
(1966) 07 CAL CK 0018
In the Calcutta High Court
Case No : A.F.O.O. No. 49 of 1965

Shamlal Sen Private Ltd. and Others

APPELLANT

Vs

Additional Collector of Customs and Others

RESPONDENT

Date of Decision : 05-07-1966

Acts Referred:

Constitution of India, 1950 — Article 226
Sea Customs Act, 1878 — Section 167(8), 178A, 182

Citation : AIR 1967 Cal 239 : (1967) CriLJ 616 : (1967) 1 ILR (Cal) 412

Hon'ble Judges : D.N. Sinha, C.J.; A.K. Mukherjea, J

Bench : Division Bench

Advocate : G.P. Kar and A.N. Banerjee, for the Appellant; E. Meyer and Somnath Chatterjee, for the Respondent

Final Decision : Dismissed

Judgement

Sinha, C.J.—The facts in this case are shortly as follows: The respondent No. 1 Shamlal Sen Private Ltd. is a company registered under the Indian Companies Act, having its registered office situate at No. 3, Meerbahar Ghat Street (formerly 7 Nalini Sett Road), Calcutta and a workshop-cum-residence at No. 164, Cotton Street, Calcutta. The respondents Nos. 2, 3, 4 and 5 Sitanath Sen, Janakinath Sen, Shankarlal Sen and Tarak Nath Sen are the directors of the said company. The said company carried on business in gold and silver and is a manufacturer of gold loaves. Originally it was a partnership concern, commencing its business more than 100 years ago, but later on it was converted into a private limited company. On 29th December, 1954 both 7. Nalini Sett Road and 164, Cotton Street were raided by the customs authorities and a quantity of gold leaves, gold bullion and gold coins were seized together with books of account. On the 24th January 1955 a show-cause notice was issued by Mr. Srivastava the Assistant Collector of Customs etc. upon Mr. Janakinath Sen and the subject-matter of the said notice was stated to be as follows:

""Sub :--One pkt contg. gold leaves (details shown in Appendix "A") seizure of,

by Customs--Deptt. at the above mentioned address on 29th December 1954 on suspicion of having been legally (sic) imported into India--Notice to show cause."

It was stated in the said notice that the above-mentioned articles were seized at 164, Cotton Street by Customs Preventive Officers, as there were reasonable grounds to believe that they had been illegally imported into India in violation of the provisions of the Foreign Exchange Regulation Act and the Sea Customs Act. Mr. Janaki Nath Sen was required to prove by suitable documentary evidence that the said gold leaves were imported or in the alternative how he came into possession of the said gold bullion and to show cause why the gold should not be confiscated and penal action should be taken against him u/s 167(8) of the Sea Customs Act. It may be mentioned here that these gold leaves have since been released and in reality we are not concerned with the same in this appeal. On the 19th April, 1955 a second show-cause notice was issued by the said Mr. Srivastava, addressed to M/s. Shamlal Sen Ltd., 7, Nalini Sett Road, Calcutta relating to the following subject-matter :--

"Sub:--Gold bars and gold coins (bullion) bearing inscriptions and Marks indicative of foreign Origin (Nt. 627 T. 13 As. 6 P.) Value Rs. 57545/7 duty Rs. 8230/7 seizure of by the Customs Dept. at the shop at the above-mentioned address on 29th December, 1954--Notice to show-cause."

2. These were seized from 7, Nalini Sett Road. The gold coins excepting 10 pieces are not official coins, but are in the nature of gold bullion made up in the form of gold coins stamped with certain inscriptions. The particulars of such inscriptions are as follows :

"(a) Habib Bank 6 pieces (b) Murshidabad coins or Mohurs 58 pieces (c) S. L. Sen" 502 pieces (d) Sovereign 6 pieces (e) Gold Mohur 4 pieces"

All the above coins, excepting item (c), have since been released and we are not concerned with them in this appeal. In the second show- cause notice it was stated that the gold bullion mentioned therein was seized by Customs Preventive Officers, as there were reasonable grounds to believe that they had been illegally imported into India without payment of proper customs duties and without production of a permit of the Reserve Bank of India. The notice called upon the parties to show cause how the gold in question, which was of foreign origin, came into their possession and to show cause why the goods should not be confiscated and penal action taken under Section 167(8) and (39) of the Sea Customs Act. To this show-cause notice, the company replied and denied that there was any gold of foreign origin or that they were imported from outside India. They submitted that no offence had been committed.

3. On the 1st of July, 1955 a third show-cause notice was issued upon the parties, the relevant part whereof was as follows : -

"Subject : Smuggling of gold--contravention of the provisions of the F. B. R. A. and the S. C. A., Messrs. Shyam Lal Sen Ltd. of 7, Nalini Sett Road, Calcutta and

Shri Sita Nath Sen, Shri Sankar Lal Sen, Janaki Nath Sen and Shri Taraknath Sen."

On receipt of reliable information that Messrs. Shyam Lal Sen Ltd. of 7, Nalini Sett Road, Calcutta were regularly receiving smuggled gold at their premises No. 164, Cotton Street. (Hukka Putty) in accordance with well-planned -- arrangements, watch was kept by the Customs Officers of their premises. On 28th December 1954 one person, later known to be W. B. Zadkar, wearing a long coat accompanied by another person at about 9 A. M. entered No. 164, Cotton Street, and after few minutes went away. On 29th December 1954 the same person appeared again at about 9-30 A. M. and as he was going towards No. 164, Cotton Street, (Hukka putty) he was apprehended by the Customs Officers. Sri. W. B. Zadkar, admitted that he was carrying gold for the purpose of delivering the same in the aforesaid premises at No. 164, Cotton Street. He also admitted that prior to his visits on 28th December 1954 and 29th December 1954 he had visited the same premises on at least half a dozen times and delivered the gold and that after each delivery he used to be paid by the persons who took delivery of the Gold a sum of Rs. 125 per trip for his services. Shri Zadkar also stated that his commission had been fixed by previous arrangement. He owned that he knew that the gold that he delivered was smuggled gold and that whatever gold had been previously received by him from Dum Dum Airport having been brought by foreign aircrafts. He explained the arrangements for the smuggling of gold for Messrs. Shyam Lal Sen Ltd., and its Directors and for another Burra Bazar party and how they had been made.

X X x x The importation of gold without entry being duly made and proper customs duty being paid is an offence in contravention of Section 36, Sea Customs Act and is punishable u/s 167(37) *ibid*. The importation of gold without general or special permit of the Reserve Bank of India contravenes the provisions of Section 8(1) of Foreign Exchange Regulation Act 1947 read with the Government of India, Ministry of Finance Notification No. 12 (11) F. 1/48 dated 25th August 1948 as amended by Notification No. 12 (11) F. 1/57 dated 27th February 1951 and the offence is punishable u/s 167 clause 8 of the Sea Customs Act read with Section 23-A of the Foreign Exchange Regulation Act. 1947".

x x x x 4. In view of the foregoing Shri Shan lair Lal Sen, the parties were called upon to explain the matter in writing within 7 days hereof and also to show cause why they should not be penalised for being persons concerned in the offence u/s 167(8) of the Sea Customs Act. The respondents showed cause by filing a petition. Paragraphs 2, 3 and 4 of the said petition are relevant and are set out below:

"2. That the story narrated in the notice dated 1st July, 1955 is nowhere to be found in the two notices referred above and it is submitted that this Company and the Directors viz. your petitioners, never received any smuggled gold at premises No. 164, Cotton Street, or at any other place far less regularly

receiving such gold.

That the Company and its Directors, your petitioners never knew anybody named Sri W. B. Zadkar nor did they ever purchase any gold from or through the said Sri Zadkar, nor was there any arrangement far less well planned with the said Zadkar or with anybody nor did your petitioners ever pay Rs. 125 per trip for his alleged services nor do your petitioners admit that alleged statements by Zadkar against your petitioners' company and your petitioners.

That your petitioners emphatically deny that in August and September, 1954 they had anything to do with inviting the said Zadkar and finalising any arrangement at Grand Hotel and they ever received any delivery of gold through the said man either in the Maidan or at Red Road or at any other place.

3. That the story of delivery of gold through Zadkar to your petitioners' Company or to your petitioners is false and concocted with some ulterior purpose and your petitioners challenge the said person to prove his statement in open Court and your petitioners getting an opportunity to cross-examine the matter or the statements and thus show that the alleged story is tissue of falsehood which has been got up with the sole object of making it the basis of the case for confiscation.

4. That the story as embodied in the notice dated 1st July, 1955 is nowhere to be found in earlier notices referred above in paragraph 1 of the causes shown."

Thereupon, the customs authorities proceeded to adjudicate upon the show-cause notices. Zadkar, mentioned in the third show-cause notice was not produced for cross-examination. On the 31st of May, 1956 and 15th June, 1956 Sri Rangaswami, Additional Collector of Customs passed orders No. 68 and 69 relating to the gold bars and gold coins seized at No. 7, Nalini Sett Road and the gold leaves. It was ordered that, excepting the pieces bearing the impression "S. L. Sen" the rest should be released, but that the pieces bearing the impression "S. L. Sen" be confiscated u/s 167(8) of the Sea Customs Act read with Section 3(2) of the Import and Export Control Act. As regards gold leaves, the order was that the same were confiscated, u/s 167(8) of the Sea Customs Act read with Section 3(2) of the Import and Export Control Act. On the 14th of June, 1956 another order was passed by the said Sri Rangaswami, that M/s. Shamlal Sen Ltd- should pay a penalty of Rs. 3 lakhs within a fortnight and that each of its directors should pay a penalty of Rs. 30,000 each, also within a fortnight. On the 9th of August, 1956 the respondents made an application to this Court under Article 226 of the Constitution and a rule (matter 160 of 1956) was issued together with an injunction restraining the appellants from selling the confiscated goods or taking any further action in respect of the penalty. On the 18th of March, 1958 an order was made by Mukharji, J. by consent of parties. The relevant terms whereof were as follows:

"i) Customs Authorities to supply Respondents with a copy of the statement of Zadkar and a copy of the Chemical Test Report within a fortnight;

- ii) Customs Authorities to arrange for examination and assaying of the sold bars, leaves and coins in the Government Mint, such assaying to be effected within a fortnight after the statement and report are supplied;
- iii) A fortnight after the assaying of the gold, etc. the Customs Authorities would give the Respondents a hearing and allow the Respondents to cross-examine Zadkar, if possible;
- iv) Gold coins ordered to be released by the Customs Authorities by order No. 68 are to be returned to the Respondents."

Thereafter, the gold coins that were to be returned were returned by the Customs Authorities and samples were drawn for assaying and sent to the India Government Mint, Alipore, On the 3rd of June, 1958 copies of assay certificates issued by the India Government Mint were sent to the respondents and according to the said certificates the fineness of the gold varied from 947.5 to 992.7. On the 16th April, 1958 the respondents were also furnished with two statements made by Zadkar, and a copy of a chemical test report in which the fineness of gold varied from 991,3 to 999.15. Thereafter, the respondents demanded a personal hearing and cross-examination of Zadkar. But as nothing was done by the Customs Authorities, on 29th June, 1960 the respondents made a second application to this Court under Article 226, for a writ directing the appellants to give a personal hearing, for an opportunity to cross-examine the said Zadkar, and for return of the gold. At the hearing before Ray, J. it was stated on behalf of the Customs Authorities that personal hearing could not be given because Zadkar could not be found. It was, however, pointed out that not only two statements of Zadkar dated Dec. 29, 1954 and Jan. 7, 1955 had been sent to the respondents, but even after the consent order, three other statements of Zadkar dated March 29, 1955, October 13, 1955 and April 15, 1956 had been sent and learned counsel on behalf of the respondents characterised this as highly suspicious. The learned Judge in his judgment himself thought it to be very peculiar that the authorities should have the other three statements with them and yet they should not have supplied them together with the other two statements. The learned Judge made the Rule absolute and it was directed that the appellants would not be entitled to rely on any statement of Zadkar save and except the two earlier statements which were furnished in 1958. The appellants were directed to return all gold to the respondents except the gold coins bearing mark "S. L. Sen" and the gold leaves confiscated by Orders Nos. 68 and 69. Books of accounts were directed to be returned.

5. On the 13th of March 1961 the gold and books of accounts directed to be returned were in fact returned to the respondents. Thereafter, a personal hearing took place before Shri Srivastava. To this the respondents took strong objection on the ground that Shri Srivastava had been actively taking part on behalf of the respondents, personally directing the seizure etc. and therefore, he could not act as the adjudicating officer. On the 13th of May, 1961 Zadkar was produced for cross-examination and was cross-examined. On the 19th of May, 1961 the

evidence of Zadkar as made before the adjudicating officer was forwarded to the respondents. On the 29th May, 1961 the solicitor for the respondents drew the attention of Sri Srivastava to the fact that in the statement supplied of Zadkar, he was stated to have used the word "gold", but in fact he never did so. He had in fact used the word "packet". I might mention here that subsequently, Shri Srivastava has admitted that the word "gold" was never used by Zadkar, although he had stated so in the copy of statement sent to the respondents. In spite of the objection raised by the respondents, Shri Srivastava insisted on acting as the adjudicating officer and on 12th June, 1961 he passed Order No. 486 whereby he imposed a personal penalty of Rs. 5,00,000 on M/s. Shamlal Sen Private Ltd. u/s 167(8) of the Sea Customs Act read with Section 23A of the Foreign Exchange Regulation Act, for being persons concerned in the illegal importation of gold; a personal penalty of Rs. 3,00,000 each on the directors as being persons concerned in the illegal importation of gold and confiscation of the gold coins bearing inscription of "S. L. Sen" u/s 167(8) of the Sea Customs Act read with 23A of the Foreign Exchange Regulation Act. Thereupon, the respondents made a third application under Article 226 challenging the order of Shri Srivastava. The main ground was that Shri Srivastava was a biased person and there was violation of the rules of natural justice. The matter was heard and decided by Banerjee, J. who by his order dated 12th of July, 1962 held that Shri Srivastava was a biased person and the adjudication order violated the principle of natural justice. It was further held that his findings were based on presumptions and conjectures and not based on any evidence. The Rule was, therefore, made absolute and the order was quashed, but the Customs Authorities were given liberty to proceed to adjudicate upon the charges afresh, in accordance with law.

6. On the 29th November, 1962 Shri S. Venkataraman, Additional Collector of Customs (appraising) intimated to the respondents that it had been decided to proceed afresh with the charges contained in the show-cause notice dated 1st July 1955 (third show cause notice mentioned above) and he enquired as to whether the respondents would require a fresh show-cause notice or they would prefer the case being readjudicated, on the basis of the charges already framed against them and whether a personal hearing was desired. A personal hearing was asked for and took place. At the hearing the learned counsel on behalf of the respondents agreed to have the case decided on the basis of the show-cause notice dated 1st July 1955 and did not insist on a fresh show-cause notice. It was, however, never agreed that adjudicating officer could rely on evidence taken in the previous hearings, which had been quashed. There was a personal hearing on 15th of February, 1963 and on the 16th of February 1963 an order was made by Shri Venkataraman which is as follows:

(i) Gold coins bearing inscription of "S. L. Sen" are confiscated u/s 167(8) S. C. Act read with Section 23-A F. T. R. Act.

(ii) Gold leaves forming subject matter of order No. 69 are released.

(iii) Held that the firm M/s. S. L. Sen (Private) Ltd. had knowledge and complicity in the smuggled gold they were receiving and that, therefore they are persons concerned in the offence of smuggling of gold on a number of occasions and certainly at least on one occasion when the gold intended for them was seized from Zadkar.

(iv) Personal penalty of 2,40,000/- imposed on M/s. S. L. Sen (Private) Ltd. as being persons concerned in the illegal importation of at least 915 tolas of gold valued at Rs. 85,000/-.

(v) By virtue of their position and knowledge as directors of the firm M/s. S. L. Sen (Private) Ltd.--(1) Sitanath Sen (2) Janakinath Sen (3) Shankarlal Sen and (4) Tarak Nath Sen are also persons concerned and that they are equally liable for deterrent action. "Considering however that the directors were not individually identified and that penalty had already been imposed on the firm, personal penalty was imposed on them for the amount of Rs. 2,50,000/-each.

Against this order the respondents made an application under Article 226 and a Rule was issued on the 11th April, 1963 upon the appellants to show cause why a writ in the nature of Mandamus should not be issued directing them to forbear from giving any effect to the said order No. 21 dated 16th of February, 1963 and as to why the gold coins should not be returned and for other reliefs. This Rule came up for hearing before Banerjee, J. and by his order dated 7/10th August 1964 the Rule was made absolute and it was held that appellants had failed to prove the charges against the respondents and the penal order for confiscation and of monetary penalty was quashed. It is against this order that this appeal is directed.

7. It must be observed that the impugned order may be divided into two parts. The first relates to the gold coins with the inscription "S. L. Sen" which were seized at premises No. 7, Nalini Sett Road and which were confiscated. The second part of the order is one in which the company and its directors were held to be "persons concerned" in the offence of smuggling gold on a number of occasions and at least on one occasion when the gold was seized from Zadkar. The first point to be considered is the applicability of Section 178-A of the Sea Customs Act. This is a section which was inserted by Section 14 of the Sea Customs (Amendment) Act, 1955 (21 of 1955) which came into operation on the 7th of May 1955. This section has altered the burden of proof and the terms thereof are as follows :

"178-A Burden of proof. -- (1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be on the person from whose possession the goods were seized.

(2) This section shall apply to gold, gold manufactures diamonds and other precious stones, cigarettes and cosmetics and any other goods which the Central Government may by notification in the Official Gazette specify in this be half.

(3) Every notification issued under Sub-section (2) shall be laid before both Houses of Parliament as soon as may be after it is issued."

Obviously, this section would be of no avail to the appellants in respect of gold seized from Zadkar, because in the said section the burden of proof lies on the person from whose possession goods were seized and therefore could not in any event lie on the respondents. An attempt has been made to apply it in respect of the seizure of the coins. Undoubtedly, they were seized from the possession of the respondents. Seizure, however, took place on the 29th December, 1954 and the amendment came into operation on the 7th of May 1955. The hearing was on the 15th of February, 1963 and the adjudication order was made on the 16th February, 1963. The question is whether this section applies to the facts of the instant case and the burden of proof has been shifted upon the respondents. In other words, the question is as to whether the provisions of Section 178-A are retrospective or prospective in operation, that is to say prospective from the date of the seizure. Upon this point, a number of decisions have been cited and fall to be considered. The first case to be considered is the Supreme Court decision *Babulal Amthalal Mehta Vs. The Collector of Customs, Calcutta*, . In that case, the facts were as follows : The petitioner carried on business as a broker in diamonds and precious stones in Calcutta. On 4th of May, 1955 Customs Authorities searched his residence and seized a number of diamonds concealed in an old jacket in the washing closet. On the 4th of May, 1955 notice was served on the petitioner stating that there were reasonable grounds to believe that the goods had been illegally imported into India and the petitioner was asked to show evidence to the effect that the goods had been legally imported into India on payment of proper customs duties. The petitioner showed cause and on the 12th of September, 1955 it was held that the petitioner had failed to discharge his onus under Section 178-A of the Sea Customs Act, and the goods were confiscated. Thereupon, an application was made under Article 132 of the Constitution before the Supreme Court and the point raised was that Section 178-A offended Article 14 of the Constitution and was, therefore, ultra vires and void. It will be observed that the seizure was made a few days before Section 178-A came into operation. But before the Supreme Court no point was taken as to the prospective or retrospective operation of the amended section. The Supreme Court proceeded to deal with the objection that the section was ultra vires and held that Section 178-A did not violate the provisions of Article 14 and was, therefore, valid. The next case to be considered is *Ambalal v. Union of India* AIR 1961 SC 264. The facts in that case were as follows : On 22nd June, 1951 there was search in the appellant's house and among other goods certain gold bars and gold bullion were seized. He was called upon to show cause why they should not be confiscated u/s 167(8) of the Sea Customs Act read with Section 7 of the Land Customs Act. The appellant admitted that some goods were smuggled from Pakistan where the appellant originally resided but with regard to others it was stated that the goods had been brought from Pakistan into India before partition. This explanation was not accepted and there was an order of confiscation on

18th January 1952. The appellant filed a writ petition in the High Court of Punjab which was dismissed, after which he appealed to the Supreme Court. Subba Rao, J. said as follows :

"The decision in regard to items 1 to 5 turns purely on the question of onus. The Collector of Central Excise as well as the Central Board of Revenue held that the onus of proving the import of the goods lay on the appellant. There is no evidence adduced by the customs authorities to establish the offence of the appellant, namely, that the goods were smuggled into India after the raising of the customs barrier against Pakistan in March 1948. So too, on the part of the appellant, except his statement made at the time of seizure of the goods and also at the time of the enquiry that he brought them with him into India in 1947, no other acceptable evidence has been adduced. In the circumstances, the question of onus of proof becomes very important and the decision turns upon the question on whom the burden of proof lies.

This Court has held that a customs officer is not a judicial tribunal and that a proceeding before him is not a prosecution. But it cannot be denied that the relevant provisions of the Sea Customs Act and the Land Customs Act are penal in character. The appropriate customs authority is empowered to make an inquiry in respect of an offence alleged to have been committed by a person under the said Acts, summon and examine witnesses, decide whether an offence is committed, make an order of confiscation of the goods in respect of which the offence is committed and impose penalty on the person concerned, see Sections 168 and 171-A of the Sea Customs Act and Sections 5 and 7 of the Land Customs Act. To such a situation, though the provisions of the Code of Criminal Procedure or the Evidence Act may not apply except in so far as they are statutorily made applicable, the fundamental principles of criminal jurisprudence and of natural justice must necessarily apply. If so, the burden of proof is on the customs authorities and they have to bring borne the guilt to the person alleged to have committed a particular offence under the said Acts by adducing satisfactory evidence. In the present case no such evidence is forthcoming; indeed there is no title of evidence to prove the case of the customs authorities. But it is said that the onus shifted to the appellant for three reasons, namely, (i) by reason of the provisions of Section 178-A of the Sea Customs Act; (ii) by reason of Section 5 of the Land Customs Act; (iii) by reason of Section 106 of the Evidence Act.

Section 178A of the Sea Customs Act does not govern the present case, for that section was inserted in that Act by Act No. XXI of 1955 whereas the order of confiscation of the goods in question was made on January 18, 1952. The section is prospective in operation and cannot govern the said order."

8. It will be observed that the Supreme Court has specifically held that the section was prospective in operation. The next case to be considered is also a decision of the Supreme Court *Pukhraj v. D. R. Kohli* AIR 1062 SC 1559. The facts in that case were as follows: The appellant was a goldsmith owing a gold

and silver shop at Rajnandgaon in Madhya Pradesh. On 25th October, 1956 while travelling by a passenger train from Calcutta he was searched at Raigarh railway station and live pieces of gold bullion were seized by the officer concerned acting on a reasonable belief that it was smuggled goods. Show-cause notice was served on 20th May 1957, and on 26th July, 1958 the Collector of Central Excise, Nagpur passed an order of confiscation. It would thus appear that the seizure itself was after the amendment. But the importance of this case is that it discusses the circumstance under which Section 178-A places a burden of proof upon the party in whose possession the goods were seized. Gajendragadkar, J. (as he then was) said as follows:

"Now Section 178-A places the burden of proving that the goods are not smuggled goods on the person from whose possession the said goods are seized, where it appears that the said goods are seized, under the provisions of the Sea Customs Act in the reasonable belief that they are smuggled goods. Once it is shown that the goods were seized in the manner contemplated by the first part of Section 178-A, it would be for the appellant to prove, that the goods were, not smuggled goods;"

The words "seized in the manner contemplated by the first part of Section 178-A" are important".

9. The next case to be considered is a decision of the Bombay High Court M.G. Abrol and Another Vs. Amichand Vallamji and Others, . In that case, the facts were as follows: Respondents carried on business in Bombay as dealers, in bullion. On 12th September, 1955 they sent an amount of gold to the Bombay Bullion Association Refinery for the purpose of melting and assaying. On the same day, 151 tolas of gold which they had so sent were seized. Thereupon, statements were taken and books looked into. 41 tolas of gold were returned and on the 9th August, 1956 a show-cause notice was issued on the firm of Ambalal Amichand to show cause why the balance of the gold should not be confiscated. Thereupon, an application was made under Article 226 before the Bombay High Court and it was contended that upon their own showing the Customs Officer had seized the gold on mere suspicion that it was smuggled gold and not under any reasonable belief that it was smuggled gold. It was held by Desai, J. that at the time of seizure there was a mere suspicion, and therefore the provisions of Section 178-A were not satisfied. Against that there was an appeal before a Division Bench. Shah, J. laid as follows:

"In other words, we are of the opinion that it is at the stage of issuing the show-cause notice that the Inquiry Officer has got to decide upon the course that he would adopt, viz., whether, if he is not satisfied that there was such a reasonable belief in the minds of the Customs Officers who seized the gold at the time of the seizure, he would require the Customs Department itself to produce necessary evidence to show that the gold was smuggled, or in case he is satisfied on the material placed by the Investigating Officers before him that there existed in the minds of seizing officers a reasonable belief that the gold they had seized was

smuggled gold at the time of the seizure thereof call upon persons to whom the notice is addressed to adduce all the evidence that they would desire for the purpose of showing that the gold was not smuggled gold. As stated above, the words used in Section 178-A are too simple to admit of any doubt as to their true construction. The reasonable belief referred to in that section can only refer to the point of time when the gold is seized."

10. The last case cited on this point is the decision of a Single Bench of this Court *Kshetra Nath Basak v. Collector of Land Customs, Calcutta* AIR 1959 Cal 850. In that case, P. B. Mukharji, J. held that Section 178-A relates to procedural rights. The point of time with reference to which such procedural rights are to be applied and judged is when the time for the proof comes i.e., it comes into operation when after the goods have been seized a time arrives for the hearing of the case. The learned Judge hold that Section 178-A was not retrospective but no question of its retrospective application arose because the goods were seized on 2-8-1955, but the hearing did not commence before 4-11-1955 by which time the amendment in both the Sea Customs and Land Customs Acts had come into force and therefore the rule about burden of proof as contained in Section 178-A as extended to the Land Customs Act could be rightly applied by the Collector of Land Customs. Section 178-A of the Sea Customs Act was introduced by the Sea Customs (Amendment) Act, 1955 which came into operation on the 7th of May, 1955. Section 9 read with the schedule has also been amended and this has been made applicable to the Land Customs Act, 1924. It appears from the facts of the case that the gold bullion and silver coins were actually seized on the 20th August 1955, that is after Section 178-A came into operation. In my opinion however, the learned Judge came to an erroneous conclusion in holding firstly that the burden of proof is always a procedural matter and secondly that the relevant point of time to consider is not when the seizure took place, but when the matter comes to be heard. This is not in accordance with the Bombay decision mentioned above as also the Supreme Court decisions discussed above. On the question as to whether the burden of proof was substantive law or procedural law, the matter has been succinctly stated in Halsbury's Laws of England, Third Edition, Volume 15, page 267, paras 488 and 489. The relevant part thereof is set out below :

"General rule -- In legal proceedings the general rule is that he who asserts must prove; mis proposition is sometimes more technically expressed by saying that the burden of proof rests upon the party who substantially asserts the affirmative of the issue"

In applying the rule, however, a distinction is to be observed between the burden of proof as a matter of substantive law or pleading, that is, the burden of proving an issue or issues, sometimes termed the legal burden, and the burden of proof as a matter of adducing evidence during various stages of the trial. The former burden is fixed at the commencement of the trial by the state of the pleadings or their equivalent and is one that never changes under any circumstances

whatever;"

It is clear, therefore, that the burden of proof of facts, which are asserted, is a matter of substantive law. Charging a person with having committed an offence u/s 167(8) of the Sea Customs Act read with the appropriate sections of the Foreign Exchange Regulation Act, which offence if proved may result in the penalty of confiscation or fine, has been held to be in the nature of criminal proceedings. Normally, the burden of proof is entirely on the prosecution. Not only has the prosecution the duty to prove a case against the accused, but it must prove it to the hilt. Section 178-A of the Sea Customs Act, has completely altered this burden and cast it on the accused. Now it is he, who is to show that the goods are not smuggled. There can be no doubt that this is an alteration in the substantive law, and not merely of procedure. It is not a question of when to prove or what, but the question is as to who is to prove the facts asserted. This cannot be said to be a change in the procedural law. With respect I am unable to agree with the decision of Mukharji, J. The Supreme Court has expressly held that the section is prospective and not retrospective, and the other cases cited above make it clear that the point of time to be considered is when the seizure is made and not when the matter is heard. Consideration of Section 178-A itself clearly shows that this must be so. The section has been cited above and will show that the provisions do not apply in all cases, but that there are severe restrictions. Firstly, the goods that are seized must be one to which the section applies. These goods are mentioned in Sub-section (2) and may be added to by a notification under Sub-section (3). The section certainly applies in the cases of gold bullion. The second condition is that the goods must be seized in the reasonable belief that they are smuggled goods and the seizure must be under the Sea Customs Act. The very fact that the seizure must be of goods to which Section 178-A applies denotes that the section cannot be retrospective. Gold bullion cannot possibly be goods to which Section 178-A applied, before Section 178-A itself came into existence, and the seizure could not be u/s 178-A because the seizure contemplated u/s 178-A is only of goods to which the said section applies. In my opinion the Bombay case was entirely correct in holding that the relevant point of time is seizure. Since seizure in this case took place before Section 178-A came into operation, it could not apply in the facts of the instant case.

11. That being the position, the onus was entirely upon the customs authorities to prove that the goods were smuggled and also that the respondents directors were persons concerned in the smuggling thereof. In other words, the onus of proof is still to be considered in the normal way. Certain authorities may now be noticed to show what the burden of proof is in such cases. Before I proceed to deal with the decisions of other High Courts and the Supreme Court, I may start with one of my own judgments. *Manicklal Sen and Another Vs. Additional Collector of Customs and Another*, . The facts in that case were as follows: Shri Manicklal Sen carried on business under the name and style of "Kedar Nath Dutt" in New Market, Calcutta. On or about 11th October, 1951 search was conducted

by the officer of customs at the shop and they seized 28 pieces of transistor radio sets, two pieces of transistor phonographs, lip sticks and cigarette lighters. A show-cause notice was thereafter issued stating that the goods seized were of "foreign origin" and he was asked to show cause why the goods should not be confiscated u/s 167(8) of the Sea Customs Act read with Section 3(2) of Imports and Exports (Control) Act, 1957 and penal action taken u/s 167(8) of the Sea Customs Act.

Shri Sen gave explanations, some of which were accepted and others were not, and while some goods were released others were ordered to be confiscated. The only point to be considered there was upon whom lay the onus of proof. Section 178-A of the Sea Customs Act was excluded because the goods seized were not of the nature mentioned therein. After referring to various decisions, including several decisions of the Supreme Court, viz., AIR 1961 SC 264 *Gian Chand and Others Vs. The State Of Punjab*, and a decision of the Madras High Court *Public Prosecutor, Madras Vs. M.L. Modi*, I came to the conclusion that the Assistant Collector had wrongly assumed that the burden of proof was on Shri Sen to prove that the goods in his possession were not smuggled into India. I held that the burden of proof was on the customs authorities to prove beyond reasonable doubt that the goods had been illegally imported and were smuggled goods. Even the fact that the goods bore foreign names would not shift the burden of proof upon Mr. Sen. The Rule was accordingly made absolute. It may be useful to refer to some more details of the cases upon which I relied. The Madras case cited above was an extreme case. What happened in that case was as follows : The petitioner H. L. Modi disembarked at Meenampakkam aerodrome from an aeroplane which flew from Bombay to Madras. He was interrogated by customs official and his trunk was searched with the result that underneath certain articles of clothing a tin box was found containing 247 wrist watches of foreign manufacture. It was claimed by the authorities that the accused admitted that there were watches upon which duty had not been paid, show-cause notice was served on the accused asking him to show cause why the goods should not be confiscated and why penalty should not be imposed. The accused was convicted, upon which a revisional application was made before the Madras High Court, which was allowed. The learned Judge held that the onus was upon the customs authorities to prove that the goods were smuggled goods and that the accused was a person involved in the smuggling of the same into this country. The customs authorities had not discharged the burden. The fact that the wrist watches were of foreign make would not discharge the burden and even the admission of the accused was not one upon which a conviction could be justified. The most important decision on the subject is, however, the Supreme Court decision of AIR 1961 SC 264 (*supra*). I have already set out above extracts from the judgment of Subba Rao, J. wherein he held that a customs officer was not a judicial tribunal and a proceeding before him was not a prosecution, but the relevant provisions of the Sea Customs Act and the Land Customs Act are penal in character as they impose a penalty or confiscation and fine and although the

provisions of the Code of Criminal Procedure or the Evidence Act may not apply here in terms, the fundamental principles of criminal jurisprudence and natural justice apply. The burden of proof was on the customs authorities and they have to bring home the guilt of the person alleged to have committed the offence, by adducing satisfactory evidence. It was held that no satisfactory evidence had been adduced and indeed there was no title of evidence to prove the case of the appellant. Accordingly, the order of the customs authorities except with regard to certain items which were admitted to be smuggled, were set aside. In *Gian Chand and Others Vs. The State Of Punjab*, it was held that in the absence of any valid statutory provisions in that behalf the onus to establish the ingredients necessary to bring home the offence of an accused was on the prosecution.

12. As against this, Mr. Ker has referred to several decisions of the Supreme Court in an attempt to show that the court should not interfere with the findings of facts by an inferior tribunal. I shall briefly refer to the authorities cited. The first case cited is *Pukhraj Vs. D.R. Kohli*, . In that case, what came to be considered was the provisions of Section 178-A. As stated above, it is provided therein that one of the pre-conditions for application of that section is that there must be a reasonable belief in the mind of the officer who effected the seizure that the goods were smuggled goods. The case considers as to how far the court can examine the reasonableness of that belief. It was held that all that the court could consider was whether there were *prima facie* grounds to justify the reasonable belief. In that case, what happened was that a person was found travelling in a train with five bars of gold weighing 290.6 tolas without any ticket and his explanation as to how he came to be in the passenger train was found to be obviously untrue. It was held that a person carrying such a large quantity of gold the value which would be about Rs. 30,000 and who was unable to explain his presence in the train and gave a false story, might well have induced a reasonable belief in the mind of the officer who effected the seizure that the goods were smuggled. I do not see how it affects the burden of proof, apart from Section 178-A.

13. The next case cited is also a decision of the Supreme Court, *State of Mysore Vs. S.S. Makapur*, . This was a writ petition filed by the respondent challenging the validity of an order of dismissal. The broad facts were as follows : The respondent was employed in the Police as a constable. There was a complaint against him and a number of witnesses were examined who made statements in writing. But these were made behind the back of the respondent. Later on, copies of these statements were given to the respondent and the witnesses were produced for cross-examination, but the oral examination was not repeated. The question was as to whether this was permissible. Aiyar, J. said as follows :

"The sole point for determination in this appeal therefore is whether the procedure adopted by the Deputy Superintendent of Police in admitting the statements of witnesses examined before Mr. Mujumdar in evidence is opposed to the rules of natural justice For a correct appreciation of the position, it

is necessary to repeat what has often been said that tribunals exercising quasi-judicial functions are not Courts and that therefore they are not bound to follow the procedure prescribed for trial of actions in Courts nor are they bound by strict rules of evidence. They can, unlike Courts, obtain all information material for the points under enquiry from all sources, and through all channels without being fettered by rules and procedure which govern proceedings in Court. The only obligation which the law casts on them is that they should not act on any information which they may receive unless they put it to the party against whom it is to be used and give him a fair opportunity to explain it. What is a fair opportunity must depend on the facts and circumstances of each case but where such an opportunity had been given, the proceeding are not open to attack on the ground that the enquiry was not conducted in accordance with the procedure followed in Courts."

14. Again, I fail to see how this affects the question of burden of proof where the charge is one of having committed an offence punishable by confiscation or fine.

15. The next case that has been cited is again a decision of the Supreme Court, Syed Yakoob Vs. K.S. Radhakrishnan and Others, . That was a case under the Motor Vehicles Act and related to the issue of a permit by the State Transport Appellate Tribunal, Madras. Gajendragadkar, J. (as he then was) said as follows :

"The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals : these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. This limitation necessarily means that the findings of fact reached by the inferior Court or Tribunal as result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued If it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear

in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised (vide Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others, , Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and Appeals, Assam and Others, and Kaushalya Devi and Others Vs. Bachittar Singh and Others, .''''

16. It will, therefore, appear that none of the cases cited by Mr. Kar involves an offence with a penalty of confiscation or fine, or come within the mischief of the decision in AIR 1961 SC 264 (supra). Obviously, a confusion is being made between the scope of a writ of certiorari and the burden of proof in a case which is in the nature of criminal proceedings. These are two separate matters, which should not be mixed up. Where we are dealing with the latter case, the point to consider is whether the burden of proof has been wrongly shifted upon the accused. In proceeding to consider the impugned order of adjudication in this case, we will have to look at it from two points of view. Firstly, as to whether the burden of proof has been correctly allocated and secondly whether the findings of fact are -

I. Such as at all arise in this case.

II. Whether there is any evidence at all to support the findings.

In order to come to the conclusion as to whether there is any evidence to support the findings, it will be necessary to consider the matter with greater caution, where the proceedings are of a criminal nature and the onus lies upon the prosecution to prove the case beyond doubt. Whereas in an ordinary case, even slight evidence may justify the conclusion, in a case in the nature of criminal proceedings the matter must be looked at with greater strictness

17. Let us now look into the facts of the case, in the background mentioned above. Before we consider the findings in the impugned order of adjudication, a few facts should be borne in mind. The first is that the charge may be divisible into two broad headings. The first is that certain coins marked with inscription "S. L. Sen" found at premises No. 7, Nalini Sett Road have been confiscated on the ground that the gold out of which they are made is smuggled gold. The second charge is that the respondents directors are, "persons concerned" with the illegal importation of smuggled gold, being an amount of gold which was found in the person of Zadkar on the 29th of December 1954 and in the delivery of smuggled gold also on previous occasions. It will be necessary to consider these two matters separately. Before we at all consider the order of adjudication, and the evidence upon which it is based, it will have to be remembered that we

are concerned in this case only with the final order of adjudication by Sri Venkataraman dated 16th February 1963 (pages 198 to 213 of the paper book). We are not concerned with the previous proceedings and the order of adjudication of Shri Srivastava dated 12th June, 1961 which has been set aside and quashed by the order dated 12th April, 1962. Since the order of Shri Srivastava has been quashed, the evidence taken before Shri Srivastava could no longer be used, unless the respondents were clearly told that any evidence adduced before Shri Srivastava would be so used, so that they could deal with it. Otherwise, Shri Venkataraman could only be permitted to decide the matter on the evidence which was placed before him. In this connection, there appears to exist a considerable confusion in the mind of Shri Venkataraman. On 29th November, 1962 he wrote to the parties as to whether they insisted on a fresh show-cause notice or they would be content to proceed on the footing of the previous show-cause notice dated 1st July, 1955. On behalf of the respondents it was stated that a fresh show-cause notice was unnecessary and that they were prepared to proceed on the show-cause notice of 1st July 1955. They were not informed however that the evidence adduced before Shri Srivastava may be taken into account by him.

18. In this back-ground, let us now come to the first point, namely, the question of confiscation of the coins. That these coins were seized from the possession of the respondents cannot be doubted. Being made of gold, they would be subject to confiscation if it could be shown that it was smuggled gold. Provided that it can be shown that they are made of smuggled gold, nothing else stands in the way of confiscation. It has been firmly established that wherever smuggled gold can be detected, the same can be confiscated, irrespective of the question as to the person in whose possession they were found. Let us see whether there is any evidence to show that the gold was smuggled. First of all, Shri Venkataraman proceeds on the footing as if the burden of proof that gold was smuggled or not was on the respondents. He first of all refers to the entries in the books of account of the respondents. He refers to the fact that the purchase of gold was enormous and save and except a small amount of gold, the rest could not be accounted for, firstly because names of the sellers do not appear in the account book and secondly because they were stated to be "distress sales", but this story has not been believed. The respondents have given evidence to the effect that dealers in gold in Calcutta do not as a rule mention the name of the sellers in their books of account, But in any event, this failure on the part of the respondents could only be relevant, if the burden of proof was upon them. Shri Venkataraman was however not justified in proceeding on the footing that it was for the respondents to show that the gold seized was not smuggled gold, which would have been the case if Section 178-A was applicable. Even assuming that it was proved that the respondents had purchased large amounts of gold from time to time, it is no evidence of the fact that the gold was smuggled gold. While the presence of a large amount of gold in the possession of a person travelling in a train without a ticket who gave a false story of how he came to be in the train,

may be a good reason for an officer to entertain the "reasonable belief" that the gold was smuggled, which would justify a seizure u/s 178-A, the purchase of gold from lime to lime by an established business of nearly 100 years, cannot possibly be of the same category, and cannot be taken to be prima facie evidence of the fact that the gold was smuggled. The real ground on which it was held that the gold was smuggled was that it was of a fineness which, according to the Custom authorities show that the gold was of foreign origin. It appears that from time to time samples of gold were assayed and assay reports were supplied to the respondents. Before the adjudicating officer, no particular assay report was proved. In paragraph 7 of this report, at page 202 of the paper book, he sets out the results of assay as follows :

974.5 (i) Gold leaves ----- (Fineness per mile) 974.4 986.6 (ii) Gold Piece ----- "S.L. Sen" 992.7 This was, however, the assay which took place while Shri Srivastava was the adjudicating officer. The respondents were never told that the result of such assay will be taken into account by Shri Venkataraman. The next thing that Sri Venkataraman says is that the gold leaves were found to be of the fineness only about 947.5 and he has excluded them. He proceeded to say as follows:

"I am not prepared however, to extend the same consideration to the gold coins, not only in view of their much higher fineness but also because the validity of the argument of Counsel about distress sales is open for doubt."

He has mixed up the question of fineness with the books of account here. Be that as it may, we find that, firstly there is no evidence adduced before Shri Venkataraman to show the fineness of the gold and secondly there is no evidence before him whatsoever that if gold is of such fineness it is of foreign manufacture. Even Shri Venkataraman has not himself said that gold of such fineness is not manufactured in India. This, to my mind, is a very crucial point. In the case of *Bapalal v. R. Prasad* AIR 1965 Guj 135 it was found as a fact that the gold was of fineness or 999.0, but that in fact no one in India produced gold of such fineness. Even so, the customs authorities did not succeed. In the instant case however, there is absolutely no evidence of the fact that gold of such fineness, that is, what was alleged to be the fineness of the gold out of which the coins were made, was not made in India. In other words, even if the figures of assay mentioned above are taken to have been proved, there is no evidence to show, nor has the adjudicating officer himself stated, that gold of the fineness of 986.6 or 992.7 was not manufactured in India. On this point, therefore, it must be held that the conclusion was based on no evidence at all.

19. We next come to the question about the seizure of gold from Zadkar on the 29th December 1951. Upon this point, the first thing to be looked at is the show-cause notice dated 1st July 1955. It was stated in the said document that on receipt of reliable information that Messrs. Shyamlal Sen Limited of 7, Nalini Sett Road was regularly receiving smuggled gold at their premises No. 16-4, Cotton Street, watch was kept by Customs Officers over the premises. Next it was

stated that on 28th December, 1954 one person, later known to be W. B. Zadkar, wearing a long coat: accompanied by another person at about 9 A. M. entered No. 164 Cotton Street and after a few minutes went away. Next it is stated that on 29th December, 1954 the same person appeared again and as he was going towards No. 164 Cotton Street he was apprehended by the Customs Officers. Shri Zadkar is said to have admitted that he was carrying gold for the purpose of delivering the same at No. 164 Cotton Street. He is also said to have admitted that prior to 28th and 29th December 1954 he had visited the same premises on at least half a dozen times and delivered the gold. It is stated that gold seized on 29th December 1954 from the person of Shri Zadkar was worth Rs. 85,000 approximately. It is stated that some of the previous six deliveries consisted of one tin each and some two tins each, full of gold bars, and therefore, at least 3000 tolas of gold had been delivered by Shri Zadkar at No 164, Cotton Street prior to 29th December 1954 during the months of November and December of that year. In answer to this show-cause notice, a petition was filed, dated the 7th July, 1955 in that petition it was stated that neither the company nor its directors ever received any smuggled gold at premises No. 164, Cotton Street or at any other place, not to speak of, regularly receiving such gold. Next it was stated that neither the company nor its directors know anybody named Shri W. B. Zadkar, nor did they ever purchase any gold from or through the said person, nor was there any arrangement with him or with anybody as alleged, nor did the petitioners ever pay Rs. 125 per trip for his alleged services. The petitioners denied that in August and September 1954 they had anything to do with inviting the said Zadkar or that they received any delivery of gold through him anywhere. They further stated that the story of delivery of gold through Zadkar was false and concocted and they challenged his statement and asked for an opportunity to cross-examine Zadkar. In order to establish the facts stated in the said show-cause notice, the appellants obtained statements from the said Shri Zadkar. These statements were being produced from time to time without offering Zadkar for cross-examination and this met with strong objection. Ultimately, an order of Court dated 10th of March 1961 was made and it was inter alia ordered that the Customs Authorities shall not rely on any statement made by Zadkar save and except the two statements dated 29th December, 1954 and 7th January 1955. As regards the first statement, the relevant part runs as follows:

"After about 3 months the Agent proposed to me that I could receive more money if I delivered the gold to the purchaser in Burra Bazar. It was a good temptation to me and I accepted the offer. This gave me additional Rs. 125/- for each box. I have delivered gold to various agents at various places in Calcutta. Today I was going to deliver the stuff to a Bengalee party in the Cotton Street. I can show you the place. The way to this Bengali gentleman's house is through a narrow lane. I have delivered the stuff to that place about eight times during the 4 months Yesterday I delivered two boxes in the Cotton Street in aforementioned premises."

In the second statement dated the 7th January, 1955 he said that he delivered

gold in Burra Bazar area at two places only, accompanied by an agent. He stated that he had shown the two places and could show them again. He does not say to whom he had shown and what place. He stated that one of the places was a red building and delivery was made always to the same person and it would be about four times. At the other place, deliveries were made but not to the same man. Six deliveries were made at the second place. He used to get extra Rs. 125/-for delivery in the Burra Bazar area. He mentioned Cotton Street, but he did not give the number of the house where he gave delivery. Ultimately, Shri Zadkar was offered for cross-examination. In cross-examination at various places Zadkar is supposed to have said that he was taking delivery of "gold" and was himself delivering it at Burra Bazar to certain persons. Later on, Shri Srivastava who took down the deposition admitted that the word "gold" was never mentioned. Zadkar always stated that he took delivery of "packets" and himself gave delivery of the same. He admitted in his cross-examination that he did not know what were the contents inside the packets. He stated that he was arrested on 29th December, 1954 and offered to show the places mentioned by him. Thereupon, Shri Srivastava asked Mr. Somenath Chatterjee, counsel for the respondents as to whether he would like to accompany him for inspection of the place, but learned counsel declined to do so. No further attempt was made to make Zadkar show the place to Shri Srivastava in the presence, or upon notice to the respondents. Zadkar said that he did not remember the names of the persons to whom he delivered packets or the name of the street. The following questions and answers are important.

"I do not remember how many times I delivered gold (packets) in the Burra Bazar area. I remember that I delivered these on quite a number of occasions

Q. Can you remember to whom you were going to deliver gold (packets) on the day you were apprehended?

Ans. To a person at a certain place, I can show the place if I am taken to. I do not remember the name of person or the name of the street. He used to stand just outside his house and would take delivery of the gold only after I was inside the house. I used to be taken inside the house that is to say, inside the doors and the curtain

At no time I was asked by the Customs Authorities to identify the person.

I did not give Mr. Srivastava the names of any persons to whom I had delivered gold (packet) because I did not know the names."

20. On the 13th of May, 1961 Shri Srivastava asked Mr. Somenath Chatterjee whether he would agree to produce the directors for identification by Zadkar, but counsel said that this was beyond the direction of the court and so he did not agree. This is all the evidence that there is, and the question is whether in proceedings which are in the nature of criminal proceedings, the offence of the respondents, meaning the company and the directors can be said to have been proved. Zadkar said that he was entrusted with some "packets" the contents of

which he did not know. He delivered them in the house of some "Bengalee" in "Cotton Street". He did not give the premises number, but only stated that they were delivered in two places", one of which is a red house and which is opened on a lane. He nowhere in his evidence mentioned 164 Cotton Street or 7 Nalini Sett Road. He frankly stated that he did not know the contents of the packets and he did not know the identity of the person to whom he delivered the packet. In the show-cause notice, it is stated that premises No. 164 Cotton Street was watched by Customs Officers upon receiving certain information. In the adjudication order made by Shri Venkataraman dated 19th February 1963 appears the following:

To quote Zadkar's word :--

"To-day I was going to deliver the stuff to a Bengalee party in Cotton Street. I can show you the place. The way to this Bengali gentleman's house, is through a narrow lane. I have delivered the stuff to that place about 8 times during the 4 months."

21. Then again, later on in the same statement Zadkar states : "Yesterday I delivered two boxes in the Cotton Street in the aforementioned premises". This statement recorded as it was, immediately after Zadkar was apprehended and two boxes containing gold were recovered from his person, has to be taken in the context of the information which the Customs had, and the record of the fact (which is not in dispute) that the Customs Officers had seen Zadkar coming out of No. 164, which, it is stated that the adjudicating officer verified to his own satisfaction, had its entrance to a narrow lane)."

22. It will thus be seen that the adjudicating officer was relying on the evidence of Customs Officers who had seen Zadkar coming out of 164 Cotton Street and that there was a record of the fact. No such record has been produced, and no such officer has been examined. In fact, in the show-cause notice, it has been said that the officers had watched the house, but no such officers have been produced. Zadkar has nowhere mentioned premises No. 164 Cotton Street. The most astonishing thing is that the adjudicating officer said that he went and verified that premises No. 164 Cotton Street has its entrance in a narrow lane. No notice of any such inspection was given to the respondent and indeed if there is a narrow lane, a number of houses must have their entrance through this narrow lane. But how did the adjudicating officer find out that the house mentioned by Zadkar was 164 Cotton Street? Zadkar has said that he had pointed out the house to the Customs Officers, but no one was called to corroborate his statement or identify the premises No. 164 Cotton Street. There has obviously been a gross violation of the rules of natural justice for the adjudicating officer to try and identify the premises the number of which was not given by Zadkar in the absence of the parties and behind their back.

23. It is obvious that there is no evidence to connect the premises No. 164 Cotton Street with the delivery of gold by Zadkar, even assuming that it is

possible to come to the conclusion that the packets carried by Zadkar on previous occasions, that is to say on 28th December and other days, contained gold. On the 29th December, Zadkar was apprehended, not in premises No. 164, Cotton Street but at a distance, on the road. There is, therefore, nothing to connect premises No. 164, Cotton Street with birr, on that day. To say that Zadkar was delivering gold at a house in "Cotton Street", which must have hundreds of houses, to an unnamed Bengalee gentleman or to several persons whom he cannot identify, is evidence which cannot possibly establish the commission of a criminal offence, however liberally the evidence is construed. As regards the statement by Shri Venkatraman that the records showed that Customs officers had seen Zadkar coming out of 161, Cotton Street on the 28th December, I asked Mr. Kar if his clients can produce such records before us. Upon taking instruction he informed us that no such records were in existence and none could be produced. Indeed the fact had not been proved at all. So far as 28th December and other days are concerned, the findings are entirely based on surmises and conjectures.

24. The learned Judge in the Court below was right in holding that the verification made by the adjudicator about the location of delivery is open to serious objection. Zadkar said that the house where he made the delivery had its entrance in a narrow lane. He however did not identify this house as premises No. 164 Cotton Street. The adjudicator says that he verified that the house had its entrance in a narrow lane and immediately concluded that it was No. 164 Cotton Street. All this was done behind the back of the parties and is violative of the elementary rules of natural justice. The adjudicator had drawn an adverse inference against the respondents for their refusal to get the place of delivery identified by Zadkar. The learned Judge in the court below was right in commenting that it was open to the adjudicator to have the disputed place identified by Zadkar upon notice to the parties, whether the respondents agreed to it or not. He relied on the ability of Zadkar to identify the house, and not on any real identification made by him which could be used as evidence. In the court below, Mr. Kar had argued that the statements of the informer Bira Singh and the customs officer S.K. Sen, who had been examined by Mr. Srivastava could be used in evidence. The learned Judge rightly rejected the contention inasmuch as the adjudication before Shri Srivastava and his report were quashed. No notice was given to the respondents that the adjudicator was going to rely on oral evidence given at the previous adjudication proceedings. However, we are glad to say that Mr. Kar has not advanced this argument before us, and has not relied on these two witnesses. He has advanced an argument which appears surprising to me. He has argued that in the show-cause notice dated 1-7-1955 certain facts were stated, namely that on 28th December 1954 Zadkar, wearing a long coat and accompanied by another person entered No. 164, Cotton Street at about 9 A.M., and after a few minutes came out of it. It is argued that this fact has not been denied in the reply and as such should be taken as admitted. I have already set out the gist of the reply. On behalf of the

respondents it is contended that the company and its director never knew anybody called W. B. Zadkar nor did they ever purchase any gold from him and it is stated that the story of delivery of gold by Zadkar was false and concocted. In my opinion, there has been sufficient denial of the allegations made in the show-cause notice. The allegations which were made on the basis that certain customs officers had been watching the premises, stand discredited. None of these officers were called to give evidence. In a proceeding like this, which is in the nature of criminal proceeding, the onus of proof is entirely on the prosecution. As the pleadings stand, it is impossible to say that there has been an admission of guilt so as to justify the conviction. Next, it is stated in the show-cause notice that Zadkar admitted that on the 29th December 1954 he was carrying two packets gold to No. 164, Cotton Street. Mr. Kar has said that there has been no denial of this fact. In my opinion this is incorrect. Zadkar in his evidence has nowhere admitted that he was carrying gold for delivering it at No. 164, Cotton Street. What he said to the customs officers when he was apprehended cannot be known to the respondents and they can neither admit nor deny it. In any event such evidence cannot be used in the absence of Zadkar's own evidence in support of it, or the evidence of those who, on behalf of the Customs, apprehended Zadkar and before whom the alleged admission was made. Next, it is said that the learned counsel on behalf of the respondents had admitted the allegations. Nowhere do I find any kind of admission by Counsel. In my opinion, the conclusions arrived at by the adjudicator were based mostly on conjectures and surmises. As I have stated above, the charge that Zadkar had delivered gold at No. 164, Cotton Street has not been substantiated. The adjudicator states that the gold that was apprehended on search of the person of Zadkar on 29th December amounted to 950 tolas valued at Rs. 85,000. From that he concludes that it would not be "unfair to assume that more or less an equal quantity of gold had been delivered the previous day also at the same premises". This is entirely a conjecture and based on no evidence at all.

25. The only possible thing that can be said to have been proved against the respondents is the Fact that their books of accounts showed transactions in gold for a huge amount. Most of these were stated to be "distress" sales and the adjudicator has rejected the story. This would have been of very considerable significance if Section 178-A was applicable, and if the conviction was based on the ground that that the respondents had failed to account for this quantity of gold. As we have stated above, Section 178-A is not applicable in the instant case, and the charge also does not relate at all to the gold which could not be accounted for in the books of accounts of the respondents. All that we are concerned in this case is whether the coins bearing the inscription "S. L. Sen" were made of smuggled gold and whether the respondents directors of the company were persons concerned in the smuggling of such gold into India In our opinion, the appellants failed to prove the charge in respect of the said coins and the learned Judge in the court below has rightly held that the charges against the respondents have not been proved and has rightly quashed the penal orders of

confiscation of gold and the monetary penalty against the respondents. In the premises, this appeal fails and is dismissed. In consideration of all the facts and circumstances of the case we make no order as to costs of this appeal, but the costs awarded in the court below should not be disturbed.

Arun K. Mukherjea, J.

26. I agree.