, was pleased to extend three months time from 3rd February, 1977, for issuance of show cause in the matter. Thus, on the basis of such extension, the petitioners claimed, that the 1st date of the issue of the show cause, was 3rd May, 1967. They have further claimed that they were neither informed nor given any opportunity to oppose the extension as mentioned above and as such, there was contravention of Section 110(2) of the Customs Act, 1962 (hereinafter referred to as the said Act). Section 110 of the said Act, deals with seizure of goods, documents and things and provides that where any goods are seized under Sub-section (1) and no notice in respect thereof is given under Clause (a) of Section 124 within six months of the seizure of the goods, the goods shall be returned to the persons from whose possession they were seized. The proviso to the said Sub-section (2) further lays down that such period of six months may, on sufficient ground being shown, be extended by the Collector of Customs for a period, not exceeding six months. Such period of six months according to the petitioners had expired, within which no steps were taken in accordance with law. As such, they have stated that since no prima facie case was made out against them, the learned Additional Chief Metropolitan Magistrate was pleased to release them on bail on 15th March, 1967.

4. It has further been stated by the petitioners that they were again informed by the Superintendent concerned, that the Collector of Customs, West Bengal had again extended the time of issue show cause notice by three months from 3rd

May, 1967 i.e. time was extended to 3rd August, 1967. This extension, was also claimed by the petitioners, to have been made again, behind their back and in contravention of the provisions of Section 110(2) of the said Act. The Customs Authorities, who are Respondents herein, however on or about 29th July, 1967, issued a show cause notice to the petitioners, asking them to show-cause as to why penalty should not be imposed upon them and why, the goods and the currency notes as mentioned above and which were seized, should not be confiscated under the provisions of the said Act. The petitioners have stated that they duly replied to the said show-cause on 5th March, 1968, claiming the action as taken, to be improper, irregular, unauthorised, void, apart from being without jurisdiction and claimed that they be exonerated from the charges forthwith. It has also been stated by the petitioners that they had asked for opportunities to cross-examine the seizing and investigating officers and such prayer was refused, by the order dated 24th January, 1968 as in Annexure "E" to the petition and which was passed by the Assistant Collector concerned.

5. It was the case of the petitioners that on or about 2nd February, 1968, the Collector of Customs concerned commenced the adjudication proceedings and in such proceedings, they had adduced evidence by producing witness before the officer concerned and on 7th February, 1968, they were granted personal hearing. It was claimed that at the time of such hearing also, the petitioners duly stated or narrated their defence and prayed for the exoneration as mentioned above. That apart, it has been stated that on 12th February, 1968, the petitioners submitted a written statement of defence.

6. The Collector of Customs, Respondent No. 1, however passed an order on 18th April, 1969, confiscating ten items of the goods as mentioned in the seizure list and imposed a penalty amounting to Rs. 25,000/- on each of the petitioners and released the remaining goods on the ground of benefit of doubt. The particulars of the goods which were confiscated and those which were released on the manner as mentioned above, would appear from the records in Annexure "G" to the petition. Such order by the Collector of Customs, the petitioners have stated was received by them on 17th June, 1969 and being aggrieved by the order of imposing penalty and confiscation as mentioned above, they on or about 2nd August, 1969, preferred an appeal to the Central Board of Revenue. The petitioners have also stated that on 18th April, 1971, two years period for exercising the power of revision by the Board had expired as the order was dated 18th April, 1969 and accordingly, the suo moto power of the Board in respect of the concerned order u/s 130(1) became barred by the provisions of Section 130(2) of the said Act. Those provisions are quoted hereunder :-

Section 130(2). No decision or order passed by an officer of customs shall be received under this section by the Board of its own motion and no application for the revision of any such decision or order shall be entertained, after the expiry of two years from the date of such decision or order.

7. It was also and the further case of the petitioners that 26th April, 1973, was

the date fixed for hearing the appeal by the Board, but such date of the hearing of the appeal was cancelled and by an order Ist/6th March, 1974 as in Annexure "I" the Central Board of Excise and Customs, issued a show cause notice u/s 128(2) of the said Act, calling upon the petitioners to show cause why the Collector's order in respect of the goods which were released, should not be modified and personal penalties should not be enhanced to Rs. 50,000/- as those diamonds and jewelleryes collectively valued at Rs. 54,630/-, were not available for confiscation. Section 128 of the said Act makes provisions for appeals and Sub-section (2) thereunder lays down that the Appellate Authority may, after giving an opportunity to the appellant to be heard, if he so desired and making such further enquiry as may be necessary, pass such order as it thinks fit, confirming, modifying or annulling the decision or order appealed against, provided that an order enhancing any penalty or fine in lieu of confiscation of goods of greater value shall not be passed (a) by an Appellate Collector of Customs; (b) by the Board, unless the appellant has been given reasonable opportunity of showing cause against the proposed order and with the further proviso that where the Appellate Authority is of" opinion that any duty of customs has been short levied, no order enhancing the duty, shall be passed, unless the appellant is given notice within the time limit specified in Section 28 to show cause against the proposed order.

8. The contesting Respondents, through their affidavit-in-opposition dated 8th May, 1978, which was affirmed by Debnath Chakraborty, Assistant Collector of Customs and Central Excise (Preventive), West Bengal, Calcutta, have stated, that acting on an information, the Customs officers of Preventive and Intelligence Unit, West Bengal, Calcutta, the strength of a search order, issued by the competent authority, searched the business premises of the said firm and recovered a large number of diamonds, precious stones, gold rings and jewelleryes fitted with precious stones, nail cutters of foreign origin and also a cash amount of Rs. 63,250/- in Indian currency notes. It has been stated that on the same day, the residence of the petitioners were also searched, but nothing incriminating was found. It has further been stated that on demand by the officers concerned, the petitioners could not produce any evidence, documentary or otherwise, in support of the licit importation, acquisition, possession of the valuable materials as mentioned hereinbefore and which were so recovered. It has further been stated that the petitioners could not give any satisfactory reply for the possession of the Indian currency notes as recovered. It was also the case of the said deponent that Kantilal Shah, petitioner No. 1, confessed in his statement dated 3rd August, 1966, that the said Firm was dealing in the goods and precious stones as mentioned above, both of Indian and foreign origin. The deponent has also stated that the diamonds, precious stones along with the jewelleryes fitted with such stones as in inventory list, were then seized by the Customs authorities, on reasonable belief that they were illicitly imported from foreign territory, in contravention of the provisions of the said Act and others statutes and were liable to be confiscated. The deponent has further stated that

the Indian currency notes, thus recovered, were also seized on reasonable belief that they were the sale proceeds of the illicitly imported diamonds and other precious stones. The deponent has further stated about the arrest of the petitioners u/s 104 of the said Act and he has admitted the fact of the subsequent release of the petitioners on bail by the learned Chief Metropolitan Magistrate, Calcutta.

9. It was also stated by the said deponent that the precious stones were duly appraised by the competent authority and then, further enquiries were initiated in respect of the seized goods and currency notes. It has also been stated that to complete the enquiry, much time was lost and such the Collector concerned had to extend the time twice, for issuance of the show-cause notice. The deponent has stated that after two extensions, on 29th July, 1967, show cause notices were issued and to which the petitioners duly replied. That apart, it has been stated that petitioners were given personal hearing on their exceptions as taken. The deponent has further stated that the order as made by the Collector of Customs, was u/s 111(d) of the said Act. Section 111 deals with confiscation of improperly imported goods and sub-clause (d) thereunder, lays down that any goods which are imported or attempted to be imported or are, brought within the Indian customs waters for the purpose of being imported contrary to any prohibition imposed by or under the said Act of any other law for the time being in force, shall be liable to confiscation. The order as made was sought to be supported in terms of the provisions of the statute as mentioned above, apart from u/s 112 of the said Act, which prescribed penalty for improper importation of goods.

10. The deponent has further stated that the said Firm, by their letter dated 6th June, 1962, requested the Assistant Collector concerned to adjust Rs. 50,000/- as personal penalty imposed upon the two petitioners, out of the amount of Rs. 63,250/- which had been ordered to be released to the party by the Collector concerned, by his letter dated 18th April, 1969 and such adjustment was made by the Assistant Collector of Customs, in respect of the personal penalty against the petitioners in this Rule. It has also been stated that being aggrieved by such order, the petitioners separately moved the Central Board of Excise and Customs on 20th August, 1969 and the Board, after examination of the records of the concerned adjudication proceedings, for the purpose of satisfying themselves as to the legality or propriety of the order, felt that in realising certain items as seized from the possession and custody of the said Firm, there was perhaps some lacunae and error with the adjudicating authority and on us which lay on the owners and/or proprietors of the said Firm, was not fully discharged for burden of proof in certain cases. The deponent has further stated that the necessity of initiating a proceeding was also duly considered for the purpose of obtaining satisfaction and/or for properly evaluating the submissions of the petitioners and as such, the concerned show cause notice was issued to the petitioners, in due exercise of powers, authority, competence and jurisdiction. It has been alleged that instead of replying to such show-cause notice, the

petitioners have moved and obtained this Rule with corresponding interim order.

11. The writ petition has been claimed by the deponent to be premature and not maintainable as the proceedings are still pending before the Appellate Authority. In any view of the matter, the act or action as taken, were claimed by the. said deponent, to be authorised, proper, valid and legal and he has stated that there has been no illegality or any irregularity, which would require any interference by this court at this stage.

12. The affidavit-in-reply to the above opposition was dated 22nd May, 1976 and was filed, through the petitioner No. 1. The material allegations in the affidavit-in-opposition as mentioned above, have been denied and the deponent has stated that there was no licit importation of any foreign goods or articles, for the contravention whereof, the proceedings as sought to be initiated, could be maintained against the petitioners. In any event, it was claimed that the authorities concerned were wrong and they had acted illegally and with material irregularity, in initiating the concerned proceedings and it was further claimed that since such proceedings were absolutely without jurisdiction and unauthorised, the writ petition at the stage when the same was moved, was maintainable.

13. Mr. Ghosh, appearing in support of the Rule, sought to impeach the impugned action, firstly on the ground of irregularity of extension of time as the same was done without notice on both the occasions as mentioned above. He, secondly contended that the impugned search and the ultimate seizure of the currency notes at least, was bad, as there was no authorisation for the same and thirdly, it was claimed that the entire action was bad, irregular and unauthorised, as the goods in question and which were seized, were not contraband goods and so also they could not be confiscated.

14. The show cause notice which is at Annexure-I to the petition, was dated 6th March, 1974 and on a reference to the same, Mr. Ghosh, apart from the above, claimed that the show cause notice or the terms of the same and the grounds for initiation of proceedings were also bad, as under the camouflage or garb of Section 128 of the said Act, the Respondents were actually trying to proceed u/s 130 and that too, even after the proceedings became barred by time. In fact, the submissions as mentioned hereinbefore, were sought to be made by Mr. Ghosh, for supplementing his submissions on the first ground of attack. It was also claimed by Mr. Ghosh that as the appeal as preferred, was only in respect of 10 items and the scope of the concerned appeal was only in respect of those items and not in respect of the goods or items which were released, so the initiation of any proceeding which would travel beyond such scope of the appeal and more particularly in respect of the items which were directed to be released, was unauthorised, void, illegal and irregular. In fact, such was his submissions amongst others, on the question of invalidity of the notice and it was also and specifically contended by Mr. Ghosh that the jurisdiction in the instant case, was confined to the items of goods as seized and which were under appeal. It was also contended that as the Collector's order was made on or about 18th April,

1969, so that required period of 2 years even u/s 130 of the said Act, had expired on or about 18th April, 1971 and as such, the purported initiation, as sought to be made on 1/6th March, 1974 was also incompetent. On the question of invalidity of the notices, Mr. Ghosh, apart from the above, also submitted that even if the order as made, was one u/s 128(2) of the said Act, the same was irregular, unauthorised and bad, as there was no jurisdiction to issue the concerned notice without complying with first stage viz. without a hearing. On construction of Section 128 of the said Act, Mr. Ghosh contended that the said Section, once in Sub-section (2) and thereafter, in sub-clause (b) of the first proviso to the said Sub-section, contemplates hearing. It was claimed that the first stage of hearing is contemplated in Section 128(2) and the second one at the stage of Clause (b) to the first proviso to the said Section 128(2). Mr. Ghosh claimed further that the hearing as contemplated u/s 128(2) should be, as mentioned above, in respect of the scope of the appeal and not outside the same viz. 10 items as involved in the concerned appeal in this case and as since the initiation as made, related to items outside the scope of the appeal or in respect of the goods as released, so, such initiation was bad, void and without jurisdiction. Mr. Ghosh of course claimed that under the proviso as mentioned above, proceedings for enhancing the penalty or fine in lieu of confiscation or confiscating goods could be made. But he claimed that such steps should also have been taken after opportunities as mentioned in Clause (b) to the first proviso to Section 128(2), and as no such opportunity was given, the action as taken, was also bad, improper and unauthorised. In view of the above and on the basis of his submissions, that no opportunity was afforded at any stage, Mr. Ghosh claimed the initiation, as made, to be void.

15. In support of his submissions on the illegality and irregularity of the proceedings as initiated, on extension of time, and that too without any notice, Mr. Ghosh referred to the provisions of Section 110(2) of the said Act and contended specifically that the retention of documents and the goods as seized being void and being in violation of provisions of the said Act and also principles of natural justice, the confiscation of goods, so illegally retained, was liable to be set aside. To supplement his arguments, Mr. Ghosh, firstly referred to the determinations in the case of Charandas Malhotra Vs. Assistant Collector of Customs and Superintendent Preventive Service and Others, . In that case, on construction and consideration of the proviso to Section 110(2) and Section 124, which is to the following effect :-

124. Issue of show cause notice before confiscation of goods, etc.-No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person-

(a) is given a notice in writing informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty ;

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of

confiscation or imposition of penalty mentioned therein; and

(c) is given a reasonable opportunity of being heard in the matter ;

Provided that the notice referred to in Clause (a) and the representation referred to in Clause (b) may, at the request of the person concerned be oral, it has been observed that under the proviso as mentioned above, time can be extended for as many times as is found necessary, provided that in each case, sufficient cause for such extension was shown and overall period did not exceed another six months i.e. upto one year from the date of seizure of the goods. It has further been observed in that case that on expiry of six months from the date of seizure of goods of extended time under the proviso as mentioned above, the right for return of goods vest in the person from whose possession, they were seized and that right, can only be taken away on "sufficient cause" and the officer concerned, cannot decide as to whether "sufficient cause" has been shown, unless he hears the party effected. The manner of hearing which is required to be given has also been indicated; apart from holding that the object of notice u/s 124, is to give the person affected, an opportunity to prove legal importation and not to disprove a conclusion already arrived at by the authorities. The next case on which reliance was placed on behalf of the petitioners, was the one which was made in appeal by the Supreme Court against the above mentioned Calcutta Judgment and in the case of Assistant Collector of Customs Vs. Charan Das Malhotra, , wherein it has been observed that the power under the Proviso to Section 110(2) is quasi-judicial and at any rate one requiring a judicial approach. While the power of seizure under Sub-section (1) of Section 110 can be exercised on basis of reasonable belief on part of the concerned officer the power of extending the period to give notice u/s 124(a) is to be exercised only on "sufficient cause being shown." This expression envisages at least some sort of inquiry on facts placed before the authority and determination by him of those facts. Extension order is not to be passed mechanically. The power under Sub-section (1) cannot be equated with the power under the provision to Sub-section (2) of Section 110, and the Calcutta decision was upheld. Thereafter, Mr. Ghosh made reference to the observations in the case of Collector of Customs and Central Excise, West Bengal and Others Vs. Hindustan Motors Ltd. and Another, , wherein it has been observed that when goods seized u/s 110 are proposed to be confiscated, a notice to the owner of goods showing grounds for the confiscation, has to be given within six months. This period, cannot be extended by the Customs Authorities by an ex-parte order for, the power under the proviso to Section 110(2) is quasi-judicial or at any rate one requiring a judicial approach. Consequently, an opportunity of being heard has to be given before orders for extension of that period are made. Apart from the above cases, reference was also made by Mr. Ghosh, to the determinations in the case of Mohanlal Devdanbhai Choksey and Others Vs. M.P. Mondkar and Others, . In that case, it has been observed that failure to issue show cause notice within the prescribed time would not be a fetter upon the power to initiate confiscation proceedings.

16. Mr. Roy Chowdhury, on a reference to the pleadings and with reference to the prayers and more particularly to prayers (a) and (b), which were as under :-

(a) A Writ of and/or in the nature of Certiorari directing the respondents to remit forthwith all papers and documents relating to and/or connected with the said show cause notice dated 29th July, 1967, order of the Collector dated 4th April, 1969 and the show cause notice dated 1st/6th March, 1974 issued by the Respondent No. 1 and 2 including the said orders/show cause notice and to show cause why the said order and/or notice be not set aside and/or washed so that the conscionable justice be done.

(b) A Writ and/or in the nature of Mandamus be issued directing the Respondents No. 1 and 2 to show cause as to why the said respondents be or not commanded and/or directed to release forthwith the said articles being items Nos. 2, 3, 4, 10, 11, 15, 16, 18, 38 and 39 of Seizure List, claimed either of them to be not maintainable and misconceived and that too in view of the admitted fact that the appeal as preferred, was still pending.

He on a reference to the observations in the case of Radha Kissen More and Others Vs. E. Rajaram Rao and Another, , claimed that because of the pendency of the concerned appeal, no interference was either possible or permissible as required. In that case, it has been laid down that when there is an alternative remedy, the existence of such remedy is not an absolute bar to the entertainment of an application under Article 226, but for difference in the case when the party moving the court under Article 226 has already availed himself of the alternative remedy and whether or not he is entitled to any relief in that claim has not yet been decided. The case under consideration was under, the provisions of Sea Customs Act and it has also been observed that, where a party has preferred an appeal u/s 188, Sea Customs Act, against the order of the Collector of Customs imposing penalty under the Sea Customs Act and that appeal is pending, the party cannot be allowed to move the High Court under Article 226 of the Constitution of India. While on the question of interference by this court in the facts of this case, Mr. Roy Chowdhury, further referred to the determinations in the case of Sheo Nath Singh Vs. Appellate Assistant Commissioner of Income Tax (Central Range) and Others, , which was a case under the provisions of Income Tax Act, 1922 and wherein, it has been observed that mere existence of alternative remedy may not bar the reliefs of Certiorari and Prohibition, where questions of initial lack of jurisdiction or of violation or rules of natural justice are involved. However, cases where, in addition to the existence of another remedy, the party also . .pursues such remedy have to be distinguished and relief under Article 226 in such cases must be refused, apart from relying on the observations in the case of K.K. Shrivastava and Others Vs. Bhupendra Kumar Jain and Others, , to the effect that where there is an appropriate or equally efficacious remedy, the Court should keep its hands off, on his submissions that this writ proceedings should not be entertained or any interference made.

17. Mr. Roy Chowdhury, then referred to the impugned notice in Annexure-I and also to Section 123 of the said Act, which deals with burden of proof in certain cases and provides that (I) where any goods to which this section applies 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 on the person whose possession the goods were seized.

(2) This section shall apply to gold, diamonds, manufactures of gold or diamonds, watches, and any other class of goods which the Central Government may by notification in the official gazette specify, and claimed that since diamonds were involved in this case, so Section 123 had application and as such the relevant and necessary initiation was due and proper. He also claimed that the provisions in Section 128(2) of the said Act, also includes the power to enhance in all cases and such power was not restricted only to the item involved in the concerned appeal. Mr. Roy Chowdhury further claimed that the impugned initiation, to be due, proper and legal u/s 130 and 131 if not u/s 128. He of course, in his usual fairness, stated that if confiscation was improper, void, irregular and without jurisdiction and not duly done or continued u/s 110 of the said Act, under the determinations of Charandas case (Supra), the petitioners would have the right to claim return of the goods or get them back. But, such challenge was not open to the petitioners as they have admittedly taken resort to the alternative remedy, and as such also, no interference, as indicated above, should be made in this jurisdiction now. Mr. Roy Chowdhury further claimed that the goods in question could be lawfully and in fact they were so and duly confiscated under the provisions of Sections 110 and 111(d) of the said Act. He also referred to the determinations in the case of Mohanlal Devandabhai Choksey and Ors. v. M.P. Mondker and Ors. (Supra). Apart from the initial findings in that case, the particulars, whereof have been mentioned hereinbefore, it has also been observed that object underlying Section 110 is not initiation of proceedings for confiscation of goods or for imposition of personal penalty, but is to indicate, what will happen if such initiation has not taken place within the time prescribed by the section itself. The consequences of non-initiation of proceedings within the prescribed time, are that the goods shall be returned to the person from whose possession they were seized. All the provisions of Chapter-XIII are steps to facilitate investigation machinery and failure to issue show cause under Clause. (a) and Section 124, within the prescribed time, will only result in an obligation on the part of the Customs Authorities to return the goods to the person from whose possession they were seized. There is nothing in the language of Section 110 to indicate that a fetter or limitation is imposed upon the power of competent authority to initiate proceedings u/s 124. On the other hand, Section 124 is contained in Ch. XIV, which contains substantive provisions relating to confiscation of goods etc. and imposition of penalty. u/s 124 issue of a show cause notice prior to passing an order of confiscation or imposition of personal penalty is mandatory, but the language of Section 124 is clear and precise and no restriction or limitation or even a fetter is imposed as regards the time when

proceedings may be initiated by issue of a show cause notice. Section 124 prescribed the conditions precedent which are to be fulfilled by the Authority before an order of confiscation of goods or an order imposing any penalty can be passed against any person. These conditions precedent are laid down in Cls. (a), (b) and (c) of Section 124. None of the three conditions precedent even suggest that there is a limitation on the exercise of the power either as regards the time or existence of seizure. On a plain reading of Section 124 it will be open to the Competent officer to pass an order of confiscation of goods or imposing any penalty without seizing any goods or after returning the goods under the proviso to Section 110(2), for failure to initiate proceedings within the prescribed time. An investigation machinery cannot be equated with a limitation upon a substantive power contained in Section 124 more so, when that only consequence that prescribed time is laid down in Section 110(2), namely return of goods to the person from whose possession they were seized. It was claimed by the answering Respondents that the goods in this case were duly and properly confiscated. On the admitted facts, that certain diamonds belonging to others and not to the petitioners were seized, Mr. Roy Chowdhury also contended that the petition would not be maintainable, as those owners have not moved this court. It was claimed that the claimants were not the owners of the seized articles. Mr. Roy Chowdhury further contended that the notice by the Board was not without jurisdiction and the time limit for initiation as mentioned hereinbefore, would be in respect of proceedings under Sections 130 and 131 and not in respect of proceedings u/s 128 of the said Act. He further claimed that the pendency of the concerned appeal, automatically attracted the provisions of Section 128(2) of the said Act.

18. On the question of maintainability of this proceedings and his submissions as mentioned hereinbefore, Mr. Roy Chowdhury placed reliance on the determinations in the case of Geep Flash Light Industries Ltd. v. Union of India and Ors A.I.R. 1977 S.C. 456, wherein it has been observed that a prayer against prayers of Writ or Certiorari and Mandamus were misconceived on the facts of this case as there was no order either judicial/quasi-judicial which could attract Certiorari. No Mandamus could go because there was nothing which were required to be done or . . . under the Act. The issue of the notice required the parties to represent their case. There was no scope for Mandamus to do any duty or act under the statute. A Writ or Prohibition could not be issued for the obvious reasons that the Central Government had jurisdiction to revise. The above determinations were made in a case, where the question arose, whether a notice u/s 131(3) of the said Act, for revision of order of refund was due, valid and proper. Then, Mr. Roy Chowdhury made a reference to the determinations in the case of A. Faqir Chand Vs. C.P.W.D. Work Charged Staff Consumers Co-operative Society and Others, . In that case, it has been observed that when cause of a petitioner having taken the dispute before the Arbitrator under Bombay Co-operative Societies Act he could not challenge the validity of the extension of the statute to Delhi till the award has become final, the petitioner could not be

blamed for not having filed the writ petition expeditiously.

19. In that case it has also been observed, that where the pendency of a proceeding before the Registrar under Bombay Co-operative Societies Act, the Writ fail to take the point about the construction of a Rule framed under the Act, that point could not be allowed to be urged before High Court by way of a writ petition for the first time, when construction of the Rule was a matter within the jurisdiction of the Registrar. Apart from holding that where the reference of a dispute u/s 54 of the Bombay Co-operative Societies Act was only regarding a principal sum against the Society and there was no dispute regarding cost or interest in absence of any claim as laid down by the Registrar under Rule 37 of the Rule framed under the Act. The award of" cost and interest was an error of law apparent on the face of the record, to be corrected by the High Court in exercise of his Writ Jurisdiction.

20. In answer to the submissions of the Respondents as mentioned hereinbefore, the learned Advocate for the petitioners claimed and contended that the facts and determinations in the cases of K.K. Srivastaran etc. v. Bhupendra Kumar Jain and Ors. (Supra), Radha Kissan More and Ors. v. E. Rajaram Rao & (Supra) and Geep Flash Light Industries Ltd. v. Union of India and Ors. (Supra), have no application in the facts and circumstances of the instant case and more particularly when, those determinations were made on different issues and facts. Such was also the submissions made in respect of the determinations in the case of Faquir Chand Sharma v. C.P.W.D. Work-Charged Staff Consumers Co-operative Societies Ltd. and Ors. (Supra). It was further claimed, that apart from the cases cited at the Bar, in view of the determinations in the case of Uma Rajeswarrao Patra v. Union of India and Ors 1977 (2) C.L J. 266, since there were no due and appropriate compliance with the provisions of or under Sections 110 and 124 of the said Act, the petitioners were and still are entitled to return of the goods as seized. The observations in the case as mentioned above were to the following effect :-

21. Section 110(2) of the Customs Act has been incorporated in the 1962 Act. No such provision was there in the Old Sea Customs Act of 1878. Upon a reasonable belief that certain goods are liable to confiscation, the Customs officer is empowered to seize such goods from any person. The power of seizure founded on the mere reasonable belief is however an extraordinary power. Six months time has been provided to complete the enquiry and to collect materials in support of the officer's reasonable belief that the seized goods are liable to confiscation. If within the said period, prima facie evidence for confiscation is not available, and at the same time, if the officer concerned thinks that further investigation into the matter is necessary, the Collector of Customs, an officer superior in rank, under proviso to Section 110, may extend a further period of six months. But the power under the proviso is to be exercised quasi-judicially.

22. The appropriate Customs officer may exercise his power of seizure u/s 110(2) on the basis of his reasonable belief, but the power of granting extension

of the period for the purpose of giving notice u/s 124(4) is to be exercised only "on sufficient grounds to be shown". That expression envisages some sort of an enquiry on facts, to be placed before the authority concerned, for determination on such facts. The order for extension of time is not to be made mechanically. The power under Sub-section (1) can't be equated with the power under the proviso to Sub-section (2) of Section 110 of the Act.

23. The obvious object behind Section 110(2) of the Act is that a citizen should not be deprived of his right to property indefinitely, upon the mere reasonable belief of a Customs Officer that his property might be confiscated under the Customs Act. That is why a period of six months is prescribed by the legislature to enable the authority concerned to make out a prima facie case for confiscation of the goods already seized. In other words, if within the said period of six months, the officer concerned fails to make out a prima facie case in support of his reasonable belief that the goods are liable to confiscation, the goods seized, should be returned to the person from whose custody they were seized.

24. The power of confiscation is not restricted only to the goods seized. In Sections 111, 112 and 124 the words "any goods" and "any person" are used. These words cannot be given a restricted meaning. Moreover, an order of confiscation rests on the theory of "offending goods", where goods have been unlawfully imported, those goods become the "offenders" and they are liable to be confiscated without any obligation of finding out the actual importer. But, for the purpose of confiscation of goods, physical existence of the goods is necessary. When the seized goods are returned to the owner in that case, the returned goods lose the character of the "offending goods" and as such those goods could not be confiscated. It is true that Section 110 and Section 124 are two independent Sections and the items limits as mentioned in Section 110(2) does not control the issuance of the notice u/s 124. But still then, there is a connecting link between the notice of confiscation of the goods and the retention of the seized goods.

25. In the instant case, it appears that no notice u/s 124 of the Act was issued within six months from the date when the goods were seized. The Collector of Customs also did not extend the six months time after affording the owner of the goods a reasonable opportunity of being heard. Undoubtedly where seized goods are to be retained, the authority concerned must take recourse to the two conditions mentioned in Section 110 of the Act. The two conditions are : (a) when notice u/s 124 is given within the period of six months from the date of seizure of the goods ; (b) when the Collector after hearing the owner of the goods seized extends the said period of six months. Apart from these two conditions, there is no other provisions in the Act which empowers the Customs to retain the seized goods. The provisions of Section 110(2) are mandatory-the goods "shall" be returned to the person from whose possession they were seized. Where under the law the goods "shall be returned", such goods retained unlawfully, cannot be confiscated under the provisions of the Act. The goods

which ought to have been returned under the law were retained by the customs in the instant case, contravening the mandatory provisions of Section 110(2) of the Act. It is well settled that a statutory authority exercising statutory powers cannot act contrary to law. There cannot be any decision in adjudication proceedings under the Act, if any inherent nullity lies at the very root of the said proceedings. A quasi-judicial authority in exercising quasi judicial powers cannot take advantage of its own illegality. The whole object of Section 110(2) of the Act becomes nugatory and meaningless if by contravening the mandatory provisions of the Statute, the Collector of Customs confiscates the goods seized which he has no right to retain and must have been returned to the owner long before.

26. That being the position in law, the impugned order of confiscation made by the Collector of Central Excise & Customs, the appellate order made by the Central Board of Excise and Customs and the revisional order made by the Secretary to the Government of India u/s 131 of the Customs Act were quashed by a Writ of Certiorari. It was further claimed by the petitioners that on the basis or the framing of the prayers in the petition, the same would be maintainable at this stage and even inspite of the fact that the petitioners have taken resort to the other remedy under the statute. Such submissions were made, as it was claimed that the initiation as made or steps taken on the basis thereof, were void abinitio, being absolutely without jurisdiction or in excess of the same. It was also claimed and that too on the basis of the determinations in the case of East India Commercial Company Ltd., Calcutta and Am. v. Collector of Customs, Calcutta A I.R. 1962 S.C. 1898, that since the initiation in the instant case was violently contrary to the requirements of the statute, so the proceedings as continued on the basis of such initiation, was unauthorized and not consistent with the said Act and as such irregular continuation of the proceedings, interfered with or affected the rights of the petitioners, the application as made, was maintainable, even inspite of the availability of alternative or other remedies. In the case of Union of India (UOI) Vs. Tarachand Gupta and Bros, , which was a determination under the provisions of Sea Customs Act, 1878. It has been observed that the decision or order as mentioned in Section 188 of that Act, would mean a real and not purported determinations by taking into considerations . . . which the officers had no right to do. On a reference to such determinations, it was also contended on behalf of the petitioners that since, because of the irregularity in the initiation of the proceeding in the instant case, the officer concerned had no jurisdiction or authority to continue with the proceedings, so the petitioners had the right to move this Court, even without availing of the alternative remedy in the statute or even after purporting the . . . of the same.

27. In terms of the determinations in the case of The Assistant Collector of Customs and Superintendent, Preventive Service Customs, Calcutta and Ors. v. Charan Das Malhotra (Supra), which has upheld the . views of this Court in the case of Charandas Malhotra v. Assistant Collector of Customs etc. and Ors. (Supra), there is no doubt that under the proviso to Section 110(2), time can be

extended for as many times as is deemed to be necessary, provided that in such case, sufficient and necessary cause for such extension was shown and established and further overall period did not exceed another six months i.e. extension can be given upto one year from the date of seizure of the goods and on the expiry of six months from the date seizure or of the time as extended, there would be right for the return of the goods to the persons, from whose possession, the seizure was made and such right, can only be taken away on "sufficient cause" and such cause or the existence of the same, cannot be decided without due hearing and opportunities. It has also been made clear that the object u/s 124 of the said Act is to give the person affected, an opportunity to prove and establish legal importation of the concerned goods and not to disprove the conclusion, as arrived at by the authorities. The determinations as mentioned above also indicate and establish that the power under the proviso to Section 110(2) of the said Act, is quasi-judicial or at least, one requiring judicial approach. The expression "sufficient cause being shown", means at least some sort of enquiry on facts placed by the authorities and determination of the same by them duly and not mechanically. The Calcutta view and the decision as mentioned above, which was affirmed the Supreme Court decision as above has also been referred to in the cases *Re : Pradeep and Ors. v. Collector of Customs and Ors.*, 76 C.W.N. 746, *Collector of Customs and Ors. v. James David Crighton and Ors.*, 80 C.W.N. 485 and followed by the Bombay High Court in the case of *Mohanlal Devandanbhai Choksey and Ors. v. M.P. Mondkar and Ors.* (Supra), amongst other cases of other High Courts.

28. Apart from the above citations, the determinations in the case of *Collector of Customs & Central Excise, West Bengal and Ors. v. Hindustan Motors Ltd.* (Supra), that when goods are seized u/s 110 of the said Act or steps are proposed for that or for confiscation a notice to the owner of such goods, has to be given within six months and such period cannot be extended by the authorities concerned by an ex-parte order which action postulates, a hearing or opportunity to the owner of the concerned goods, can be profitably applied in the facts of this case and that too on the fair stand taken by Mr. Roy Chowdhury, that if confiscation was improper, void, irregular and without jurisdiction and not duly done or continued u/s 110 of the said Act and if his submissions on other points do not succeed, then the petitioner would be entitled to the return of the goods. The dates relevant in this case are 2nd/3rd August, 1966, when the search was conducted and the seizure was made. Then, after the letter dated 8th October, 1966 from the petitioner, on 28th January, 1967, first extension for three months from 3rd February, 1967 was obtained and as such, according to the petitioner's such extension, even though the same was obtained without opportunities to them, was to expire on 3rd May, 1967. Then came the second extension to 3rd August, 1967, which was also, claimed by the petitioner to have obtained behind their back and without any notice or opportunities to them. The petitioners were asked to show cause, on the question of imposition of penalty on 29th July, 1967 and they had filed their reply to the same on 5th January, 1968, whereupon the

adjudication was commenced on 2nd February, 1968 and after personal hearing, on 18th August, 1969, the order of penalty and confiscation of 10 items as indicated hereinbefore was passed. That order was received by the petitioners on 17th June, 1969. The appeal by the petitioners was preferred on 2nd August, 1969 and according to the petitioners, two years limitation, in terms of Section 130 of the said Act, had expired on 18th April, 1971 taking the date of communication of the order dated 17th June, to the petitioners on 18th April, 1969. The date of hearing of the appeal which was fixed on 26th April, 1973 was shifted and on 16th March, 1974, show cause u/s 128 was passed for modification and enhancement of penalties.

29. Now, let us see, if the petitioners would be entitled to the benefits of those determinations in view of their admitted participation in the proceedings, which was claimed by Mr. Roy Chowdhury, to be submission to the jurisdiction and if the pendency of the concerned appeal, as indicated hereinbefore, would be a bar to the interference by this court in this jurisdiction and that too on the basis of the determination as cited at the Bar, the particulars whereof have been mentioned hereinbefore. Ordinarily such submissions to jurisdiction and pendency of the Appeal, which was the statutory one and as availed of, would be a bar. But, there may be exceptional circumstances amongst others viz. that the proceeding was without jurisdiction and against principles of natural justice, when even in spite of such submissions to jurisdiction or proceedings and pendency of the statutory appeal, the High Court should not be denuded of its power to interfere. Such being the position, I think that the pendency of the appeal or submission to the jurisdiction would not debar the petitioners in maintaining this proceeding, in view of the provisions and position in law as indicated above and more particularly when there ", was no due compliance with such law, which has made the proceedings void ab initio and without jurisdiction. Thus, the submissions of Mr. Roy Chowdhury, on the preliminary points of maintainability of the petition, should fail and the cases as cited by him and as indicated hereinbefore, would in my view, be of no avail and assistance and really, they are distinguishable.

30. The expression "any decision or order" as in Section 128 of the said Act, are of, wide amplitude and include all orders or decisions passed under the said Act. The authorities, deciding the Appeal, as indicated hereinbefore, function as quasi-judicial authorities in the matter of disposing the Appeals. It is also true that Sections 128, 130 and 137 form a complete machinery for obtaining appropriate and necessary reliefs. The availability of appropriate remedy, as indicated hereinbefore, under Article 226 of the Constitution of India, would be available in appropriate cases and under special circumstances.

31. Section 130 of the said Act has replaced Section 180A of the Sea Customs Act, 1878, with an amendment which categorically provides that the time limit laid down in Section 28 of the said Act, for issuing notice of short levy, etc. will apply even where an order claiming short levy is made in revision. Section 130

confers power of revision on the Board and postulates that the Board may of its own motion or on the application of the person aggrieved, call for and examine the records of any proceedings in which a customs officer has made any decision or passed an order under the said Act (not being an order passed in Appeal u/s 128 of the said Act), for the purpose of satisfying itself to the legality, propriety or otherwise of any such decision or order and may pass such order thereon, as he thinks fit. In terms of the first proviso to the said section, no order, enhancing a penalty or fine in lieu of confiscation or confiscation of goods of greater value, shall be passed, unless the person affected by such order has been given a reasonable opportunity of showing cause against such proposed action. Again, in terms of the second proviso, when the Board is of the opinion that any Customs duty has not been levied, or has been short levied, no order levying or enhancing the duty, shall be made, unless the person affected by such order, is given notice or show cause against the proposed action, within the time limit as specified in Section 21 and Section 139(2) lays down that no decision or order passed by a Customs Officer shall be revised by the Board of its own motion and no application for revision of any such decision or order shall be entertained after the expiry of two years from the date of the concerned decision or order.

32. The continuation of the proceeding in this case, was really violently contrary to the requirements of the statute, and consequently, the proceedings as contained on such initiation, cannot continue. Such initiation, as made in this case, being thus void ab initio and absolutely without jurisdiction or in excess of the same, the same, in my view, should not have been continued.

33. The above being the position, there is no other way but to hold the submissions of Mr. Ghosh, to be of substance and to make the Rule absolute, and I order accordingly. The Rule is thus made absolute. There will be no order as to costs.

34. For the view as expressed by me, I kept it on record, that the other points as mentioned hereinbefore, are not required to be decided and I have not gone into the merits of them.