
(1974) 04 MAD CK 0040
In the Madras High Court

Misrimal Hansraj

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 11-04-1974

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 517
Customs Act, 1962 — Section 135(b)(ii)

Citation : (1975) 1 MLJ 188

Hon'ble Judges : N. Krishnaswamy Reddy, J;N. Krishnaswami Reddy, J

Bench : Division Bench

Judgement

N. Krishnaswamy Reddy, J.—The appellant Misrimal Hansraj was convicted u/s 135 (b)(ii) of the Customs Act (hereinafter called " the Act") and sentenced to pay a fine of Rs. 500 by the Chief Presidency Magistrate, Madras.

2. In respect of the disposal of the alleged smuggled watches (M.O. 1 series), no separate order was passed as, in the opinion of the learned Chief Presidency Magistrate, they have been already confiscated to the State by the Customs Authorities.

3. The appellant is running a business in watches and other fancy goods in the premises at No. 97, Narayana Mudali Lane, George Town, Madras, under the name and style of Messrs. Sha Manmal Misrimal, a partnership firm consisting of the appellant and his two brothers.

4. On 19th December, 1968, P.W. 1 J Rama Rao, Preventive Officer, attached to the Customs House, Madras, searched the shop of the appellant in pursuance of a search warrant issued by the Assistant Collector of Customs and recovered from the shop, 221 wrist watches, 27 fountain pens and 8 ball point pens. All of them were brand new and were of foreign origin. Of 221 wrist watches, 18 watches were kept in a paper packet under a chest of drawers attached to the showcase. Another tin containing 2 3 watches was found underneath a steel almirah in an adjoining room. All other watches were in the show-cases in the shop. The appellant did not produce the documents to prove that he acquired the

watches lawfully. But, however, it is the case of the appellant that he told the Customs authorities that he would produce the vouchers, but they asked him to produce them later at the Customs Office. P.W. 1 seized all those articles in the reasonable belief that they were smuggled ones. The details of the seized items were in-corporated in the Annexure to Exhibit P-2, the mahazar for seizure, and the copy of Exhibit P-2 was served on the appellant. The appellant does not dispute the seizure of the watches and other articles detailed in Exhibit P-2.

5. After the search of the premises at Narayana Mudali Lane, the house of the appellant at No. 51, Strotten Muthiah Mudali Street, Madras, was also searched. Leather and metal watch straps were seized during that search and they were subsequently released to the appellant as they were not, in the opinion of the Customs Officers, goods liable for confiscation.

6. P.W. 1 recorded a statement (Exhibit P-3) from the appellant. In Exhibit P-3, the appellant admitted about the seizure of the watches and other articles and stated that he was not able to produce any documents readily for the watches, fountain pens and ball point pens seized by the Customs authorities. In respect of the recovery of one brown paper packet containing watches and one tin containing watches, kept underneath a cup-board in the back-room of the shop, the appellant stated that he did not know as to how the watches came to be there and further stated therein that he was new to the business, that his elder brother Manmal used to look after the business completely and that after his death, his other brother Chunilal was looking after the shop.

7. The appellant stated that Exhibit P-3 was obtained under duress.

8. A show cause notice (Exhibit P-4) was issued to the appellant stating that the appellant was not in a position to correlate the seized watches with the relevant documents and asking him to show cause as to why 221 numbers wrist watches, 27 numbers fountain pens, 8 numbers ball point pens, 27 numbers Seiko leather watch straps and 170 numbers metal lady's watch straps, all valued at Rs. 15,796 should not be confiscated to Government u/s 111 (d) of the Act and why penalty should not be imposed on them u/s 112 of the Act.

9. The appellant questioned the method of scrutiny and correlation by the Customs authorities by his letter (Exhibit P-5), dated 24th January, 1971 in which he had given details as to how the various items of watches were acquired from the various firms at Bombay. The appellant produced several bills, vouchers, invoices etc., 34 in number (Exhibit P-6 series) with a list of those documents (Exhibit P-7) and also the stock book, day book, cash bill book, etc., and also filed a statement of correlation of the seized watches with the bills and invoices.

10. It appears that the Customs Department in Madras had requested its counterpart in Bombay by a letter, dated 22nd January, 1970 to make enquiries in respect of the bills and invoices produced by the appellant as they showed that the watches were purchased from Bombay firms. The Assistant Collector of

Customs, Bombay, by his letter, dated 17th March, 1970 (Exhibit D-7) informed the Assistant Collector of Customs, Madras, that enquiries were conducted by an officer of the Customs House in Bombay regarding the genuineness of the 34 bills and that they were able to trace Messrs. Dayabhai and Company mentioned in some of those bills, but the parties and the firms mentioned in the other bills were not traceable in the addresses given. The Assistant Collector of Customs, Bombay, enclosed a copy of the letter regarding the interconnected sales and purchases by Messrs. Dayabhai and Company along with his letter. In this context itself, it will be relevant to note that enquiries were made long after the bills were issued by the respective firms and the letter from the Assistant Collector of Customs, Bombay, would merely show that at the time when the enquiries were made, those firms were not in the addresses mentioned in the respective bills.

11. It is the case of the Customs authorities that on a scrutiny of the bills and invoices, only 34 watches were found to have been lawfully obtained while the other watches were not. The Department was not satisfied with the explanation given by the appellant in his letter < Exhibit P-5). The Department then started adjudication proceedings against the appellant and by adjudication order (Exhibit P-8) dated 30th March, 1971, which appears to have been despatched only on 2nd August, 1971, it confiscated 187 wrist watches valued at Rs. 13,600 u/s 111 (d) of the Act and levied a penalty of Rs. 10,000 u/s 112 of the Act, and by the same order, the remaining 34 numbers wrist watches, 27 numbers fountain pens, 8 numbers ball point pens, 170 numbers lady's metal watch straps and 27 numbers Seiko leather watch straps, all valued at Rs. 2,196 were released.

12. Subsequently, on 31st August, 19 71, the Additional Collector of Customs, in exercise of the powers conferred on him u/s 137 (i) of the Act, accorded sanction for the prosecution of the appellant u/s 135 (b) (ii) of the Act before the Chief Presidency Magistrate, Egmore, Madras--vide Exhibit P-9. Accordingly, a complaint was filed by the Assistant Collector of Customs against the appellant u/s 135 of the Act.

13. The learned Chief Presidency Magistrate after having taken cognizance of the complaint, framed a charge against the appellant u/s 135 (b) (ii) of the Act.

14. After the examination of P.Ws. 1 and 2, the Preventive Officers, the appellant was questioned by the learned Magistrate u/s 342, Criminal Procedure Code. The appellant admitted that the watches and other articles were seized from his shop and stated that he told the Customs Officers that he had bills with him to prove the acquisition of the watches and offered to show those bills, but the Officers had asked him to produce the bills later in the course of the enquiry. The appellant further stated that he produced the purchase documents for all the watches and the Department accepted the bills only in respect of 34 watches and rejected the other bills without justification and without making due enquiry in respect of the genuineness of the bills produced by him. The appellant also stated that he was a dealer in watches and he used to purchase watches from

the various shops at Bombay and other places and sell them in the open market and the watches which he was in possession of, to his knowledge, were not smuggled.

15. The learned Chief Presidency Magistrate observed that though the appellant had produced certain vouchers and stock account, he was not in a position to pick out the particular voucher in relation to a particular watch but only stated in general terms that those watches had been acquired under the vouchers and bills and that in the absence of such correlation, the appellant could not be deemed to have discharged the onus which lay on him u/s 123 (1) of the Act

16. It is necessary to note, in a criminal prosecution under the Customs Act, the scope and the extent of the burden of proof of the respective parties to the proceedings. In this case, we have already noted that on the complaint given by the Collector of Customs, a charge was framed u/s 135 (b) (ii) of the Act and the trial proceeded on that charge.

Section 135 of the Act is as follows:

Evasion of duty or prohibitions.--Without prejudice to any action that may be taken under this Act, if any person:

(a) is in relation to any goods in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any duty chargeable thereon or of any prohibition for the time being imposed under this Act or any other law for the time being in force with respect to such goods, or

(b) acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation u/s 111,

he shall be punishable....

17. The main ingredients of the offence u/s 135 (b) of the Act are : (i) that the goods in respect of which the offence is alleged to have been committed are liable to confiscation u/s 111 of the Act; and (ii) where the person is concerned in carrying, removing etc., of the said goods, knew or had reason to believe that such goods were liable to confiscation u/s 111.

18. Section 111 enumerates the various goods brought from a place outside India, liable to confiscation.

19. u/s 2 (39) of the Act, "smuggling " is defined as follows:

"smuggling " in relation to any goods, means any act or omission which will render such goods liable to confiscation u/s 111 or Section 113 ;

20. The Criminal Court should record a finding in respect of those two ingredients independently on the materials placed before it without reference to any finding which might have been given by the Department while exercising their powers

provided under the Act in the adjudication proceedings.

21. Section 123 of the Act, relating to the burden of proof in certain cases runs thus:

(1) 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 from 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.

Thus, under this section, when once it is proved that the goods are seized by the Customs Authorities under the Act, in the reasonable belief that they are smuggled goods, the burden of proof shifts to the appellant that such goods are not smuggled goods. Mere seizure by the Customs Authorities of certain goods does not make such goods " smuggled ", but the Officer while making such seizure must have materials for him to entertain a reasonable belief that the goods to be seized are smuggled goods and only then, the burden of proof will shift to the appellant. Whether such materials existed for entertaining such reasonable belief is, in my opinion, a matter which could be canvassed in a Criminal Court on a prosecution. If no such materials existed to infer that the seizure was made in the reasonable belief that the goods are smuggled, the burden of proof will not shift to the accused.

22. In this context, it is relevant to note the decision of the Supreme Court in *Jamatraj Kewalji Govani Vs. The State of Maharashtra*, . In that case, the Assistant Collector of Customs issued a search warrant for the search of the premises of the accused and the warrant was made out in the names of the Preventive Additional Chief Inspector and other officers. In that warrant, it was stated that there were reasons to believe that prohibited and dutiable goods liable to confiscation and documents and things useful for and relevant to the proceedings were secreted in the shop of the accused. In pursuance of the said warrant, the Officers searched the shop of the accused and seized some watches in the belief that they were smuggled. Some of the watches were returned to the accused as they were old and given for repairs. The other watches were seized and retained and thereafter, proceedings for the confiscation of the goods and for penalties were started by the Preventive Additional Chief Inspector. After the adjudication proceedings, the Additional Collector of Customs, Bombay, sanctioned prosecution u/s 135 (b) of the Act. On a complaint filed by the Customs Authorities u/s 135 (a) and (b) of the Act and in the course of the trial, the Customs Authorities led evidence only about the seizure (as is done in the instant case) by examining the officials who actually seized the goods, but did not examine the Assistant Collector who issued the warrant for the search of the premises of the accused from where those watches etc., were actually seized.

The prosecution closed its case. The accused was then examined Section 342, Criminal Procedure Code. In the written statement filed along with his examination u/s 342, Criminal Procedure Code, the accused pointed out inter alia that the prosecution had not let in evidence in respect of the reasonable belief entertained by the Assistant Collector/while issuing the warrant under which the goods were seized and contended that as there was no such proof, the burden imposed on the accused u/s 123 of the Act that the goods were not smuggled did not arise at all. In other words, it was contended that the offence u/s 135 of the Act had not been proved. The very next day after the written statement was filed, the prosecution applied to the Court u/s 540, Criminal Procedure Code, to call the Assistant Collector who had issued the search warrant with the requisite belief mentioned in the Act. It was contended by the accused in the Supreme Court that the Lower Court was wrong in having used its discretion u/s 540, Criminal Procedure Code, against the interests of the accused and that the lower Court having used such discretion had resulted in filling up the lacuna in the prosecution evidence. Repelling that argument, the Supreme Court while giving its reasons observed as follows:

...It is obvious that the just decision of the case required a finding whether they were smuggled or not....

In other words, the Supreme Court had found that for the just decision of the case, it would be necessary for the Court to give its finding whether the seizure was made by the Customs Authorities in the reasonable belief that the goods seized were smuggled.

23. Ultimately, on the materials available on record, it is the duty of the Court, irrespective of the fact whether the burden of proof is on the prosecution or on the appellant, to give a finding whether the goods seized were in fact smuggled goods, which are liable to confiscation u/s 111 of the Act. In other words, the Court has to find, independent of Section 123 of the Act, in respect of burden of proof that the watches seized in this case are smuggled watches and that the appellant had been in possession of these watches with the knowledge or in the reasonable belief that they were smuggled.

24. It is suggested by the prosecution that there were materials for the Customs Authorities for the reasonable belief that the watches which were in possession of the appellant were smuggled watches. It is the case of the prosecution that out of 221 watches seized, 18 watches were kept concealed in a brown paper packet in a chest of drawer, attached to a show case and 28 watches were kept in a tin underneath a steel almirah in an adjoining room. The appellant disputes this fact. Even assuming that these 46 watches out of 221 were kept under suspicious circumstances, it cannot be said that those watches are smuggled watches. It is significant to note that about 175 watches were kept in the show case for sale openly. Even if it is true that the appellant had kept 18 watches in one paper packet and 28 watches underneath a steel almirah, the appellant might have had his own reason to keep them separately. It may be that he had purchased those

watches from someone just some time prior and had kept them separately or he might have had other reasons or at the worst all that could be said against him is that those watches might have been suspected to be stolen property or property unlawfully obtained.

25. The learned Counsel appearing for the appellant, Mr. S. Sundar of Messrs. Aiyar and Dolia drew my attention to an unreported decision of the Supreme Court in *The State of Punjab v. Gian Chand and Ors.* C.A. No. 195 of 1962, which was a case relating to the Sea Customs Act, the relevant provisions of which are substantially similar to the provisions of this Act. It is not necessary to deal with the facts of that case in extenso excepting to point out the view taken by the Supreme Court in respect of certain circumstances placed by the prosecution against the accused to prove that the gold seized in that case was smuggled.

26. The first accused in that case was carrying on business as a saraf and he was also dealing in bullion. Four bars of melted gold with foreign markings and currency notes of the value of Rs. 9,265 were recovered from the person of the first accused ; 31 pieces of gold with foreign marks were recovered from the person of the second accused ; and certain bars of gold with foreign marks were found tied in a cloth piece around the waist of the third accused. These recoveries were made by the Police. They also recovered implements for melting and refining gold from the house of the accused. They also recovered currency notes of the value of Rs. 44,800 from three other persons in the house. Later, the accused were prosecuted u/s 167 (81) of the Sea Customs Act, which is substantially similar to Section 135 of the Act. To prove that the gold seized from the accused was smuggled and the accused were in possession of gold knowing or having reason to believe that it was smuggled, the following six instances were relied upon by the prosecution : (i) the deal was being carried on at night ; (ii) melting instruments were found in the house and two stamping instruments were recovered from the folds of respondent's clothes ; (iii) recovery of huge quantity of gold with foreign marks not proved to have been imported with the permit issued by the Reserve Bank ; (iv) seizure of currency notes from the possession of the persons who were in the house of the accused, which were supposed to be the sale proceeds of the smuggled gold ; [v] the conduct of the accused when the police raided the house ; and (vi) attempt of the first accused to hide the gold underneath the waist of the third accused and her attempt to take the gold on the upper floor of the house. It was contended by the prosecution that these circumstances led to no other inference than that the gold was smuggled and that the accused knew that to be so. The Supreme Court, after having taken into consideration the various circumstances against the accused observed:

But these circumstances do not necessarily yield to the only inference that the gold was smuggled gold, that he had knowledge that it was so and that he dealt in it or kept it knowing it to be so.

In respect of the conduct of the accused, mentioned as circumstance No. 5, the

Supreme Court held that such conduct would be consistent with the accused having been taken by surprise, and finally the Court observed as follows:

The circumstances relied upon by the trial Court and the Sessions Judge (enumerated above) may raise suspicion, even grave suspicion, but suspicion can never substitute evidence. The circumstances may suggest that the deal might have been in contraband gold but that does not mean that it was in fact so.

In this case, there is no direct evidence or even circumstantial evidence to establish that the watches in question were smuggled watches. The watches are no doubt of foreign origin. But, however, they are sold in open markets, either wholesale or retail. Even in this case, the Customs Authorities had accepted some of the bills produced by the appellant for having purchased the foreign watches from Bombay firms, and released 34 watches. Presumably, they were of the view that they were not smuggled. I am pointing out this to show that mere possession of watches of foreign origin will not be enough to hold that they are smuggled watches. Nor could it be said from such possession that a reasonable belief could be entertained that such watches are smuggled. There are other important circumstances in this case which do not indicate that the watches in possession of the appellant are smuggled watches liable to confiscation u/s 111 of the Act. The appellant is admittedly a dealer in watches, even watches of foreign origin. In the course of his business, as a dealer in watches, he purchases watches from open markets in places like Bombay, Delhi and Calcutta and sells them locally in Madras. He maintains accounts, invoices showing purchases and bills showing sales. He has produced invoices of purchases, which range from the year 1960 to 1968. These invoices were about 34 in number. The invoices contain the names of the firms and their addresses with the dates and the signatures of the representatives of the respective firms. Prima facie, all these bills appear to be genuine. As already pointed out, the Customs Authorities on making enquiries accepted the invoices of Messrs. Dayabhai and Company, Kothari Building, Bombay and released 34 watches. They have rejected the other invoices mainly on the ground that those firms could not be traced in the premises mentioned in the invoices. As already pointed out by me, most of the invoices are of the years 1962 to 1966. The enquiry was made somewhere in 1970. This enquiry does not reveal that those firms never existed at all. On the other hand, it might be that those firms which were doing their business in the addresses given in the respective invoices had shifted from those addresses to some other place. It appears that Messrs. Dayabhai and Company whose invoices had been accepted, is a big firm compared to other firms, from whom the appellant claims to have purchased the watches under the respective invoices. In those circumstances, such firms having shifted to some other place, cannot be totally eliminated, especially when the investigation by the Customs Authorities in Bombay does not disclose that those firms are fictitious or non-existent.

27. The second ground on which the invoices produced by the appellant were

rejected is that there was no correlation between the watches seized and the watches described in the several invoices. I am of the view, in the circumstances of the case, there cannot be an effective and satisfactory correlation. Some of the watches purchased by the appellant would have been sold immediately and some would have been kept without being sold for years. None can expect the dealer in watches to keep on account of the watches sold under a particular invoice of purchase, but what the dealer is concerned with is to sell the watches purchased by him under the various invoices and keep an account of purchases and sales not by invoice-wise but generally. In such circumstances, one can expect a dealer to produce the invoices alone for having made purchases of watches for sale. Unless one takes a total account of the sales already made and the stocks available, it would be difficult to correlate them from the invoices alone. The correlation, as it is, can be made only with the available stock. It may be that certain invoices produced by the appellant would mention the description of the watches which, if not all, or at least some of them, would have been sold already. It may not be possible to correlate item-wise. In these circumstances, the method of correlation cannot at all be useful for the purpose of finding out whether the dealer had purchased the watches in question under the respective invoices. Even if it is assumed in this case that the appellant should have proved that the watches were not smuggled, he had discharged the onus of such proof by producing the bills, which on the face of it, appear to be genuine and not suspicious. One cannot expect the appellant to examine the representatives of those firms for the purpose of proving the genuineness of such bills, especially when they were purchased from places like Bombay, and Calcutta a long time ago. It would be difficult for the appellant to trace those firms with whom he had transactions a number of years ago.

28. In Exhibit P-3, the statement alleged to have been given by the appellant before the Customs Authorities, which of course the appellant retracted, the appellant had not stated that the watches were smuggled watches ; but his statement was that he was a dealer in watches and that the watches seized by the Customs Authorities were watches kept for sale.

29. In respect of the 18 watches kept in a packet in the chest of drawers and 28 watches kept in a tin underneath a steel almirah, the appellant stated that his brother who was also looking after the business must be in a position to explain as to why these two sets of watches were kept in the places from where they were seized. I, therefore, do not think that there is any material to infer against the appellant from Exhibit P-3. I have no hesitation to hold that the watches seized from the appellant are not established as smuggled watches, liable to confiscation u/s 111 of the Act.

30. On the view that I have taken that the watches which were seized were not smuggled watches, the question whether the appellant was in possession of the watches knowing or having reason to believe that the watches were smuggled, does not arise.

31. In the result, the conviction and sentence are set aside.

32. The important question that was raised in this case, in respect of which a great deal of arguments were advanced, is with regard to the jurisdiction of the Magistrate in respect of the disposal of the watches. Besides the assistance rendered by the learned Counsel appearing for the appellant and the Central Government, I also sought the assistance of the learned Counsel Sri Nagaratnam, who appeared as *amicus curiae*. It is contended by the learned Counsel for the appellant, Sri S. Sundar that in spite of the fact that the Customs Department had confiscated the watches in the adjudication proceedings, the Magistrate who had tried the case, has power and jurisdiction to dispose of the property as required u/s 517, Criminal Procedure Code, while the learned Counsel appearing for the Central Government Sri G. Ramaswami, contended that when already confiscation had been made by the Department, which has become final, a Magistrate, cannot disturb the confiscation as it would amount to nullifying the order of the Department ; in other words, his contention was that though the Magistrate may have jurisdiction to exercise his powers u/s 517, Criminal Procedure Code, yet, as the confiscation had been already made by the Department and had become final, any decision by the Magistrate in respect of the disposal of the property will amount to *res judicata*.

33. Therefore, the substantial question that arises for consideration is whether the Magistrate could exercise his jurisdiction u/s 517, Criminal Procedure Code, after the properties concerned were confiscated by the Customs Department, Section 517 (1), Criminal Procedure Code, runs as follows:

When an inquiry or trial in any criminal Court is concluded, the Court may make such order as it thinks fit for the disposal by destruction, confiscation or delivery to any person, claiming to be entitled to possession thereof or otherwise of any property or document produced before it or in its custody or regarding which any offence appears to have been committed, or which has been used for the commission of any offence.

It is clear from this provision that when an enquiry or trial in any criminal Court is concluded, the Court has to make an order in respect of the disposal of the property by destruction, confiscation or delivery to any person claiming to be entitled to possession thereof. This order of disposal will be made by the Court as it thinks fit in the circumstances of the case. This order can be made in respect of any property or document produced before it or in its custody or regarding which any offence appears to have been committed, or which has been used for the commission of any offence.

34. In this case, we are concerned with the watches, in respect of which an offence u/s 135 (b) of the Act was alleged to have been committed. The watches were produced in the Court in respect of which the offence is committed and marked as M.O. 1 series. The criminal Court exercises this power normally, unless such power is limited or restricted by any statute, expressly or impliedly.

35. Even in respect of the offences created by other statutes other than the Indian Penal Code, the criminal Courts have power to enquire and try such offences u/s 5 (2), but, however, subject to any enactment regulating the manner of enquiry or trial or otherwise dealing with such offences. In other words, normally even the offences under other laws are tried by the criminal Courts ; but they are subject to the restrictions and the limitations imposed by such special law creating the offences. The procedure relating to investigation and trial of the offences under the special laws is enumerated in Schedule II of the Criminal Procedure Code under the heading "offences against other laws".

36. For the effective enforcement of the provisions of the Customs Act, the Act created certain offences triable and punishable by the Courts. One such offence is Section 135 of the Act. In respect of the investigation and trial of such offences, the Customs Act itself has limited the operation of certain provisions contained in the Criminal Procedure Code, specifically. While Clauses (1), (2) and (3) of Section 104 of the Act deal with the power to arrest and the power to release on bail, Clause (4) of the said section states that notwithstanding anything contained in the Code of Criminal Procedure, an offence under this Act shall not be cognizable. Thus, irrespective of the said Schedule in the Criminal Procedure Code, the offences under the Act are made non-cognisable. To this extent, the operation of the Criminal Procedure Code, is excluded. Similarly, u/s 138 of the Act, the offences created under the Act, other than the offence punishable under Clause (1) of Section 135 are tried summarily by a Magistrate notwithstanding the provisions contained in the Code of Criminal Procedure. Under Clause (2) of Section 105 of the Act, in respect of searches by the Officers of Customs, the provisions of the Code of Criminal Procedure are applied, "so far as may be". Thus, excepting these provisions which deviated from the provisions of the Criminal Procedure Code, which are ordinarily applicable to the offences under the other laws, there is no other provision in the Act, restricting, limiting or excluding the exercise of the powers of the Court in respect of all other matters under the provisions of the Criminal Procedure Code. In other words, there is no ouster of jurisdiction of a Court to exercise its powers by any of the provisions of the Act other than what was mentioned above, either express or implied. The power of disposal of the property as mentioned u/s 517, Criminal Procedure Code., after the conclusion of the trial has not been taken away by any of the provisions of the Act. The offence u/s 135 of the Act is concerned with the goods and, therefore, the disposal of the goods has to be necessarily made by the Court before which such goods were produced either as concerned with the offence or having been used for the commission of the offence.

37. The learned Counsel for the Central Government does not contend that the criminal Court has no jurisdiction, after the conclusion of the trial, to dispose of the property concerned with the offence u/s 517, Criminal Procedure Code. But, as already pointed out, his contention is that the Department having found on facts that the appellant was guilty of violation of law in relation to the goods, the principle of constructive res judicata would apply when the finding is sought to

be interfered with by the Court. There is no substance in this contention. It is true that the order of confiscation is in respect of the goods and that the prosecution is in respect of the offender, but the offender cannot be punished unless he is connected with the goods, in respect of which the confiscation is made as "offending goods". In a prosecution, the offender cannot be separated from the offending goods. Once the Court finds that the goods in respect of which confiscation is made by the Department are not "offending goods", the only course open to the Court is to acquit the offender and dispose of the property as it thinks fit, in the circumstances of the case. The fact that the confiscation of goods has been made by the Department on the view that the goods were liable to confiscation, would not fetter the power of the Court in disposing of the goods u/s 517, Criminal Procedure Code. The decision of the Department for confiscation may be final in its own field after having reached the top in the hierarchy. But the Courts exercising their powers independently under the provisions of the Criminal Procedure Code, are not at all concerned with the finality of the decision of the Department. The two forums are independent. One is administrative and quasi-judicial. The other is absolutely and wholly judicial. These two forums exercise their powers in their own spheres. If the Department had stopped with the confiscation of the goods and the levy of penalty and had not submitted to the jurisdiction of the criminal Court, the order of confiscation and the levy of penalty by the Department may be final. The principle of constructive res judicata will not apply for the simple reason that the forums are different and the Department itself is the complainant invoking the jurisdiction of the Court to try the offender and, therefore, the proceedings in the criminal Court are not proceedings between the same parties. In the adjudication proceedings, the Department is acting as a Tribunal while in the criminal proceedings, the Department figures as a complainant as any other complainant is. Once the Court takes cognizance of the complaint, all the incidents of a trial including the consequential orders to be passed at the conclusion of the trial will follow. u/s 137 of the Act, no Court shall take cognizance of an offence u/s 135 except with the previous sanction of the Collector of Customs. Though the Collector of Customs could himself or through his officers adjudicate, pass orders of confiscation and levy penalty, but so far as the prosecution is concerned, he has to consider, taking into account the particular circumstances of the case, whether it is necessary or desirable to institute prosecution. This discretion is given to the Collector of Customs as it is for him to decide whether the prosecution has to be instituted in a particular case. The Collector, before giving sanction for prosecution should take into consideration, in the circumstances of the case, whether the prosecution would be successful in a Court of law, which would certainly consider the whole matter judicially and impartially, especially in cases where the accused claims ownership of the properties seized, and if a doubt could be entertained by a Court whether such goods are contraband or smuggled, the Collector, in his discretion, would not take the risk of instituting a prosecution. In cases where the accused does not claim ownership of the property but comes forward with some other defence, the Department will not be

taking risk in resorting to prosecution of the concerned accused as there may not be a danger of disposing of the property by the Court against the decision of the Department. Once the Collector had decided and accorded sanction to prosecute, he submits to the jurisdiction of the Court voluntarily taking the role of complainant and he should necessarily take the consequences of the trial as any other complainant has to take. The adjudication proceedings by the Customs Department are under substantive law while the disposal of the property u/s 517, Criminal Procedure Code, is under the procedural law. It cannot, therefore, be said that the principle of *res judicata* will apply. Though the jurisdiction in respect of confiscation of goods by the Department and the Court may be said to be "concurrent" in the technical sense, yet, the power exercisable by both the forums is different in nature. The approach to a problem and the assessment of evidence by a Court is purely judicial and, therefore, different from the approach and the assessment of evidence by a Tribunal, which is quasi-judicial. Though the issues are identical, they have to be found by both the forums by exercising their powers within the ambit and the provisions of the respective enactments. Normally the decision of a Court which is wholly judicial will over-ride the decision of a quasi-judicial authority, subject to the jurisdiction and the competency of the Court.

38. The learned Counsel for the Central Government relied upon the decision in AIR 1940 105 (Privy Council) That was a decision rendered under the Sea Customs Act. While discussing the scope of Sections 188 and 191 of the Sea Customs Act, 1878, the Privy Council observed that those sections provide a self-contained code of appeal in regard to obligations created by the statute and after reaching the hierarchy, the decision of the Department becomes final and that such decision cannot be challenged in a civil Court, and it further observed that once an order of Collector of Customs dismissing an appeal u/s 188 is confirmed on an application u/s 191 of the Sea Customs Act, the jurisdiction of civil Court is excluded.

39. The above observations are of no use to support the contention of the learned Counsel for the Central Government. Those observations would be applicable to a person who challenges the order of the Department in a civil Court. Here it is not the accused who challenges the order of the Department in the criminal Court. It is the Department as a party who institutes prosecution to punish the accused. This decision, far from supporting the contention of the learned Counsel, clearly points out that the exclusion of the jurisdiction of the civil Courts cannot be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied and it further points out that even if the jurisdiction is so excluded, the civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

40. It is contended by the learned Counsel, Sri G. Ramaswami, that the words "

without prejudice to any action that may be taken under this Act " are indicative of the fact that the Collector's action already taken and action that may be taken are without prejudice to the result of the prosecution u/s 135 of the Act and as such, orders already passed in the adjudication proceedings or which may be passed are protected. I am unable to agree with this contention. These words had been introduced in the Act LII of 1962 apparently as a result of the arguments repeatedly advanced in the Courts that the prosecution in a criminal Court is barred when a person has already been punished by confiscation and levy of penalty on the principle of double jeopardy invoking Article 20 of the Constitution. These words have been introduced to make the position clear, namely, that in addition to the confiscation and penalty, the prosecution can be resorted to. Once the prosecution is instituted, as already pointed out by me, the criminal Court exercises its powers within the ambit of the Criminal Procedure Code, unless such power is excluded by any specific provision in the statute, either express or implied. If the Legislature intended to bar the jurisdiction of the criminal Court in respect of the disposal of the property u/s 517, Criminal Procedure Code, it would have said so clearly in the enactment itself as it had said in respect of some of the powers normally exercisable by a criminal Court by excluding or limiting such powers. I have adverted to this aspect earlier. The words "without prejudice to the action that may be taken" in the context would mean " notwithstanding that any action may be taken." These words make it clear that in spite of confiscation and penalty, yet, a prosecution can be instituted. These words, in my opinion, do not restrict or limit the power of the Court but, on the other hand, a discretion is given to the Department in particular cases to institute prosecution notwithstanding the action taken or might be taken.

41. The learned Counsel also contended that once the property vested with the Central Government after confiscation by the Department by virtue of the provision u/s 126 of the Act, the criminal Court is barred from confiscating the property, which had become the property of the Central Government and further contended that no order can be passed without giving notice to the Central Government. There is no substance in this contention also. Once the goods are confiscated, it must vest with the Government. Since the revenue under the Customs Act is the Central Revenue, the goods confiscated by the Department working under the Central Government naturally vest with the Central Government. Since the revenues are allocated to the Central Government and the State Government separately by the Constitution, the Act has provided specifically that the goods confiscated shall vest with the Central Government, thereby excluding the State Government. The criminal Court which exercises its powers u/s 517, Criminal Procedure Code, disposes of those goods which had come into its custody or which are concerned with the offence or which had been used for the commission of the offence. As already pointed out, the goods, namely, the watches in this case, were produced before the Court as the goods in respect of which the offence was committed. They were produced before the

Court as "Offending Goods" and not as "Confiscated Goods" vesting with Central Government. Those goods have come within the custody of the Court. It is not the concern of the criminal Court as to what happened to the goods subsequent to the seizure, but it is concerned only with the fact whether the goods were concerned with the offence and whether they were used in the commission of the offence. Therefore, the disposal of the property is based upon the fact whether such property is concerned with the offence. If the Court once holds that the property is concerned with the offence, irrespective of the fact as to what happened subsequently in respect of the said property, it should pass an order of disposal as it thinks fit, in the circumstances of the case. Even otherwise, vesting with the Central Government u/s 126 of the Act does not have the connotation of extinguishment of proprietary rights of the persons from whom the goods are seized. "Vesting with the Central Government" in the context should mean that the Central Government will be in possession of the property subject to a decision of a competent authority in respect of the disposal of such property. In cases where such property is confiscated and vested with the Central Government and where no claim is made on such property or in case the person disclaimed ownership, the vesting of such property with the Central Government may be final. "Vesting" in this context means only "taking custody". Therefore, the vesting of the watches, confiscated by the Department, with the Central Government, does not alter the nature of such goods, namely "offending goods" concerned with the offence in respect of which the accused is prosecuted. No notice is necessary to the Central Government as the interests of the Central Government are not involved. Even otherwise, the learned Counsel Sri G. Ramaswami, represents the Central Government and on behalf of the Central Government, he has argued the case. It is at the time when the judgment is delivered, that Sri G. Ramaswamy, states that he is representing only the Assistant Collector. There cannot be any doubt he is the standing Counsel appointed by the Central Government for Customs cases.

42. The learned Counsel Sri G. Ramaswami has drawn my attention to a decision in *The Public Prosecutor Vs. Babulal*, . That was a case under the Customs Act where the accused was acquitted by the lower Court on the ground that the prosecution had not proved that the goods which were seized under the Act were seized in the reasonable belief that they were smuggled goods. While acquitting the accused, the lower Court had also returned the properties to him. The State filed an appeal against the order of acquittal. A single Judge of the High Court while confirming the order of acquittal observed that it was the duty of the prosecution to show that the goods were seized under the Act in the reasonable belief of their being smuggled goods before onus can shift to the accused to prove that they were not smuggled goods. But in respect of the return of the property by the lower Court, the High Court had reversed that order on the ground that the accused ceased to be the person entitled to possession of property by reason of the property vesting with the Central Government as a result of the confiscation ordered by the Collector. There was no discussion on

this point.

43. I have already discussed about the connotation of the words ""vesting with the Central Government" and it is not necessary to repeat it again. The Court, after the conclusion of the trial, while disposing of the property concerned with the offence, has to find as to who was legally entitled to the property at the time when such property was seized or on the date when the offence was alleged to have been committed and not on the date when the judgment is delivered.

44. The learned Counsel appearing for the appellant relied upon two decisions, namely (1) Assistant Collector of Customs v. Krishna Pillai 1955 M.W.N. 137; and (ii) and unreported judgment of the Supreme Court in Gianchand v. Union of India Appeals Nos. 1430 to 1442 of 1966, to support of his contention that the jurisdiction of the criminal Court in the disposal of the property which has been confiscated by the Customs Department was not barred.

45. In Assistant Collector of Customs v. Krishna Pillai 1955 M.W.N. 137, a Division Bench of this Court held that the Magistrate can act u/s 517, Criminal Procedure Code, and order return of the property alleged to be contraband to the legal owner if it is proved at the trial not to have been contraband. This was a case under the Customs Act.

46. In the unreported judgment of the Supreme Court in Appeals Nos. 1430 to 1442 of 1966, it was held that the prosecution, after confiscation, having failed, the gold shall be returned to the person (the appellant in that case), from whom it was seized originally by the police. In that case, the gold was seized by the police and a case was instituted u/s 411, Indian Penal Code. Later on, the police filed a memo in Court saying that there was no evidence to prosecute the accused. Thereupon, the Customs Department applied to the Court to deliver the property to it, and got it. After the confiscation of gold by the Department, the Department instituted prosecution in respect of that gold, which resulted in acquittal. In those circumstances, the Supreme Court stated that since the prosecution had failed, though there was confiscation by the Department, the property should be returned to the person from whom it was seized. It is clear from this decision that the confiscation by the Department cannot be a bar for the Magistrate to dispose of the property under the provisions of the Criminal Procedure Code.

47. The learned Counsel Sri Nagaratnam, appearing as amicus curiae cited the decision in K.K. Shaik Dawood v. Collector of Customs, Madras AIR 1965 Mad. 215 In that case, the gold was confiscated and a penalty was also imposed on the appellant, under the Customs Act. The appellant did not challenge the confiscation but challenged only the penalty. The Division Bench observed that the fact that the Collector had in exercise of his powers confiscated the goods cannot prevent the Magistrate from passing an order of confiscation, technically speaking.

48. Even in this case, the learned Chief Presidency Magistrate has stated that he

was not passing an order of confiscation as the goods had already been confiscated. The learned Magistrate was aware that he can dispose of the property u/s 517, Criminal Procedure Code. But as he did not differ from the order of confiscation made by the Department in view of the conviction of the appellant, he had not passed separate orders.

49. For the foregoing reasons, I am of the view that the criminal Court has unfettered power to dispose of the property u/s 517, Criminal Procedure Code, independent and irrespective of the order of confiscation made by the Department. In this case, on the view that I have taken that the prosecution has failed to prove that the watches seized from the appellant were smuggled watches and the appellant had claimed that those watches belonged to him, he will be entitled to the return of those watches.

50. In the result, this appeal is allowed and the appellant is acquitted. The fine amount, if paid, will be refunded to him. The watches (M.O. 1 series) will be returned to the appellant. The Department, if they are in possession of the watches will redeposit the watches with the Chief Metropolitan Magistrate and the learned Magistrate will return the watches to the appellant. The assistance of the learned Counsel appearing for the appellant and the Central Government and Sri Nagarathnam, amicus curiae, is appreciated and recorded.