
(1983) 12 DEL CK 0023

In the Delhi High Court

Case No : Criminal Misc. (Main) No. 495/83

Pran Nath Dhawan

APPELLANT

Vs

Union of India and another

RESPONDENT

Date of Decision : 19-12-1983

Acts Referred:

Citation : (1984) 17 ELT 12

Hon'ble Judges : H.L. Anand, J

Bench : Single Bench

Judgement

H.L. Anand, J.—By this petition u/s 482 of the Code of Criminal Procedure, Cr. M(M) 495/83 and the connected petition Cr. M(M) 456/83, Pran Nath Dhawan and his wife, Mrs. Usha Dhawan, who are standing their trial on a complaint for an offence u/s 135(1)(b) of the Customs Act, challenge a common order of the additional Chief Metropolitan Magistrate holding that there was a prima facie case against both the petitioner for framing of a charge and the order of the Additional Sessions Judge dismissing their revision petitions and upholding the order of the trial court.

2. The petitions were filed in the following circumstances. It is alleged that on the basis of secret information a party of Customs (Preventive) officials conducted an search of the residential premises of the couple at D-140, East of Kailash, New Delhi, on August 22, 1978, allegedly leading to the recovery of 16 cameras of Japanese make, valued at Rs. 40,000/-, 180 dozen nail cutters of U.S. make, valued at Rs. 7,200/-, and 18 Sarees of Japanese make, valued at Rs. 4,054/-. Some wrappers of post parcels ex-Hong Kong addressed to various persons, including Usha Dhawan, and certain other members of the family, were also allegedly recovered. The recovered articles were seized by the Customs Officers. The two petitioners were also examined by the Customs staff soon after the seizure. In the course of their statements the petitioners admitted the recoveries. They also admitted that these goods were of foreign origin and were unable to produce any authority for their importation into India or any proof with

regard to the payment of the duty in relation to the goods. Both of them made certain other disclosures with regard to their trips to and from Hong Kong, as well as Kathmandu. By and large, both of them admitted that these goods were of foreign origin and had been imported into India by different person and had been acquired by the petitioners for sale and that they had been carrying on such activity for some time. They give details of their contacts in Hong Kong and Kathmandu, as also the particulars of person who had helped in the importation of these goods, as indeed, similar goods in the past. It is common case of the parties that while Pran Nath Dhawan was examined in the Customs House, Mrs Usha Dhawan made her statement in her residence. It is also a common case of the parties that while the statement of Pran Nath Dhawan is in the nature of a confessional statement, there was controversy is the "admissions" allegedly made by Usha Dhawan in her statement would tantamount in law to a confession. It was also not disputed that the search and the seizure took place fairly late in the night and the statement made by Pran Nath Dhawan continued beyond the mid-night.

3. In support off the complaint the Customs examined 4 witnesses. S. D. Khanna, Superintendent Customs, P.W. 1 proved the complaint and the document purporting to be the sanction to file the complaint. R. K. Mehta, Air Customs Officer, P.W. 2, testified that he had recovered the various articles, and M.L. Gupta, Inspector of customs, P.W. 4 corroborated the factum of recovery. M. L. Sobti, Superintendent of Customs, P.W. 3, who had recorded the statements of the petitioners, proved these statements on record. These are exhibits PW-3/A, PW-3/B, PW-3/D & PW-3/F.

4. At the stage of charge, a contention was raised on behalf of the petitioners that the statements of the petitioners were not admissible in evidence because they were recorded when the petitioners were in custody and were "accused" of an offence." It was further urged that these were not voluntary statements. The learned Magistrate turned down these contentions and held that the evidence of the two inspectors in respect of the recovery corroborated by the "Confessions made by the accused is more than enough for framing charges against accused persons". By an order of November 16, 1981, he ordered accordingly. The petitioners challenged the order in 2 separate petitions in the sessions court and the Additional Sessions Judge by a common order of May 13, 1983 upheld the order of the learned Magistrate and dismissed the petitions. The learned Addl. Sessions Judge observed that the case against the petitioners being on a complaint the learned Magistrate was "no doubt entitled to weigh the material on record but only for seeing whether there is some credible evidence which would sustain conviction". The learned Judge then referred to the decision of the Supreme Court in the case reported as State of Bihar Vs. Ramesh Singh, and held that applying the test laid down by the Supreme Court in that case the material on record was sufficient for presuming that the two petitioners had committed an offence punishable u/s 135(1)(b) of the Customs Act. On the contention of the petitioners that the statements were not voluntary and were,

Therefore, not admissible in evidence the learned Addl. Sessions Judge held that this was not a ground available at the stage of charge "because prima facie there is nothing existing on record which could show invalidity of the said statements". It was further observed that "the presumption at the stage of charge would be what is stated by the petitioners in their statements recorded u/s 107/108 of the Act is true". It was further observed that the statements contain minute details of the items recovered and also about the "smuggling activities of the petitioners". It was, Therefore, observed that at the "stage of charge those statements cannot be ruled out of consideration". The contention that the statements would be hit by the provisions of Section 25 of the Evidence Act was negated on the ground that in view of the decisions of the Supreme Court a person did not become "accused" until a complaint had been filed against him under the Act, and that the two petitioners were, Therefore, not accused persons when they made the statements because no complaint had until then been filed against them. The further contention of the petitioners that the seized goods had not been proved to be notified goods was negated and it was held that according to the Customs Manual cameras and sarees were notified goods. It was further observed that "it cannot be said at least in the pre-charge stage that seized articles are not notified".

5. At the outset, the maintainability of the petitions u/s 482 of the Code was challenged on behalf of the respondent on the ground that the petitioners having unsuccessfully challenged the order framing charge u/s 397 of the Code in the Section Court, a second revision to this court was barred by virtue of the provisions of sub-section (3) of that Section. It was urged that if sub-section 3 of Section 397 bars a petition for the revision of the order, the bar of sub-section (3) could not be allowed to be negated by the exercise of inherent powers of this Court u/s 482 of the Code. Sub-section (3) of Section 397, no doubt, bars a second petition of revision to any of the two courts. There was no doubt some support for the contention that the bar Section 397 would not permit the exercise of inherent power in relation to any interlocutory order and that is what the Supreme Court held in the context of sub-section (2) of Section 397 in the case of Amar Nath and Others Vs. State of Haryana and Another, . This decision would ordinarily be a good authority, on a party of reasoning, for the further proposition that the bar of sub-section (3) of Section 397 would oust even the inherent powers of this court to interfere where the revisional power had been declined by the Sessions Judge. The decision of the Supreme Court in this case was, however, "moderated" in the later decision in the case of Madhu Limaye Vs. The State of Maharashtra, and it was pointed out that on a plain reading of Section 482, it would follow that nothing in the Code, which would include sub-section (2) of Section 397 also, shall be deemed to limit or affect the inherent power of the High Court. It was, however, pointed out that if the bar was not to operate in the exercise of the inherent power at all, it will be tantamount to rendering nugatory one of the limitations imposed upon the exercise of revisional power. The Court, however, found a happy solution of the problem and held that "the

bar provided in sub-section 2 of Section 397 operates only in exercise of revisional power of High Court meaning thereby that the High Court will have no power of revision in relation to any interlocutory order". It was, Therefore, held that in case the impugned order clearly brought about a situation which was on abuse of the process of the court or for the purpose of securing of ends of justice, interference by the High Court was absolutely necessary, then nothing contained in Section 397(2) could limit or effect the exercise of inherent power by the High Court. It was, however, observed that such cases would be "few and far between" and the Court added a word of caution that the High Court must exercise its inherent power "very sparingly". This reading down of the decision of the Supreme Court in the case of Amar Nath was reiterated by the Court in the subsequent case of Raj Kapoor and Others Vs. State and Others, which again involved the bar of sub-section 2 of Section 397 in the context of the inherent power of the High Court. The Court observed that nothing in the Code, not even Section 397, can effect the amplitude of the inherent power put even a general principle pervades this branch of law so that when a specific provision is made, easy resort to inherent power is not right except under "compelling circumstances". It was further pointed out that not that there was absence of jurisdiction but that the inherent power should not invade areas set apart for specific power under the same Code. It was said that there was no ban on exercise of inherent power where abuse of the process of the Court or other extraordinary situation excites the Court's jurisdiction. The limitation was described as one of the "self-restraint, nothing more". The Supreme Court was concerned in all the three cases with sub-section (2) of Section 397 but the observations in the last case extend to the whole of Section 397 and is not confined to sub-section (2) alone. In a recent case, Cr. M(M) 562/83, decided on 15th November, 1983. I had the occasion to consider this question and expressed the view that "the quality of the bar in sub-section (2) and (3) is not different. What has been authoritatively said about the interaction of the bar on the inherent power of the High Court with reference to sub-section (2) of Section 397, to my mind, would equally hold good in the case of bar engrafted in sub-section (3) of that section". It cannot, Therefore, be said that the petition is not maintainable even though it would be open to the respondent to urge that the ground on which the petition is based may not be sustainable. In that case, I had pointed out that the "maintainability of a petition and the sustainability of the grounds on which it is based are conceptually different. While there is no lack of jurisdiction or power in the High Court, to give relief u/s 482 on the principles, which regulate the exercise of inherent power, the question would still be if in the totality of the circumstances, the impugned orders suffer from any infirmity which would justify interference." The various questions on merits may now be considered.

6. The order of the learned Addl. Sessions Judge in dismissing the revision petitions of the petitioners was assailed on the ground that it was vitiated on account of application of erroneous criterion to the question of framing of charge

and of discharge of an accused person in that Court applied the principles enunciated by the Supreme Court in the case of Ramesh Singh Supra in the context of sections 227 and 228 of the Code of Criminal Procedure to the present case, which was admittedly based on a compliant, filed by a custom officer, and which had to be regulated, in the matter of framing of charge and discharge, by the provisions of sections 245 and 246 of the Code of Criminal Procedure. The contention on behalf of the petitioners was that the two sets of provisions, namely, sections 227 and 228, on the one hand, and sections 245 and 246, on the other, embodied distinct and distinguishable tests for determination of the question with regard to the discharge of an accused or of framing of charge and that the test embodied in sections 227 and 228, as indeed, sections 239 and 240, could not be applied in cases instituted otherwise than on police report, in which the question of discharge or of framing of charge must be determined in accordance with the test incorporated in sections 245 and 246 of the Code. Now, it is not disputed that the language employed by the Legislature in the three sets of provisions dealing with discharge and framing of charge, is not in *peri materia* with each other. Section 227 provides for discharge in a case triable before a court of Sessions and section 228 provides for framing of charge in such a case. It is obvious that these two sections, as indeed, the two sections in each of the other sets of provisions must be read together because charge cannot be framed if the accused is entitled to be discharged and conversely if framing of charge would be no question of discharge. Section 227 provides that the Court shall discharge the accused if upon consideration of "the record of the case, and the documents submitted therewith", the Judge, "considers that there is no sufficient ground for proceeding against the accused". Section 228 provides for framing of charge if after consideration as aforesaid, the court is of the opinion that "there is ground for presuming that the accused has committed an offence". Sections 239 and 240 are the corresponding provisions in trial of warrant cases by magistrates instituted on a police report. Section 239 entitles the accused to a discharge if upon considering the police report and the documents sent with it and making such examination if any of the accused, "the magistrate considers the charge against the accused to be groundless." A charge has to be framed u/s 240 if on such consideration and examination etc. the magistrate is of opinion "that there is ground for presuming that the accused has committed an offence". The third set of provisions deal with discharge and framing of charge in cases instituted otherwise than on a police report and are contained in Sections 245 and 246 of the Code. Section 245(1) entitles the accused to discharge if upon "taking all evidence referred to in Section 244, the magistrate considers..... that no case against the accused has been made out which, if unrebutted, would warrant his conviction." Sub-section (1) of this section can be invoked after all such evidence as may be produced in support of the prosecution has been examined. But sub-section (2) provides that the magistrate may discharge the accused at previous stage if "he considers the charge to be groundless". Section 246 enjoins framing of a charge if after recording evidence or at any previous stage of the case, the magistrate is of opinion "that there is ground for

presuming that the accused has committed an offence." Even a cursory look at the three sets of provisions brings out certain obvious points of distinction in the context and in the choice of language. In the first two sets of provisions i.e. sections 227 and 228 as well as 239 and 240 the courts are to act on material consisting of the record of the case and the documents but there is no evidence. While dealing with these two sets of provisions, the court is really considering the evidence that the prosecution is likely to produce before the court as reflected in the records. In the third set of provisions, dealing with cases instituted otherwise than on police report, the court on the other hand, has to decide the question of discharge or otherwise not on the basis of any material proposed to be produced at the trial but on the basis of evidence recorded by the court and that evidence, according to section 244, is all such evidence as may be produced in support of the prosecution even though under sub-section (2) of section 245, the magistrate may discharge an accused even at any previous stage if the requirement of that sub-section is satisfied i.e. the magistrate considers the charge to be groundless. The material before the court u/s 246 also is evidence that has been recorded u/s 244 although even here, the decision to frame a charge may be taken by the magistrate at any previous stage of the case so long as he is of opinion that there is ground for presuming that the accused has committed an offence. Apart from the context in which and the material on which the decision has to be based in different situations a comparative examination of the language employed in these three sets of provisions also brings out a deliberate choice of distinguishable jargon. Discharge u/s 227 is justified only if there is absence of sufficient ground for "proceedings against the accused." Charge can be framed u/s 228 if there is "ground for presuming that the accused has committed an offence. " Discharge of an accused u/s 239 follows only if the charge against the accused appears to the magistrate to be "groundless" and a charge can be framed u/s 240 if there is ground for presuming that the accused has committed an offence. While the language employed in section 228 and its corresponding provision of section 240 is identical, the corresponding provision of sections 227 and 239 are not. Section 227 talks of sufficient ground for proceeding while section 239 talks of the charge being groundless. While there may be variations internally between these two sets of cases, which are instituted on police report, the phraseology of sections 245 and 246 represents further departure. Section 245 justifies discharge only if no case against the accused has been made out which, if unrebutted, would warrant his conviction. The corresponding test at any previous stage is if the charge is found to be groundless. Framing of charge is, however, justified u/s 246 if there is ground for presuming that the accused has committed an offence. It would thus be seen that the language employed in sections 228, 240 and 245 is, by and large, identical, even though sub-section (2) of Section 245 represents a departure in that the Magistrate can discharge if the charge is found to be groundless. In all the three corresponding provisions, the test is more or less common, namely, if there is ground for presuming that the accused has committed an offence. The corresponding provision in the earlier of the two sections in each of the cases is, however, different. The accused earns

a right of discharge if there is no sufficient ground for proceeding against the accused u/s 227 but right of discharge u/s 239 is if the charge appears to be groundless. On the other hand, there is right to discharge u/s 245, if no case against the accused has been made out, on the evidence before the court which if unrebutted would warrant his conviction.

7. It is obvious that in working out the three sets of provisions, the Court has to see in each of the cases first, if a discharge would be justified and only if it is not, the framing of charge would follow, such being the arrangement of the Sections. If the Section with regard to discharge in each of these sets of provisions is differently worded, even though the provision regarding framing of charge is based on a common phraseology, it follows that the expression "ground for presuming that the accused has committed an offence" in Sections 228, 240 and 246 of the Code could not but get its colour in each of the three situations from the varying language used in the Section that preceded. Thus, if the Sessions Court comes to the conclusion u/s 227 that there is sufficient ground for proceeding against the accused, it would be tantamount to a conclusion that there is ground for presuming that the accused has committed an offence. Similarly, if the Magistrate comes to the conclusion u/s 239 that the charge against the accused is not groundless, it would be tantamount to a conclusion that there is ground for presuming that the accused has committed an offence. In same the way, an opinion u/s 245 that a case against the accused has been made out which, if unrebutted would warrant conviction, it would be equivalent to an opinion u/s 246 that there is ground for presuming that the accused has committed an offence. It may seem odd that the same expression in the three sections may be read differently because of the context of the language used in the earlier of these Sections but there seems to be no escape from this conclusion. When the Supreme Court, Therefore, observed in the case of Ramesh Singh (supra) that u/s 227 and 228, if there is strong suspicion which leads the court to think that there is ground for presuming that the accused has committed an offence at the initial stage, it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. It was further observed in that case that the standard to test which is to be finally applied before recording of finding regarding the guilt or otherwise of the accused is not exactly to be applied at the of deciding the matter u/s 227 or 228 of the Code and that at that stage, the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. In that case, the Supreme Court was naturally reading Sections 227 and 228 in juxtaposition, as they ought to be read. But reading Section 245 and 246 in similar juxtaposition, one would not be able to say what the Supreme Court has said in that case because the test in Section 245 is and the question that the Magistrate has to ask to himself is if evidence before the Court would warrant his conviction, if not rebutted, and this test has nothing to do with either suspicion or even strong suspicion because the test has reference not for proceeding against the accused but the possibility of a conviction if nothing more was said by the accused and

the evidence was accepted on its face value. There are no doubt observations of the Supreme Court in para 4 of the judgment in that case which may bear resemblance to section 245 but reference in the latter part of the decision to the earlier cases and the distinction brought out in those cases between sufficient ground for "proceeding" and sufficient ground for "conviction" leave no manner of doubt that the Court was not laying that case any test which would have relevance to a case instituted otherwise than on a police report. It follows, Therefore, that a charge in such a case would be justified and it could be said that there is ground to presuming that the offence has been committed only if the question that the Court has to pose to itself u/s 245 is answered in the negative and this would take within its sweep an assessment and sufficiency of the evidence on record even though on the basis that it remains unchallenged. The test enunciated in a case covered by Sections 227 and 228 could not, Therefore, be legitimately applied to a case liable to be dealt with under Sections 245 and 246 of the Code. The learned Addl. Sessions Judge was, Therefore, clearly misled in relying on the decision of the Supreme Court in the case of Ramesh Singh (supra) but to my mind that by itself, would not vitiate the order if it can be otherwise show that the order of the trial court, as indeed, of the Addl. Sessions Judge are otherwise justified on an application of a proper test of the question of discharge and/or framing of a charge against the accused on the evidence on record. That leaves for consideration various contentions urged on behalf of the petitioners that the evidence on record could not warrant conviction, even if it remained unrebutted.

8. The question, Therefore, that arises is, having regard to the evidence on record and the various features of the case, this would court would be justified in interfering with the orders of the courts below in exercise of its inherent power u/s 482 of the Code, since in view of the dismissal of the petition of revision by the learned Addl. Sessions Judge, exercise of revisional power of this Court u/s 397 is barred by virtue of the provisions of sub-section (3) of that section. In considering this question, it would be necessary to bear in mind that even on its revisional side, this Court does not sit in appeal on the decision of the courts below framing a charge against an accused and even such powers are sparingly used, and the conditions for the exercise of the inherent power are further restricted to cases where it may be necessary to give effect to any order under the Code or to prevent abuse of the process any court or otherwise to secure the ends of justice and such powers are exercised only in rare cases. The exercise of inherent power was sought to be justified on behalf on a number of grounds.

9. In the first instance, it was urged that the material on which framing of charge was justified consisted of the undisputed factum of recovery of certain goods of foreign origin and the several statements made by the two petitioners u/s 107/108 of the Customs Act. The statements made by the two petitioners were sought to be excluded from consideration on the ground that these were not voluntary and were, Therefore, irrelevant in any criminal proceedings either by virtue of the provisions of section 24 of the Evidence Act or on the principle

embodied in that Section. It was not seriously disputed that while the statements of Pran Nath Dhawan purported to be of a confessional nature, the same was not necessarily true of the statements made by his wife even though it was conceded that it contained certain statements which may tantamount to admissions of certain incriminating facts. It was also not disputed that in view of the settled legal position, the petitioners could not be said to be "accused" persons within the meaning of section 24 when they made the statements in view of the admitted fact that a formal accusation against them either by the recording of the first information report or by institution of a complaint, has not been made and that neither the provision of section 24 nor the principle embodied in it could be attracted. But that apart, it is not possible to find fault with the decisions of the courts below that there was prima facie no material on record which may justify the inference that they were involuntary, even if one must concede and a concession was made on behalf of respondent that Pran Nath Dhawan had been taken to the Custom House and he even made that statement while within the precincts of the Custom House and even though his wife made the statement at the residence, the statement was nevertheless admittedly recorded at a fairly late hour in the night and that in the case of Dhawan, the recording of the statement went well beyond the mid-night. What is, however, ignored is that almost all the statements are in the handwriting of the petitioners and most of these not only contain representations that they were given without any duress or inducement but purport to contain graphic details of persons, places, dates, numbers, description of articles and other personal details of the activities of the two petitioners which would prima facie give these statements a ring of voluntariness even though it may be open to the petitioners at the trial produce evidence in rebuttal in aid of a possible finding to bring the case within the principles of section 24, if not its provisions, to show that these statements in spite of the unfavorable features were caused by any inducement, threat or promise. A suggestion was made that so far as the statement of Dhawan was concerned, it was perhaps based on a promise that if he made clean breast of things, he would be saving his wife from unnecessary embarrassment. But this again is a hypothesis for which material is still to be brought on the record by the petitioners if they want the court to believe at the trial that the statements were not voluntary acts of the two petitioners. True, the statements were retracted by the petitioners in court but the retraction of a statement is not determinative of its involuntary character. Retraction may only be one of the factors to be considered. There are a variety of other factors to be considered in determining the question if a statement was not voluntary. The courts below were, Therefore, perfectly justified in treating the statement as being prima facie voluntary as to justify the framing of a charge on its basis.

10. It was next urged that in any event, the statement Constituting either as of confessions or even otherwise as containing incriminating admissions, should have been excluded from consideration in that they were secured in violation of the petitioners' right to remain silent in any enquiry u/s 108 and of being

warned that the petitioners were not bound to make these statements and that if they did so, these may be used as evidence against them at the trial. It was not seriously disputed that as the law stands at present, statements u/s 108 of the Customs Act would neither be hit by Article 20(2) of the Constitution of India nor section 25 of the Evidence Act. It was also not disputed that the provision of sub-section (2) of section 164 of the Code of Criminal Procedure was also not attracted if a person made a statement u/s 108 before a Customs Officer in the course of an enquiry into the smuggling of goods as the Customs Officer, as at present interpreted, was neither a Police Officer nor a Magistrate. It was, however, urged that if a person whose conduct or activity in relation to smuggling of goods was being enquired into was required to give evidence and produce documents u/s 108 of the Customs Act and if such a person is bound so state the truth upon any subject respecting which he is examined by virtue of the duty imposed by sub-section 3 of that section, and if any such statement whether of a confessional nature or containing incriminating admissions but falling short of being a confession, could be eventually proved at a trial where he formally accused of an offence under the Act an implied duty must be read into the provision for a Customs Officer to warn the person, if not pursuant to the provisions of section 164(2), but at least on the salutary principle incorporated in that provision, as also by virtue of the duty of a functionary of the state to be "just and fair," and to save the provision of section 108 from being condemned as containing a procedure which is neither "reasonable" nor "fair". It was further urged that even though the section does not specifically say so, there is a right to silence but once the person chooses to make a statement, he was bound to state the truth. It was, Therefore, urged that on a reasonable reading of section 108, a duty must be implied to warn any person, sought to be examined under that provision, that he was not bound to make a statement and that if he made any statement, it may be used against him at the trial. It was further urged in this context, and this was not disputed. That offences under the Customs Act could also be investigated under the Delhi Special Police Act by virtue of an appropriate notification issued in that behalf. If such a duty is not read into section 108, it would lead to an anomaly in that in any case being investigated by the police, under the Code of Criminal Procedure, involving an offence under the Customs Act, a confessional statement would have to conform to the requirements of section 164, while a similar statement in an enquiry by the customs officer would not suffer from any such limitation. It was urged that the requirement of a just and fair procedure in any investigation, enquiry or trial of any offence is based on a fundamental principle and could not be allowed to be watered down nor be standard of reasonableness be allowed to be moderated depending on the gravity or the nature of the offence. Learned counsel for the customs pointed out that notwithstanding the absence of an express provision in that behalf in the Section, the Customs Officers generally administer a warning before recording statements u/s 108 that the person summoned u/s 108 was not bound to make a statement and that if he made a statement, it could be used against him in any proceeding. He in fact attributed the absence of such a

warning in the present case to an unfortunate omission on the part of the Customs Officer. The learned counsel for both the parties in fact drew my attention to a number of statements recording u/s 108 in other cases which contained averments that the person summoned had been so warned.

11. Some of these contentions no doubt raise important questions of law as to the content and scope of personal liberty, the extent of the right of silence of a suspect in the course of any investigation, inquiry or trial and as to the basic safeguards to which a suspect is or should be entitled irrespective of the nature of the investigation, inquiry or trial. Some of these questions have been subject-matter of decisions by the highest court and in the present state of the law, some of the constitutional and statutory safeguards available to a person accused of an offence were denied to a suspect on any inquiry into the contravention of any provisions of the Customs Act by a Customs Officer and it has been held that some of the provisions of the Customs Act constitute a deliberate legislative departure from the ordinary law of the land dealing with investigation or inquiry into the offences. In an attempt to extend the protective umbrella, available to a person accused of an offence, by constitutional and statutory law, including the Code of Criminal Procedure, to an investigation and/or inquiry under the Customs Act, in spite of clear dicta of the Supreme Court in a number of decisions to the contrary, and the deliberate departure from the ordinary law of the land, embodied in some of the provisions of the Customs Act, notably relating to the privilege of silence, the right of being cautioned, the admissibility of a confessional statement and of ordinary statements made by suspects in the course of inquiries under the Act, counsel for the petitioners made an impassioned appeal that the aforesaid decisions be suitably read, and if necessary be even read down, in the light of the more recent developments in judicial thought embodied in recent decisions of the Supreme Court itself in cases like *Mrs. Maneka Gandhi Vs. Union of India (UOI)* and *Another, and Nandini Satpathi* AIR 1978 S.C. 1825 which had the effect of enlarging the scope and content of personal liberty, the equal protection of the laws, and expanding the horizon of judicial control of legislative action beyond the traditional area of legislative competence by the application of the test of "just, fair and reasonable".

While there is no doubt that some of the recent decisions have given a new dimension to the concept of personal liberty and equality before the law and the equal protection of the laws and have, to an extent, introduced into the law in India, some of the ramifications of the "due process" clause of the American Constitution, and major developments in the Law on the subject in the United States particularly in the post-Warren period, but it is nevertheless not possible for this court to either ignore the decisions of the Supreme Court in the earlier cases or to read, much less read down the decisions in the context of these developments. An attempt to do so in the case of *Nandini* (supra) failed because the case of *Nandini* was heard by a Bench which felt bound by the earlier decisions of larger Benches. There are no doubt indications in the judgment in that case the court's unhappiness over the rather narrow construction of the

expression "accused" in some of the earlier cases but the court felt that "willy nilly" that Bench was bound by the decisions. This court could not put it higher whatever may be one's own inclination with regard to the ambit of certain essential safeguards for any person who is suspected of the commission of an offence, whether before or after a formal accusation. This contention is even otherwise of no consequence in the present case because whatever material was obtained by the Customs by the procedure, which is alleged to be unreasonable, has since passed the stage of investigation and inquiry and has been proved at the trial. Such material would now be protected because the "exclusionary rule" made popular by the post-Warren Court in the United States has itself been excluded by the Burger Court in that country and following that by the Supreme Court here at well (1980) 4 Section 669, 673. In any event, "the exclusionary rule" in India, is regulated by statutory provisions such as Section 167 of the Code of Criminal Procedure and sections 24 to 27 of the Evidence Act. This material could, Therefore, be legitimately taken into account in trial irrespective of any criticism, that may be made if the illegality or irregularity in the proceedings that laid to it.

12. There is also no substance in the contention that by virtue of section 4(2) of the Code Criminal Procedure, the safeguards provided in the sub-section (2) of section 161 and sub-section (2) of section 164 of the Code of Criminal Procedure would be equally available to such a person. True, neither Section 161 nor section 164 are limited in their application to "accused persons and but for the reasons that hereinafter follow, would protect a person whose conduct is being enquired into in relation to smuggling of goods under the Customs Act even before the stage of formal accusation but this contention ignores two important aspects. In the first instance, section 161 is confined to examination of witnesses by "Police" and if a customs officer is not a police officer, and this is beyond controversy in the present state of the law, this section would have no application. Section 164, in terms, enjoins a "Magistrate" when called upon to record a confession and if a customs officer recording a confession has not been empowered as a Magistrate, it is difficult to conclude that the protection of Section 164 would be available or that the customs officer would be under any statutory obligation by virtue of Section 164 to give a warning to such a person. Secondly, section 4(2) no doubt provides that offences under other law, shall also be investigated, enquired into and tried and otherwise dealt with according to the provisions of the Code, but the application of the Code to such offences has, in terms, been made "subject to any enactment for the time being in force regulating the manner or place of investigating, enquiring into, trying or otherwise dealing with such offences." Sections 161 and 164 deal with examination of witnesses and recording of confessions and statements. The provisions of sections 107 and 108, as indeed, certain other provisions of the Customs Act, with which we are not concerned, deal with matters for which provision is made in the Code by Sections 161 and 164. Sections 107 and 108, Therefore, being part of a special statute, regulating the manner of place of

investigation or otherwise dealing with offences under any other law within the meaning of sub-section (2) of Section 4, these two sets of sections being inconsistent, even though dealing with the same subject-matter, the provisions of the special statute would prevail even though the Code of Criminal Procedure is a subsequent statute. Customs Act, 1962 was certainly an enactment for the time being in force within the meaning of sub-section (2) of section 4. How far these safeguards would be impliedly read into Sections 107 and 108 or the extent to these two sections would be read down with a view to conform them to the requirement that every procedure dealing with life and liberty should be just and reasonable is a different aspect of the matter, but the provisions of sections 161 and 164, in terms, could not be said to be applicable.

13. It was then urged that the material on record if taken on its face value without any rebuttal whatsoever, it could not be said on any reckoning, that the petitioners have committed the offences with which they have been charged.

14. The petitioners are charged with an offence u/s 135(1)(b) of the Customs Act on the basis of recovery from them of certain nylon sarees, cameras and nail-cutters of foreign origin. In their statements, the petitioners have made an almost clean breast of their past activity as indeed the manner in which they came by the seized goods in relation to foreign goods the intention with which they have kept these goods and what they proposed to do with these goods. It is also patent on their statements that none of them had any authorisation of import the goods or had paid any duty on the importation of the goods. Section 135(1)(b) is attracted, if any, person "acquires possession, of or is in any way concerned in carrying, removing, depicting, 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".

15. It was not disputed that on the evidence on record the requirement of first part of the clause was fully satisfied inasmuch as the petitioners acquired possession of and were concerned in keeping, as also dealing, with the goods which were seized from the residence of the petitioners. The clause, however, has a further requirement before the penal consequences follows and that is that such that a person must know or have reason to believe that the goods in question are liable to be confiscated u/s 111. The first question, Therefore, is if the goods in question were liable to confiscation under that section. The goods were said to be so liable by virtue of clause (d) of section 111. This is how clause (d) runs :-

"any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in forces;"

It was not disputed that the sized goods were of foreign origin. It was, however, urged that there was no presumption that these had been imported into India,

contrary to any prohibition, and that the burden of proving that they have been smuggled would ordinarily be on the Department and this burden has not been discharged on the existing material. According to the customs, the burden shifts by virtue of section 123 of the Customs, according to which, where any goods to which the section applied, or seized in the "reasonable belief" that they are smuggled, the burden of proof that they are not smuggled, is on the person from whose possession the goods were seized or on the owner thereof. It was not disputed that neither the cameras nor the nail-cutters were notified goods within the meaning of section 123 and the only goods that could possibly be said to be notified were the sarees, although the goods notified were not sarees, as such but "fabrics made wholly or mainly of synthetic yarn". It was not disputed that in the case reported as H.S. Jolly Vs. Sri Kishan, this court, J. D. Jain, J., has held that sarees cut into specific length were not fabrics within the meaning of the notification. The question is not free from difficulty for a variety of reasons. But there can be no escape from the conclusion that the decision would obviously be binding on the learned Magistrate, who has framed the charge, and if ultimately he is bound to accept that decision, sarees would not attract the presumption.

16. The charge in relation to the seized goods would not be justified unless there was some material on the record which may justify a possible conclusion that the goods were smuggled, without the aid of the presumption of section 123. It was urged that on a fair reading of the statements of the petitioners, it is established that the goods had been smuggled into country by the various person and on different occasions of which the details have been given. Clause (p) of Section 111 was also pressed into service to justify charge being framed. Clause (p) renders liable to confiscation "any notified goods in relation to which any provisions of Chapter IVA or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened".

Chapter IVA deals with the detection of illegally imported goods and prevention of the disposal thereof. Section 11(b) of this Chapter empowers the Central Government to notify goods. Section 11(c) in this Chapter provides that every person who owns, possesses or controls on the notified date, any notified goods, shall within 7 days from that date, deliver to the proper officer a statement in relation to the notified goods owned, possessed or controlled by him and the place where such goods are kept or stored. Section 11(d) in this chapter further provides that no person shall acquire except by gift or succession from any other individual in India after notified date any notified goods unless such goods are accompanied by the voucher referred to in chapter 11(f) memorandum referred to in sub-section (2) of section 11(g) as the case may be or in the case of a person who has himself imported any goods, any evidence showing clearance of such goods by the Customs authorities. It was, however, not disputed that neither sarees nor nail-cutters were ever notified u/s 11(b) and that of the seized goods, only cameras have been so notified. It was not disputed that the petitioners at no stage delivered any statement in relation to the cameras, as required by section 11(c), or took the precaution in relation to them as required

by section 11(d). Petitioners did not claim in their statement to have imported the goods themselves but on their own showing did not comply with the requirement of sections 11(c) and 11(d).

Prima facie, Therefore, the cameras could be said to be liable to confiscated by virtue of clause (p) of section 111 independently of and without attracting the provisions of section 123 of the Customs Act.

17. However, the conclusion that the seized goods had been smuggled into India by the various person from whom these were received for sale by the petitioners and that the petitioner received, stored for disposal and otherwise dealt with these goods in the requisite belief is a possible conclusion on a fair reading of the statement of the petitioners, which would fully justify the impugned orders. It is not possible to exonerate Mrs. Dhawan because on her showing her connection with the goods was not the innocent act of on unwilling wife drawn into it by a demanding husband. She fully implicates herself in the active pursuit of an illegal trade in smuggled goods and held herself out as an active partner in the crime by acting as a shrewd sales person through contacts, which she had established among the "elite" of the capital. What view a Court may eventually take of her complicity by virtue of being a wife is a different aspect of the matter which would naturally be considered by the trial court if and when it decides to convict her of the offence with which she has been charged.

18. The petitions fail and are hereby dismissed. That trial court would expedite the trial of the complaint to make up for the time lost in the present proceedings and the proceedings in revision. The trial court would, however, be entitled as indeed, bound to decide the matter in accordance with law uninfluenced by any observation made by this court on the merits as these were merely intended to determine the limited question as to the justification or otherwise of any interference in exercise of this court, inherent powers.