

(1970) 08 BOM CK 0009

In the Bombay High Court

Case No : O.C.J. Miscellaneous Petition No. 127 of 1963

Prakash Cotton Mills Pvt. Ltd.

APPELLANT

Vs

B.N. Rangwani

RESPONDENT

Date of Decision : 31-08-1970

Acts Referred:

Central Excises and Salt Act, 1944 — Section 12, 18, 3, 38, 8
Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 105, 110, 12, 124, 3
General Clauses Act, 1897 — Section 8

Citation : (1971) 73 BOMLR 200

Hon'ble Judges : Nain, J;K.K. Desai, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Nain, J.—Petitioners No. 1 own textile mills and carry on the business inter alia of manufacturing cotton yarn and cotton fabrics. They are a Private Limited Company. Petitioner No. 2 is a director and shareholder of the said Company and is a citizen of India. In the petition no relief is claimed in favour of petitioner No. 2. He is in fact a formal party and all references hereinafter to "the Petitioners" refer only to petitioners No. 1. Respondents Nos. 1 to 5 are authorities under the Central Excises and Salt Act, 1944. They are hereinafter for the sake of convenience referred to as the Excise Authorities. Respondents No. 6 are the Central Bank of India. Some of the goods which are the subject-matter of this petition were at the time of their seizure pledged with respondents No. 6. They are also formal parties and no relief is claimed against them.

2. The allegations of the Excise Authorities against the petitioners are that the petitioners were manufacturing cloth on a large scale and evading payment of central excise duty thereon. Cloth manufactured in a unit of four powerlooms or less belonging to any owner is exempt from excise duty. According to the Excise Authorities the petitioners were running about 1400 unauthorised power-looms outside the main premises of their factory at Fergusson Road, Bombay. According

to those Authorities, the petitioners had limited about 100 bogus concerns in order to show that these 1400 powerlooms were engaged in the manufacture of cloth by purchasing yarn from those bogus concerns, manufacturing cloth therefrom and in turn selling the cloth to those bogus concerns. These 100 bogus concerns are alleged to be the creation of the petitioners and in fact the cloth in the said 1400 powerlooms was being manufactured for the petitioners. The Excise Authorities allege that the petitioners have by these methods evaded excise duty amounting to over Rs. 90 lakhs.

3. On March 11, 1963 the Excise Authorities served on the petitioners an order of that date, exh. C to the petition. The said order is signed by respondent No. 4 and is addressed to Jalan Dyeing and Bleaching Mills, which is a sister concern of the petitioners. He states therein that he had been directed to seize the powerloom cloth received by the addressee from the parties named in the said order for processing. It was alleged that these were unauthorised parties and the goods were liable to be seized obviously meaning thereby that these goods had escaped payment of excise duty. Thereafter between March 11, 1963 and March 20, 1963 the Excise Authorities seized certain goods belonging to the petitioners which were then lying at the premises of Jalan Dyeing and Bleaching Mills at Fergusson Road, Bombay.

4. On or about March 18, 1963 respondent No. 2 accompanied by some members of his staff visited the business premises of the petitioners at Fergusson Road and seized several books of account, documents and vouchers. He delivered to the petitioners an order dated March 18, 1963, exh. A to the petition. This is an order issued by respondent No. 1 to respondent No. 2 requiring him to seize documents pertaining to manufacture of cotton fabrics on powerlooms by the Jalan Group of Industries and to report the execution thereof to respondent No. 1. Thereafter also on or about March 30, 1963 respondent No. 3 seized more papers and books belonging to the petitioners.

5. After some correspondence with the Excise Authorities on April 8, 1963 the petitioners filed the present petition under Article 226 of the Constitution of India praying for a writ of mandamus directing and ordering the Excise Authorities to forthwith release and hand over to the petitioners the goods and books of account and other papers seized by the said authorities.

6. During the pendency of this petition, the petitioners and the Excise Authorities arrived at consent terms on more than one occasion. Under these consent terms the petitioners deposited with respondent No. 5 Government securities of agreed amounts duly endorsed in the name of the President of India and took delivery of the goods seized by the Excise Authorities. It was agreed that the securities so deposited shall be treated as sale proceeds of the said goods and shall further be treated as goods seized for the purpose of adjudication proceedings by the Excise Authorities as well as for the purpose of the orders of this Court on this petition. ;: The contentions of the petitioners in the petition and the affidavits filed by them in rejoinder are as follows. According to the petitioners, there is no

provision of law entitling the Excise Authorities to seize the petitioners' goods or books of account or other documents and the petitioners being the owners thereof are entitled to have the same returned to them. The petitioners also contend that the Excise Authorities had disregarded the mandatory provisions of Section 18 of the Central Excises and Salt Act, 1944 (hereinafter for the sake of brevity referred to as the Excise Act) read with Section 165 of the Criminal Procedure Code, 1898 and therefore the searches carried out by the Excise Authorities and the seizure of goods and books of account were illegal and the Excise Authorities were bound to release and return all the said goods and documents. The petitioners also contend that as now Section 110 of the Customs Act, 1962 was applicable having been incorporated in the Excise Act and no show cause notice having been issued within six months of the seizure of the goods, books of account and documents u/s 110(2) the petitioners were entitled to have the goods, books of account and documents returned to them.

7. The contentions of the respondents in the several affidavits filed, by them in reply are that by a Notification issued u/s 12 of the Excise Act, certain provisions including Sections 172 and 178 of the Sea Customs Act, 1878, were made applicable with certain modifications to the Excise Act. u/s 38 of the Excise Act, the said Notification has effect as if enacted in the Excise Act. Consequently, these provisions of the Sea Customs Act, 1878 became a part of the Excise Act. The Sea Customs Act, 1878, was repealed and replaced by the Customs Act, 1902, with effect from February 1, 1963. Thereafter by virtue of Section 8(1) of the General Clauses Act, 1897, the corresponding provisions of the Customs Act, 1962, must be read into the said Notification in place of the provisions of the Sea Customs Act, 1878, and that Sections 105 and 110 of the Customs Act, 1962, entitle the Excise Authorities to carry out searches and seizures. The Excise Authorities contend that the goods seized by them were liable to confiscation under Rule 9(2) of the Central Excise Rules, 1944 (hereinafter for the sake of brevity referred to as the Excise Rules). The Excise Authorities also contend that under rule 201 of the Excise Rules, they had the power to enter and search premises where excisable articles were kept and to seize goods, books and documents therein. We have already set out hereinabove the allegations of the Excise Authorities against the petitioners. The Excise Authorities claim that on these allegations they were entitled to carry out these searches and seizures. They deny that provisions of Section 18 of the Excise Act or of Section 165 of the Criminal Procedure Code had been violated or the searches and seizures were otherwise illegal. The Excise Authorities further contend that by an order dated September 20, 1963 respondent No. 5 has extended the time within which a notice u/s 124(a) of the Customs Act, 1962, or Rule 8(2) of the Excise Rules could be issued to the petitioners. They claim that on March 10, 1964, a show cause notice had been issued to the respondents. They also claim that on February 17, 1964 intimation with regard to the extension of time had been given to the petitioners. It is not in dispute that the petitioners demanded copies of the order of extension from the respondents, but no copies were furnished to

them. The Excise Authorities contend that they are not liable to return to the petitioners the goods and documents seized by them from the petitioners.

8. We have stated hereinabove briefly the respective contentions of the parties contained in their affidavits. We shall set them out in greater detail wherever necessary for dealing specifically with the contentions of the parties.

9. It is necessary for appreciation of the contentions raised on behalf of the parties to refer to some provisions of law. Section 12 of the Excise Act provides that the Central Government may by Notification in the Official Gazette declare that any of the provisions of the Sea Customs Act, 1878, relating to the levy of and exemption from customs duties, offences and penalties, confiscation and procedure relating to offences and appeals shall, with such modifications and alterations as it may consider necessary or desirable to adapt them to the circumstances be applicable in regard to the like matters in respect of the duties imposed by Section 3 of the Excise Act. Pursuant to the power conferred on the Central Government by Section 12, the Central Government has from time to time issued necessary Notifications, We are concerned, however, with Notification No. 162/60 dated November 26, 1960 which modified and incorporated a previous Notification of 1959. By the said Notification certain provisions of the Sea Customs Act, 1878, were with certain modifications made applicable to like matters in respect of the duties imposed by Section 3 of the Excise Act. In this petition we are concerned only with Sections 172 and 178. The necessary modifications for adapting the said sections include those substituting the designation of the Excise Authorities in place of the Customs Authorities and references to the Sea Customs Act, 1878, are to be deemed to be references to the Excise Act. Section 38 of the Excise Act provides that all Notifications issued under the said Act shall on publication have effect as if enacted in the Excise Act. With effect from February 1, 1968 the Sea Customs Act, 1878, was repealed and replaced by the Customs Act, 1962. We must here remember that the impugned searches and seizures were carried out in March 1963. On May 4, 1968 the Central Government issued a fresh Notification No. 68/63 u/s 12 of the Excise Act in supersession of the previous Notification making inter alia the provisions of Section 105(1), Section 110 and Section 124 of the Customs Act, 1962, applicable to like matters in respect of duties imposed by Section 3 of the Excise Act. In so applying the provisions of the new Act the necessary modifications were also made which are immaterial for our purpose. Section 172 of the Sea Customs Act, 1878, as modified in its application to the Excise Act provides that any Magistrate may on application by a Central Excise Officer not inferior in rank to an inspector issue a search warrant to search for goods and documents. In this case the searches have been carried out without any warrant issued by a Magistrate. The Excise Authorities claim that the searches have been carried out under the provisions of rule 201 of the Excise Rules. Section 172 has therefore not been used. Section 178 of the Sea Customs Act, 1878, provides that anything liable to confiscation under the Excise Act and Excise Rules may be seized by any Central Excise Officer not inferior in rank to a sub-inspector or

other person duly empowered for the prevention of smuggling. Section 105 of the Customs Act, 1962, empowers an Assistant Collector of Excise to search for goods liable to confiscation and for documents useful for or relevant to proceedings under the Excise Act and Excise Rules without obtaining a search warrant from a Magistrate. Section 110 provides for seizure of goods and documents.

10. Mr. Nariman appearing for the petitioners contended that the Central Government had no power to issue a Notification u/s 12 of the Excise Act making the provisions of the Sea Customs Act, 1878, or the Customs Act, 1962, pertaining to searches and seizures applicable as Section 12 of the Excise Act did not provide for making provisions with regard to searches and seizures applicable. It only provided for making applicable those provisions which pertained to levy of and exemption from customs duties, offences and penalties, confiscation and procedure relating to offences and appeals with regard to duties imposed by Section 3. It, however, appears to us that searches for and seizures of documents and moveable property is a part of procedure relating to offences in respect of duties imposed by Section 3 of the Excise Act. Rule 9(1) of the Excise Rules provides for time and manner of payment of duty. Sub-rule (2) provides that if any excisable goods are in contravention of sub-rule (1) deposited in or removed from any place specified in the said sub-rule, the producer or manufacturer thereof shall pay the duty levied on such goods upon written demand made by the proper officer and shall also be liable to pay penalty which may extend to Rs. 2,000 and such goods shall also be liable to confiscation. Sub-rule (2) provides for assessment of duty imposed by Section 8 which has been evaded and for penalty and confiscation. Section 9 of the Excise Act makes evasion of the payment of any duty payable under the Act an offence punishable with imprisonment for a term, which may extend to six months or with fine which may extend to Rs. 2,000 or with both. Evasion of duty is an offence and also incurs a penalty apart from the prosecution. Under the Code of Criminal Procedure searches for and seizures of goods and documents are a part of well recognised procedure relating to offences. Apart from this, searches and seizures are necessary for levy of customs duties and penalties and confiscation of goods. In our opinion, therefore, Section 12 of the Excise Act would authorise the Central Government to apply by Notification the provisions of the Customs Acts to duties imposed by Section 3 of the Excise Act in respect of searches for and seizure of goods and documents.

11. As we have stated hereinabove, these searches and seizures were carried out in March 1963. There has been considerable amount of controversy as to whether at that time the provisions of Sections 172 and 178 of the Sea Customs Act, 1878, were applicable to these searches and seizures by virtue of the Notification dated November 26, 1960 which was superseded only on May 4, 1963 by the new Notification making the provisions of the Customs Act, 1962, applicable or whether by virtue of Section 8 of the General Clauses Act the corresponding provisions of Sections 105 and 110 of the Customs Act, 1962,

should be read in the Notification dated November 26, 1960 with effect from February 1, 1963 when the Sea Customs Act, 1878, was repealed and the Customs Act, 1962, came into force. Mr. Bhabha contended that by virtue of Section 88 of the Excise Act which provides that all Notifications issued under the Excise Act shall on publication have effect as if enacted in the Excise Act, the Notification dated November 26, 1960 shall have effect as if enacted in the Excise Act. He further contended that the provisions of the Sea Customs Act, 1878, made applicable by the said Notification shall also have effect as if enacted in the Excise Act. If that position be correct, Mr. Bhabha further contended that u/s 8(1) of the General Clauses Act on the repeal of the Sea Customs Act, 1878, and coming into force of the Customs Act, 1962, with effect from February 1, 1963 the reference in the Notification dated November 26, 1960 to Sections 172 and 178 of the Sea Customs Act, 1878, should be read as reference to Sections 105(1) and 110(1) and (3) of the Customs Act, 1962. Section 8(1) of the General Clauses Act reads as follows :

8. (1) Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.

While this argument would be correct if the reference to the provisions of the Sea Customs Act, 1878, had been contained ins. 12 of the Excise Act itself, it may not be correct when the reference to the provisions of the Sea Customs Act, 1878, is contained in a Notification issued u/s 12 of the Excise Act. It may be that by virtue of Section 38 of the Excise Act the Notification has effect as if enacted in that Act. But Section 12 does not merely provide that the Notification may make any of the provisions of the Sea Customs Act, 1878, as they appear in the said Act applicable in respect of duties imposed by Section 3 of the Excise Act. It provides that these provisions of the Sea Customs Act shall be made applicable by the Notification "with such modifications and alterations as the Central Government may consider necessary or desirable to adapt them to the circumstances." If by virtue of Section 8(1) of the General Clauses Act the new provisions of Sections 105(1) and 110 (1) and (3) are made applicable to the Excise Act, without modifications, alterations and adaptations, these sections will make no sense. It therefore requires a further legislative effort on the part of the Central Government to modify, alter and adapt the provisions of the new Act before making them applicable to the Excise Act. In fact the Central Government themselves realised the necessity of this and by a Notification dated May 4, 1963 modified, altered and adapted the provisions of the Customs Act, 1962, to the needs of the Excise Act and made them applicable. The said Notification in terms says that the said Notification was issued in supersession of the previous Notification indicating that until then the previous Notification was in force, and under it the provisions of the Sea Customs Act, 1878, as modified, altered or adapted which had been made applicable to the Excise Act continued to apply.

We are of the view that until May 4, 1963 the adapted provisions of the Sea Customs Act, 1878, applied to proceedings under the Excise Act and the impugned searches and seizures were carried out under the law as in force up to May 4, 1963 and it is only after that date that the goods were retained by the Excise Authorities under the provisions of the Customs Act, 1962, on the footing that for the purpose of the new provisions the goods should be deemed to have been seized on May 4, 1963.

12. Mr. Nariman for the petitioners contended that on the repeal of the Sea Customs Act, 1878, with effect from February 1, 1963 the provisions of the said Act applied to the Excise Act by the Notification dated November 26, 1960 issued u/s 12 of the Excise Act also stood repealed. In other words, from February 1, 1963 until May 4, 1963 when certain provisions of the Customs Act, 1962, were applied by a fresh Notification Section 178 which pertained to seizure of goods did not apply and Section 110(3) had not yet been applied. He, therefore, contended that in March 1963 when the petitioners' goods were seized there was no power in the Excise Authorities to seize the goods and the seizure being illegal the goods must be returned to the petitioners. There is however no substance in this contention. By virtue of Section 38 of the Excise Act the Notification issued u/s 12 of the said Act applying Section 178 as modified by the said Notification had the effect as if it was enacted in the Excise Act. The said Notification was not repealed by the Customs Act, 1962. The said Notification was in terms superseded by the Notification of May 4, 1963. Section 178 of the Sea Customs Act, 1878, as modified by the Notification of November 26, 1960 therefore continued to apply until May 4, 1963. The seizure of goods in March 1963 was carried out under the said section. The seizure was, therefore, not illegal. This is apart from the argument of Mr. Bhabha for the Excise Authorities that apart from Section 178 of the Sea Customs Act, 1878, there was independent power in the Excise Authorities implicit in Rule 201 of the Excise Rules to seize the said goods. He contended that the power to search under Rule 201 covered the power to seize. We do not consider it necessary to deal with this argument, in view of the fact that we find that Section 178 of the Sea Customs Act, 1878, was in force on the dates of seizure and conferred the necessary power on the authorities to seize the goods which the authorities claimed were liable to confiscation under Rule 9(2) of the Excise Rules on the ground that the petitioners had evaded payment of excise duty in respect thereof.

13. Mr. Nariman for the petitioners contended that as the goods were not produced or manufactured by the petitioners, but by independent owners of 4 powerlooms or less who were admittedly exempt from excise duty the goods were not liable to seizure u/s 178 of the Sea Customs Act, 1878, not being liable to confiscation under Rule 9(2) of the Excise Rules. The contention of the Excise Authorities however is that the petitioners are the beneficial owners of the said looms and the ostensible owners are bogus and benatni. The Excise Authorities further contend that in any case the petitioners are "manufacturers" of the said goods within the meaning of that expression in the Excise Act and are liable to

pay excise duty thereon. This point is decided against the petitioners by a Division Bench of this Court consisting of Patel and Chandrachud JJ. in *Shri Agency v. M.Y. Kakade* (1961) Special Civil Application No. 138 of 1901, decided by Patel and Chandrachud JJ., on July 12, 190] (Unrep.), which is binding on us unless it is set aside by the Supreme Court in the appeal which is pending against the said judgment. This contention has, therefore, to be rejected.

14. Mr. Nariman on behalf of the petitioners contended that u/s 178 of the Sea Customs Act, 1878, only goods liable to confiscation could be seized. He pointed out that in the order of seizure exh. C to the petition it had not been stated that the goods were liable to confiscation. He contended that the officer concerned had not applied his mind or objectively determined that the goods were liable to be confiscated. The order however docs state that the goods were received from unauthorised parties and were to be seized. We are of the view that this is an indication of application of mind and objective determination that the goods had escaped duty and were liable to confiscation. Apart from this we have now on record the affidavits of respondent No. 1 who directed the seizure showing that he had applied his mind and come to an objective conclusion that the goods were liable to confiscation.

15. We have referred to the contention of the Excise Authorities that by virtue of Section 8(1) of the General Clauses Act, Sections 105(1) and 110 (1) and (3) must be read in the Notification dated November 26, 1960 with effect from February 1, 1963 when the Sea Customs Act, 1878, was repealed by the Customs Act, 1962.. We have rejected this contention. The petitioners argued that if the above contention be correct, Sub-section (2) of Section 110 and proviso thereto would also be attracted as Section 8(1) of the General Clauses Act made the provisions of the new Act applicable with "all variations and modifications" and Sub-section (2) and proviso thereto were such modifications. He contended that Sub-section (2) and the proviso thereto put a restriction on the power of seizure conferred by Sub-section (1) of Section 110. He invited our attention to a judgment of Lord Justice Stirling in the case of *Stevens v. General Steam Navigation Company* [1903] I K.H. 890, holding that under a provision of the English Interpretation of Statutes Act, corresponding to Section 8(1) of the General Clauses Act, modifications would include additions. This has been followed in the subsequent English case of *Reg. v. Goswami* [1968] 2 W.L.R. 1163. In fact the Supreme Court has taken the same view in the case of *State of Uttar Pradesh Vs. M.P. Singh, S.P. Sabharwal and R.K. Lahri*, . The petitioners contended that on this construction a part of their goods would have to be returned. The Excise Authorities however contended that on a true construction of Section 8(1) of the General Clauses Act, Sub-section (2) of Section 110 of the Customs Act, 1962, and the proviso thereto would not be attracted as there was no corresponding provision in Section 178 of the Sea Customs Act, 1878. In view of the fact that we have held that Section 178 continued to apply until May 4, 1963, we do not consider it necessary to consider the applicability of Section 110(2) and the proviso prior to May 4, 1963.

16. One of the contentions of the petitioners in this petition is that searches carried out by the Excise Authorities are in contravention of the provisions of Section 18 of the Excise Act, Section 165 of Criminal Procedure Code and rule 201 of the Excise Rules. They contend that these searches are illegal and what is seized as a result of illegal searches must be returned. We shall deal with these contentions in connection with the searches for and the seizure of documents. We have as will appear later held that searches were not illegal. The contention of the petitioners however is that even the seizure of goods is illegal as searches therefore were illegal. It is however not the case of the Excise Authorities that the seizure of the goods between March 11 and 20, 1963 was pursuant to any search. In fact the order of search dated March 18, 1963 exh. A to the petition pertains only to documents and not to any goods. The order of seizure exh. C to the petition does not provide for a search. The contention of the Excise Authorities is that the power of seizure conferred by Section 178 of the Sea Customs Act, 1878, is independent of any search. If an authority wishes to seize goods it must undoubtedly enter upon certain premises and look for the goods. But this looking for the goods is not the same thing as a search under a search warrant or an order for search which attracts the provisions of Section 165, Criminal Procedure Code. This contention appears to us to be correct. We are of the view that the power of seizure u/s 178 is quite independent of a search. This is apart from the contention that the offending goods seized as a result even of an illegal search may not be liable to be returned, with which aspect we shall deal later when we deal with the searches for and seizure of documents. We are supported in our view that the power of seizure u/s 178 of the Sea Customs Act, 1878, is independent of a search by a Division Bench judgment of M. C. Shah and Miabhoy JJ. of this Court in the case of A. J. Butler v. Mohanlal & Co. (1957) 60 Bom. L.R. 194. In the judgment of Miabhoy J. it is observed as follows (p. 202):

...In this connection it, is useful to turn to the provisions contained in Section 178 of the Indian Sea Customs Act. Under this section, power is conferred not merely upon the Customs Collectors but also upon every officer of Customs and even upon a person duly employed for the prevention of smuggling to seize all things which are liable to be confiscated under the Act. The officers or persons concerned can exercise this power anywhere and everywhere and do not require the aid of a warrant to do so. Therefore, before answering the question, in each case, it will have to be decided whether the seizure of articles was by virtue of the powers which the officer possessed u/s 178 aforesaid or whether the seizure was as a result of the warrants issued by the learned Magistrate. It is only when the learned Magistrate can come to the conclusion that the things seized were under his own warrants, then, in a suitable case, where the learned Magistrate comes to the conclusion that the warrants were illegal or were void ab initio and were such as required to be recalled or cancelled, he can put the parties on proper terms and restore the status quo.... In our opinion, this is just a normal case and there is no special circumstance for holding that the power of seizure

was exercised under the warrants and not u/s 178 of the Act.

17. Section 178 of the Sea Customs Act, 1878, was superseded and replaced by the Notification of May 4, 1963 interlaid by Sections 105(1) and 110 of the Customs Act 1962. Section 110(1) provides that if the proper officer has reason to believe that goods are liable to confiscation under the Excise Act and the Excise Rules, may seize such goods. After May 4, 1968 therefore the continued retention of the goods of the petitioners must be deemed to be on a fresh seizure on May 4, 1968 under the provisions of Section 110(1).

18. Mr. Nariman for the petitioners argued that even on the assumption that the goods were seized on May 4, 1968 they were liable to be returned to the petitioners under the provisions of Section 110(2) of the Customs Act, 1962. Section 110(2) of the Customs Act, 1962, reads as under:

110, (2) Where any goods are seized under Sub-section (1) and no notice in respect thereof is given under Clause (a) of Section 124 (Customs Act 1962) within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized :

Provided that the aforesaid period of six months may, on sufficient cause being shown, be extended by the Collector of Central Excise for a period not exceeding six months.

19. In this connection the admitted facts are that on September 16, 1963 respondent No. 1 made an application to the Collector of Central Excise, respondent No. 5, for extension of time for giving notice u/s 124(a) of the Customs Act, 1962, corresponding to Rule 9(2) of the Excise Rules. On September 20, 1963 an order of extension for a further period of six months was in fact made. The fact of the extension was communicated to the petitioners on February 17, 1964. The petitioners thereafter wanted copy of the order, but this was never supplied to them. On March 10, 1964, a show cause notice was in fact served by the Excise Authorities on the petitioners under the provisions of Section 124(a) of the Customs Act, 1962, and Rule 9(2) of the Excise Rules. It is obvious from these dates that if the date of seizure under the provisions of Section 110(1) be taken as May 4, 1963 and there is an extension of time for giving show cause notice by six months, the notice served by the Excise Authorities on the petitioners is within the extended period and the petitioners would not be entitled to have the goods returned to them. Mr. Nariman, however, contended that as the goods were seized between March 11 and 20, 1963 the order of extension made on September 20, 1968 was in any case beyond a period of six months and was, therefore, illegal. He contended that on a true construction of Section 110(2) and the proviso thereto, the order of extension itself in order to be valid must be made within six months of the date of the seizure of the goods. We, however, do not find any warrant for this proposition in the language of Sub-section (2) and the proviso thereto. We are of the view that an order for extension could be made at any time within or after six months of

the date of seizure. In this case, therefore, even though the order of extension was made beyond a period of six months from the date of the seizure of the goods, it would in our opinion be valid.

20. The contention of the petitioners, however, is that the order of extension dated September 20, 1963 is void as it was made without giving to the petitioners an opportunity to show cause against the grant of extension. The petitioners contend that important civil rights of theirs were involved in the decision to extend time inasmuch as their right to have the goods returned to them was being taken away and such right could not be affected without giving them an opportunity to show cause against it. The petitioners relied upon a Division Bench judgment of the Calcutta High Court in the case of Charandas Malhotra Vs. Assistant Collector of Customs and Superintendent Preventive Service and Others, . D.N. Sinha C.J. observed in his judgment that upon expiry of six months from the date of seizure of goods or of extended time u/s 110(2) proviso, right for return of goods vests in the person from whose possession they were seized. If that right is to be taken away that can only be done for a sufficient cause and the officer concerned cannot decide as to whether sufficient cause has been shown unless he hears the parties affected. Hearing of affected parties need not be as if it was in a Court of law but some opportunity to be heard in defence would have to be given. Even though action was executive, statutory provision required that a judicial approach should be adopted. Reliance was placed on the judgment of Gajendragadkar C.J. in the case of Shri Bhagwan v. Ram Chand AIR [1905] S.C. 1767, which itself followed the English case of Ridge v, Baldwin [1964] A.C. 40. This contention of the petitioners is taken in an affidavit dated August 23, 1970 made and filed during the course of arguments. Mr. Nariman cited the decision of the Supreme Court in the case of State of Orissa Vs. Dr. (Miss) Binapani Dei and Others, , and contended that an order which affected civil right passed without an opportunity of hearing is a nullity.

21. Mr. Bhabha for the Excise Authorities contended that the order of extension was being challenged after a period of over 6 years. The petitioners became aware of the order of extension on or about February 17, 1964. They could have challenged its validity, as also the validity of the show cause notice issued pursuant to the extension by a separate petition. He contended that this affidavit amounted to an amendment of the present petition at a time when a substantive petition for the same relief would have to meet the objection of inordinate delay. He further contended that the petitioners' alleged right to get back the goods became complete according to the petitioners in September 1963 and in any event on November 4, 1963 and today even a suit for recovery back of the goods would have to meet a plea of limitation. He contended that the petitioners had waived their right, if any, and were also estopped from taking this plea at present. He further contended that investigation into evasion of the duty was in progress and this was a ground for the application for extension of time on which the order of extension was made. If notice had to be given to the petitioners of the application for extension, the grounds would have to be disclosed and even

the nature of evidence in the investigation would have to be disclosed and this might lead to mischief. He contended that the petitioners had no right to be heard before an extension was granted. He relied upon a Division Bench judgment of the Mysore High Court in the case of *Ganeshmul v. Collector, Central Excise, Bangalore* AIR [1968] Mys. 89. In the judgment of Somnath Iyer J. it is observed that the purpose of the Customs Act among others is the prevention of smuggling and the punishment of the smuggler. The Collector of Customs is the authority to decide whether a case is one which falls within the proviso to Section 110(2) and whether he should therefore extend the period of investigation. This authority has to consider all the circumstances and the attendant facts to form a judgment in his own mind whether there was sufficient cause for non-service of the notice within the first six months. Parliament has confided into him the power to extend time over a further period not exceeding six months in a special case for exceptional reasons, such as non-completion of the investigation or the liability together with all the material and evidence supporting the charge so that the purpose of the Act may not be defeated by efflux of the first period of six months to which Section 110(2) refers. The power is entrusted to a sufficiently high authority such as the Collector of Customs who is enjoined to exercise this power only on his being satisfied that there is sufficient cause for such extension.

22. In the Calcutta case relied upon by the petitioners the goods were ordered to be returned, but in the said case both the order of extension and the show cause notices were impugned and were held to be invalid. That was the reason for the goods being ordered to be returned. In this case what is impugned is the order of extension and not the show cause notice. If in law an opportunity had to be given to the petitioners to show cause against the extension it would involve several questions of law and fact and in any case it would be difficult to pronounce on the validity of the said order in this petition. We are however of the view that any such opportunity given to an alleged smuggler or tax evader would defeat the very purpose of the investigation. It is notorious that smugglers and tax dodgers stop at nothing in tampering with evidence and suborning witnesses once the nature of the evidence and the cause for delay is disclosed to them, as it must be, if they are to be given an opportunity of being heard. It is not that their right to the return of goods is taken away by the order of extension. It is merely postponed. The confiscation of goods would ultimately depend upon the order to be made under Rule 9(2) of the Excise Rules. In our opinion, by an order of extension important civil rights are not affected. Such opportunity would also be contrary to the purpose of the Excise Act. Following the judgment of the Mysore High Court, we are of the view that the order of extension is not void on account of absence of opportunity given to the petitioners to show cause against the order of extension.

23. We therefore hold that the petitioners are not entitled to the return of the goods seized by the Excise Authorities.

24. Coming to the contentions of the petitioners with regard to the search for

and seizure of documents we find that in the order for search exh. A to the petition, respondent No. 1 has relied upon powers conferred upon him u/s 12 of the Excise Act read with the Notification dated January 24, 1959 (which has in fact been amended by the Notification of November 26, 1960) and Section 105 of the Customs Act, 1962. The Notification issued u/s 12 of the Excise Act makes inter alia Sections 172 and 178 of the Sea Customs Act, 1878, applicable to the Excise Act. u/s 172 the power of search is conferred on a Magistrate. No search warrant has been obtained in this case from a Magistrate. Section 178 pertains to seizure of goods and not to search for documents. Section 105 of the Customs Act, 1962, as we have held hereinabove, became applicable to excise matters with effect from May 4, 1963 and not earlier. The search was carried out in March 1968. In our opinion, therefore, the search cannot be justified by the powers relied upon by respondent No. 1 in the order dated March 18, 1963. Mention of a wrong provision of law in the order is however not sufficient to declare an order invalid. The order can always be justified by the correct provisions of law as has been held by the Supreme Court in the case of Lekhraj Satramdas, Lalvani Vs. Deputy Custodian-cum-managing Officer and Others, . Mr. Bhabha for the Excise Authorities has relied upon rule 201 of the Excise Rules which provides that the Central Government may empower any officer of any Department under its control to enter and search at any time by day or by night any premises upon or in which he has reason to believe that excisable goods are processed, sorted, stored, manufactured or carried in contravention of the provisions of the Excise Act or the Excise Rules. Under Notification No. SRO 8869 dated December 7, 1957 Appendix III of the Excise Rules has been amended and every officer not inferior in rank to an inspector has been authorised to exercise powers of search and seizure under rule 201 of the Excise Rules. It would, therefore, appear that under rule 201 any officer of Central Excise not below the rank of an inspector may carry out a search. Section 18 of the Excise Act provides that all searches made under the Act or any rules made thereunder shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1898, relating to searches made under that Code. The parties are agreed that the reference with regard to searches is to Section 165, Criminal Procedure Code. It, therefore, follows that searches under rule 201 must be carried out in accordance with Section 165, Criminal Procedure Code. The documents have been seized from the same place from which the offending goods have been seized. Under rule 201 the Excise Authorities had the power to enter and search premises in which they had reason to believe that excisable goods evading excise duty were stored. If on search they found not only goods but also documents, their power to search for and seize documents is not limited as long as they enter and search the place where they have reason to believe that excisable goods are stored.

25. It has been contended on behalf of the petitioners that the search contemplated by rule 201 of Excise Rules and Section 18 of the Excise Act does not include the power to seize any documents. The petitioners further contend that there is no other power anywhere in any law under which the Excise

Authorities could have seized the documents. This contention does not appear to us to be correct as in our opinion the power to search includes and covers the power to seize the documents which contained evidence of the contravention. If this were not so, there would not be much purpose in carrying out a search and after having found the documents the authorities wanted they would have to leave them where they found them, and the documents could not be used as evidence of contravention. In our opinion as we will indicate later with effect from May 4, 1968 the power to search for and seize documents is contained in Sections 105(1) and 110(3) of the Customs Act, 1962, The inclusion or non-inclusion of the power of seizure in the power of search before May 4, 1963 is, therefore, today only of academic interest. In any case, in view of the fact that assessment proceedings under Rule 9(2) of the Excise Rules are pending against the petitioners and these documents would be useful for and relevant to those proceedings, we do not propose to interfere with the retention of those documents by the Excise Authorities even if the seizure prior to May 4 1963 had been illegal.

26. Now, we come to the main contention of the petitioners with regard to the documents. They contend that the search for documents was in contravention of Section 18 of the Excise Act read with Section 165, Criminal Procedure Code and that a seizure consequent upon an illegal search is illegal and what is illegally seized must be returned. In fact the reliance is on the provisions of Section 165 of the Criminal Procedure Code and the order of search exh. A to the petition and the contention is that the provisions of Section 165 have not been followed.

27. We now proceed to deal with the grounds on which the petitioners contend that the search does not comply with the provisions of Section 165, Criminal Procedure Code.

(1) The petitioners contend that in the order exh. A respondent No. 1 has not recorded in writing the grounds of his belief that anything necessary for the purpose of investigation into any offence which he is authorised to investigate may be found in the place searched. In our view there is no substance in this contention. The order states:

whereas information has been laid before me and on due inquiry thereupon I have been led to believe that the below mentioned premises are used as a place for the deposit of documents pertaining to manufacture of cotton fabrics on powerlooms belonging to Jalan Group of Industries, Bombay.

The grounds for the belief obviously are (a) information laid before respondent No. 1 and (b) due inquiry into the said information. It is true that in the order respondent No. 1 has not set out the names of his informants, the nature of the information and what inquiry he has held into the correctness of the information. But any such statement would only defeat the purpose of the search. It may be that the grounds are not sufficiently communicative. But this has to be so from the very nature of the proceedings.

(2) Respondent No. 1 has not expressed in the order an opinion that but for the order for search the documents he required could not be obtained without undue delay. It is true that there is no expression of such an opinion in the order.

(3) There are no grounds recorded in writing in the impugned order for the belief that anything necessary for the purpose of an investigation into an offence which respondent No. 1 is authorised to investigate may be found in the place to be searched. We think there is no substance in this contention, because it is stated in the order that the premises to be searched are used for the purpose of deposit of documents pertaining to manufacture of cotton fabrics on powerlooms belonging to Jalan Group of Industries and that the production of the said documents is essential to the inquiry being made into the offence of evading the payment of excise duty.

(4) The impugned order does not specify with any particularity the thing for which the search is made. We think there is no substance in this contention as the impugned order authorises the Excise Superintendent to seize and take possession of "all the documents pertaining to the manufacture of powerloom cloth by the Jalan Group of Industries and any other thing relevant to the manufacture of powerloom cloth." This in our opinion is a sufficient specification of the thing for which the search was to be made.

(5) Sub-section (2) of Section 165, Criminal Procedure Code provides that the officer carrying on the investigation shall if practicable conduct the search in person. Sub-section (3) provides that if he is unable to conduct the search in person and there is no other person competent to make search present at the time, the officer investigating may after recording in writing his reasons for so doing require any officer subordinate to him to make a search. It is contended that as the search is not carried out by respondent No. 1 who made the impugned order but by respondent No. 2 to whom the impugned order is addressed, respondent No. 1 should have recorded in writing his reasons for authorising respondent No. 2 to carry out the search. He has not done so. We are afraid that the contention is taken on a misconstruction of Sub-section (3). Under the 1957 Notification issued under rule 201 referred to by us hereinabove respondent No. 2 himself was a person competent to make a search, being an officer not below the rank of an inspector. Sub-section (3) requires the grounds for authorisation to be recorded on the happening of two conditions: (a) if the officer investigating is unable to conduct the search in person and (b) there is no other person competent to make the search present at the time. Respondent No. 2 who carried out the search was a competent person to make the search, and he was present at the time of the search. The search was not carried out by a subordinate officer who was not in his own right a person competent to make search. The recording of reasons for the delegation was therefore not necessary.

(6) Sub-section (5) of Section 165, Criminal Procedure Code requires that copies of any record made shall forthwith be sent to the nearest Magistrate "empowered to take cognisance of the offence." It is contended on behalf of the petitioners

that this has not been done. There is no dispute about the fact that no copies of the record were sent to a Magistrate. But we think that it was unnecessary to do so, because as the words of the sub-section indicate that the copies have to be sent to "the nearest Magistrate empowered to take cognisance of the offence" indicating that the investigation is into an offence. The action taken by respondent No. 1 was under Rule 9(2) of the Excise Rules pertaining to assessment of evaded excise duty. Offences under the Excise Act are u/s 9 of that Act. Respondent No. 1 was not carrying out any investigation into an offence which any Magistrate was empowered to take cognisance of. There was therefore no need to send any copies of any record to the nearest Magistrate.

28. It is true that one of the requirements of Section 165 has not been complied with inasmuch as there is no expression of opinion that without a search the documents would not be obtained without undue delay. But the fact that without such a search warrant the documents would not have been forthcoming is self evident. The Excise Authorities were dealing with alleged tax dodgers and they were entitled to take the precaution of securing the documents without previous notice of their intention to the petitioners. In our opinion, there has been substantial compliance with the provisions of Section 165, Criminal Procedure Code and the search is, therefore, not illegal as contended by the petitioners.

29. Mr. Nariman for the petitioners cited to us the judgment of the Supreme Court in the case of *The State of Rajasthan Vs. Rehman*, wherein it has been observed that searches made by police officers during the course of an investigation of a cognisable offence can properly be approximated with the searches made by the authorised officers under rule 201 of the Excise Rules. For in the former case the police officer makes a search during the investigation of a cognisable offence and in the latter the police officer makes his search to ascertain whether a person has contravened the provisions of the Act or the Rules which is an offence. The Legislature by stating in Section 18 of the Excise Act that the searches under the Act and the Rules shall be carried out in accordance with the provisions of the Code of Criminal Procedure relating to search clearly indicated that the appropriate provisions shall govern searches authorised by the Excise Act and the Rules and, therefore, the provisions of Section 165, Criminal Procedure Code must be followed in letters of searches under rule 201 of the Excise Rules. The recording of reasons u/s 165 did not confer on the officer jurisdiction to make a search though it was a necessary condition for making a search. Section 165 laid down various steps to be followed in making a search. Recording of reasons was an important step in the matter of search and to ignore it was to ignore an important part of the provisions governing searches. If that was ignored, it could not be said that the search was carried out in accordance with the provisions of the Criminal Procedure Code and it would be a search made in contravention of the provisions of the Code. This was a case of an investigation into an offence of resisting the search. The Supreme Court clearly laid down that recording of the reasons did not confer on the authority concerned the jurisdiction to carry out the search and it did not

lay down the consequences of an illegal search. In our case we have held that the search has been carried out substantially in accordance with the provisions of the Criminal Procedure Code. As laid down by the Supreme Court, the recording of the reasons is undoubtedly an important step in the matter of search. But we are of the view that in this case this important step has not been ignored.

30. The next case cited on behalf of the petitioners is the judgment of the Supreme Court in the case of *The Commissioner of Commercial Taxes and Others etc. Vs. R.S. Jhaver and Others etc.*, . After holding that Section 165, Criminal Procedure Code applied to searches carried out u/s 41(2) of the Madras General Sales Tax Act I of 1959, the Supreme Court observed that Section 165 provided safeguards for the citizens. In that case the High Court had held that the search warrants were bad. This finding was not challenged in the Supreme Court. With regard to the consequences of the illegal search, the Supreme Court observed, "It follows therefore that anything recovered from the search of the residential accommodation on the basis of this defective warrant must be returned." Mr. Nariman also invited our attention to the judgment of the Supreme Court in the case of *Income Tax Officer, Special Investigation Circle-B, Meerut Vs. Seth Brothers and Others etc.*, . In that case the Supreme Court observed that a condition for entry into or making a search of a building or place is reason to believe that the books of account or other documents which will be useful for or relevant to any proceedings under the Income Tax Act may be found. Their Lordships observed that the exercise of power of search was a serious invasion upon the rights, privacy and freedom of tax payers and the power must be exercised strictly in accordance with the law and only for the purposes for which the law authorises it to be exercised. If the action is maliciously taken or the power is exercised for a collateral purpose, it is liable to be struck down by the Court. If the conditions for exercise of the power are not satisfied the proceeding is liable to be quashed. The judgment of Shah J. also states:

...Again, any irregularity in the course of entry, search and seizure committed by the Officer acting in pursuance of the authorisation will not be sufficient to vitiate the action taken, provided the Officer has in executing the authorisation acted bona fide.

There is no allegation of mala fides against respondents Nos. 1 and 2 in this case. In the first instance, the provisions of Section 165, Criminal Procedure Code have been substantially complied with. But if, as we have stated, the opinion that if the search is not carried out the documents required will not be forthcoming without any delay is not expressed in the order of search, it may be an irregularity which will not be sufficient to vitiate the action taken in absence of mala fides. There is no allegation of mala fides and we are afraid the action taken in carrying out the search is not vitiated.

31. Mr. Bhabha on behalf of the Excise Authorities invited our attention to the judgment of the Supreme Court in the case of *Radhakishan Vs. State of U.P.*, . In the judgment of Mudholkar J. it is observed that it may be that where the

provisions of Section 165 are contravened, the search can be resisted by the person whose premises are sought to be searched. It may also be that because of the illegality of the search, the Court may be inclined, to examine carefully the evidence regarding the seizure. But beyond these two consequences no further consequence ensues and the seizure of the article is not vitiated.

32. Mr. Bhabha also invited our attention to a judgment of the Kerala High Court in the case of *A. A. Beeravoo v. Collector, C.E. & C., Cochin* [1965] 2 Cri.L.J. 279. It follows the judgment in *Radha Kishan v. State of U. P.* and sets out the effect of *State of Rajasthan v. Rehman*. In the judgment of Govindan Nair, T. it is stated as follows (p.281):

... Assuming, therefore, that the search and the seizure in this case are illegal, it does not necessarily follow that the material collected as a result of that search and seizure cannot afford evidence for the conclusions reached.... And the decision relied upon by counsel for the petitioner in *State of Rajasthan v. Rehman* has laid down nothing more than that a person whose premises are sought to be searched without the authority of law can resist and even use force in going resisting such a search.

33. We have held that the provisions of Section 165, Criminal Procedure Code have been substantially complied with and the search is not illegal. Assuming, however, that there is no expression of any opinion in the order of search that but for the search the documents required by the Excise Authorities would not be available without delay or for any other reasons the search and the seizure were illegal, on a consideration of the judgments of the Supreme Court, including those in *Radha Kishan v. State of U.P.* and *I. T. Officer, Meerut v. Seth Bros.*, we are of the view that the consequences will not be as contended by the petitioners that the documents or the articles seized must be returned. This would on the face of it be an absurd position. It cannot be that if as a result of an illegal search a weapon with which a murder has been committed or smuggled gold or smuggled or illicit liquor are seized, the weapon or the goods must be returned to the person from whose possession they were seized. We are, therefore, of the view that whether the search was legal or illegal the documents and goods seized cannot be returned to the petitioners.

34. The search for and seizure of the documents was under the provisions of rule 201 of the Excise Rules which continues to be in force. In any event with effect from May 4, 1963 there is a further power of seizure of documents in Section 110(3) of the Customs Act, 1962, which provides that the proper officer may seize any documents or things which will in his opinion be useful for or relevant to these proceedings. The position with regard to the legality or illegality of the search for and seizure of documents prior to May 4, 1968 is rendered purely of academic interest by Sub-section (3) of Section 110 and in any event the documents being required as evidence in the inquiry that is pending against the petitioners under Rule 9(2) of the Excise Rules, we see no reason to interfere or to order the return of the goods or the documents seized by the Excise

Authorities from the possession of the petitioners.

35. In the result, the petition fails and is dismissed.

36. As complicated questions of law arose which the petitioners were entitled to have adjudicated upon by this Court, there will be no order as to costs.