
(1970) 03 CAL CK 0034
In the Calcutta High Court
Case No : A.F.O.O. No. 42 of 1969

S.K. Srivastava and Others	Vs	APPELLANT
Vullubhdas Kalyanji and Co. (P) Ltd.		RESPONDENT

Date of Decision : 24-03-1970

Acts Referred:

Constitution of India, 1950 — Article 19(1), 20(1), 226
Foreign Exchange Regulation Act, 1947 — Section 12(1)
Sea Customs Act, 1878 — Section 137, 167(37), 167(8), 29

Citation : AIR 1970 Cal 527 : 74 CWN 1006

Hon'ble Judges : D. Basu, J;Ajay K. Basu, J

Bench : Division Bench

Advocate : Kar, for the Appellant;

Judgement

D. Basu, J.—This appeal is against the judgment of T. K. Basu, J. dated 3-2-09, by which he quashed the order of penalty passed on 17-8-62 by the Additional Collector of Customs (pp. 111-120 of the Paper Book) and the orders dated 13/15-12-63 and 21-9-64, passed by the Central Board of India and the Government of India, rejecting the appeal and revision preferred by the Petitioner Company under Article 226 of the Constitution, -- the Respondent before us. The Additional Collector and the Government have preferred the present appeal.

2. The charge upon which the impugned order (p. 119 of the Paper Book) was made by the Appellant was that 1000 bales of B. Twills which the Respondent sought to export to Kenya per SS Ispinge "have been misdeclared in the relevant Shipping Bills in respect of the F. O. B. value thereof", and the Appellant (Addl. Collector) held that by such misdeclaration, the Respondent had contravened Section 167 (8) of the Sea Customs Act, read with Section 23A of the Foreign Exchange Regulation Act as well as Section 167 (37) of the Sea Customs Act. He, therefore, confiscated the goods in respect of which Shipping Bills had been presented at the Customs House, but gave an Option to the Respondent to

redeem the goods on payment of a fine of Rs. 2 lakhs, and also imposed a personal penalty of Rs. 35,000. After paying the sum of Rs. 235,000 as aforesaid, under protest, the Respondent got the goods released and thereupon challenged the impugned order by statutory appeal and revision, as stated at the outset. The Government of India having dismissed the application for revision on 21-9-64, the Respondent brought his application under Article 226 of the Constitution on 14-5-65 (pp. 4-16 of the Paper-book), to quash the impugned orders, asking for a refund of the sum of Rs. 2,35,000 which the Respondent had paid under protest, as fine in lieu of confiscation and personal penalty. From a reading of the impugned order at pp. 119-20, it is evident that the Addl. Collector relied upon both Section 167 (8) and (37) in imposing the order of confiscation and penalty.

3. The judgment of the Court below was a short one. In the main, the Court relied upon the majority judgment of the Supreme Court in the case of Union of India (UOI) and Others Vs. Rai Bahadur Shreeram Durga Prasad (P) Ltd. and Others, reported in holding that the only obligation of an exporter under the provision in Section 12 (1) of the Foreign Exchange Regulation Act, 1947 was to furnish "a declaration that the amount representing the full export value of the goods has been, or will within the prescribed period, be, paid in the prescribed manner" and that no offence u/s 167(8) of the Sea Customs Act, 1878, read with Section 12 (1) of the Foreign Exchange Regulation Act, was committed where a declaration as aforesaid had been furnished by an exporter, however, false the contents of the declaration might have been. The Customs Authorities might have other remedies for such misdeclaration but not one u/s 167 (8) of the Sea Customs Act, to confiscate the goods sought to be exported and to impose penalty upon the exporter. Upon this view, he held that the impugned order was vitiated by an error apparent on its face. He, therefore, quashed the impugned order and also issued a writ of mandamus directing the Appellants "to refund to the Petitioner the sum of Rs. 2,35,000 realised by way of fine in lieu of confiscation and personal penalty". At the same time he gave liberty to the Appellants to proceed according to law.

4. Mr. Kar, appearing on behalf of the Appellants, has taken a number of points which should be dealt with separately.

5. I. The first point is that the majority decision in Union of India (UOI) and Others Vs. Rai Bahadur Shreeram Durga Prasad (P) Ltd. and Others, has no application to the facts of the instant case.

6. Before going into the merits of this contention, it should be pointed out that the majority decision in Union of India (UOI) and Others Vs. Rai Bahadur Shreeram Durga Prasad (P) Ltd. and Others, , has since been affirmed by unanimous Benches of the Supreme Court in McLeod & Co. v. Collector of Customs, C. A. No. 1173 of 1967, D/- 12-9-1969 (SC) and Backer Gray & Co. v. Union of India, C. A. No. 1178 of 1967, D/- 23-1-1970 reported in (1970) 1 SCWR 303. In Backer Gray's case (1970) 1 SCWR 303, the Court reiterated the

majority judgment in Union of India (UOI) and Others Vs. Rai Bahadur Shreeram Durga Prasad (P) Ltd. and Others, , in these words -

"It is true that the declarations required to be made under the Rules in Form GRI contained incorrect information; hut that incorrect information related to points on which Section 12 (1) does not require a declaration. A declaration, which is in contravention of the Rules or the Forms prescribed under the Rules, may be penalised u/s 23 of the Act, but such contravention will not attract the provisions of the Sea Customs Act.

Under Section 23-A of the Act, only a breach of restrictions imposed u/s 12 (1) of the Act is to be deemed to be a contravention of the restrictions imposed by Section 19 of the Sea Customs Act. An incorrect declaration in contravention of the Rules made u/s 27 of the Act is not to be deemed a contravention of the restriction imposed by Section 19 of the Sea Customs Act. It is therefore quite clear fruit in these cases the imposition of the penalties u/s 167 (8) of the Sea Customs Act was totally unjustified."

7. The above observations of the Supreme Court answer the arguments advanced by Mr. Kar that-

(a) Since the prescribed Form requires the exporter to state the real value of the goods exported, a misstatement under that column would constitute an offence under the Sea Customs Act, read with Section 12 (1) of the Foreign Exchange Act; and that

(b) Since Section 12 (1) required the ex-porter to declare the "full export value of the goods", it cannot be interpreted to mean that the exporter would be exonerated from his statutory liability by declaring an incorrect value.

8. The law, as laid down by the Supreme Court in the foregoing cases, is that for making an incorrect or false declaration, the authorities may proceed against the exporter under other provisions of the law, but not u/s 167 (8) of the Sea Customs Act. Hence, the impugned order of confiscation and penalty imposed u/s 167 (8) of the Sea Customs Act cannot be upheld, so far as the present point goes.

9. Learning that the Government of India had amended the law in order to plug the loophole created by the Supreme Court judgment in Union of India (UOI) and Others Vs. Rai Bahadur Shreeram Durga Prasad (P) Ltd. and Others, we directed a further hearing of these appeals before us. At that hearing the materials relating to the amendment have been produced before us. It appears that by promulgating the Foreign Exchange Regulation (Amendment) Ordinance, 1969, on 13-11-69, Section 12 (1) of the Foreign Exchange Regulation Act has been amended by requiring that the declaration must be "true in all material particulars" as to the amount representing "the full export value" or "if the export value of the goods is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions, expects to

receive on the sale of the goods in the course of international trade....." In exercise of the power conferred by this amendment, the Government has issued a fresh notification on 14-11-69 (GSR 2641), superseding its previous notification u/s 12 (1), requiring the exporter to make a declaration "true in all material particulars" in terms of the amended section.

10. It is clear from a plain reading of the provisions of the Ordinance that the effect of the change, whatever it might be, is not retrospective and would not affect any declaration which was made u/s 12 (1) prior to the making of the Ordinance and the issue of the new notification. It was, of course, vehemently argued by Mr. Kar that since the object of the Amendment Ordinance was, to protect the public from fiscal loss by roping in a fraudulent exporter, the amendment must be construed, by implication, to be retrospective in operation. In support of this contention, Mr. Kar relied upon the observations in *Craies on Statute Law*, 6th Edn., at p. 305, where the learned Author refers to the decision in *R. v. Vine*, (1875) 10 QB 195. In that case, the majority of the Court applied the provisions of Section 14 of the Wine and Beerhouse Amendment Act, 1870 which enacted that "every person convicted of felony shall be for ever disqualified from selling spirits by retail" to a person who had been convicted before the Act came into force but was still holding a licence to sell spirits, on the ground that it would advance the object of the statute, which was to protect the public against the abuse of inns being kept by persons of bad character. There are, however, various reasons why the aforesaid decision cannot be applied to the case before us.

(a) In *Vine's* case (1875) 10 QB 195 the ground of disqualification had already been incurred by conviction. But in the instant case, if retrospective operation is to be given to the Ordinance, the Respondent would be penalised for not doing something which the law then existing, as interpreted by the Supreme Court, did not require him to do. It is only, in the declarations furnished after the 14th November, 1969 that the duty to furnish true material particulars attaches and a man may be penalised only for violation of that duty.

(b) The primary rule of construction of a fiscal statute that imposes a burden upon a citizen is that it must be strictly construed upon the language used within the four corners of the statute, [*A.V. Fernandez Vs. The State of Kerala*,]. It follows, therefore, that the Court will not readily infer a retrospective operation so as to impose or enhance the liability of the citizen, *ex post facto*, and this rule applies even where a statute is expressly retrospective. In such a case no greater retrospective effect will be given by the Court than what has been granted expressly by the statute [*Income Tax Officer, V Circle, Madras, and Another Vs. S.K. Habibullah*,] This principle of construction operates with greater force where a transaction has been completed prior to the amendment of the statute, as in the case before us [*ibid*]; *S.C. Prashar, Income Tax Officer, Market Ward, Bombay and Another Vs. Vasantsen Dwarkadas and Others*, ; *S.S. Gadgil, Income Tax Officer, Bombay Vs. Lal and Company*, ; *George v. Controller of*

Estate Duty, Mysore AIR 1907 SC 849 (852).

(c) Further, the law which is sought to be amended, in the case before us, is penal in nature and will make that a statutory offence which was not an offence when the act, namely, the submission of the disputed declaration, was done. It is to be noted that even in Vine's case (1875) 10 QB 195 the dissenting Judge Lush, J. observed-

"This is a highly penal enactment. The sound and well-established canon of construction is that such an enactment is to be read as prospective, unless a contrary intention be clearly established from the language used".

The majority Judges, Cockburn, C. J. and Mellor, J., overcame this objection only by holding that the object of the legislation in that case was not to punish, but to impose "restraints upon the persons who should be qualified to hold licenses": (1875) 10 QB 195. The only sanction in Vine's case, (1875) 10 QB 195 was that the convicted man was to be disqualified for holding a licence.

11. In the case before us, not only will the exporter lose his goods but he would be subjected to pay pecuniary penalty, for nonpayment of which he may be sent to jail (Section 193 of the Sea Customs Act, read with Section 83 of the Criminal Procedure Code). Even on suspicion that he has committed an offence u/s 107, he may be arrested (Section 173 of the Sea Customs Act). No doubt, the bar under Article 20(1) of the Constitution extends only to "conviction" by a Court of law, but the question before us is not one of a constitutional bar against conviction under an ex post facto law, but that of construction of a change in a penal statute, which is wider than the immunity conferred by Article 20(1). It is an age-old proposition that a penal statute or amendment thereof should not be construed to be retrospective, in the absence of express words to that effect because "it manifestly shocks one's sense of justice that an Act, legal at the time of doing it, should be made unlawful by some new enactment." [Midland Ry v. Pye, (1861) 142 ER 419 (424); R. v. Griffiths, (1891) 2 QB 145 (148); Moon v. Durden, (1848) 2 Ex 22; Butchers, Hide Co. v. Seacome, (1913) 2 KB 401.]

12. We have already said that in Vine's case (1875) 10 QB 195 the law imposed only a disqualification and not a penalty. The distinction between the two has also been pointed out in the recent English case of Re A Solicitor's Clerk, (1957) 3 AER 617 (019), in these words:--

"It enables an order to be made disqualifying a person from acting as a solicitor's clerk in the future and what happened in the past is the cause or reason for the making of the order; but the order has no retrospective effect. It would be retrospective if the Act provided that anything done before the Act came into force was made void or voidable or if a penalty were inflicted for having acted in this or any other capacity before the Act was made...."

13. The same distinction has been observed by our Supreme Court in the case of The State of Maharashtra Vs. Vishnu Ramchandra, .

14. The other case relied upon by Mr. Kar, namely *Jogodanund v. Amrita Lal Sarkar*, ILR (1895) Cal 767 (FB) also does not help him, because the observations at pp. 777 and 780 of the Report show that the implication of retrospective operation was made in that case on the footing that the statutory provision involved (i. e., Section 174 of the Bengal Tenancy Act) was a remedial provision. The court made it clear that no such implication would be made where the statutory provision created a "new obligation" as in the case before us.

15. From whatever standpoint, thus, the matter is looked at, the Amending Ordinance in question before us cannot be given retrospective effect to render an act or omission an offence which was not an offence before the Amending Ordinance was promulgated; and where a statute cannot be construed as retrospective, no subordinate legislation issued under such statute can be given retrospective effect [*The Income Tax Officer, Alleppey Vs. M.C. Ponnose and Others*,]; *Strawboard Manufacturing Co. Ltd. Vs. Gutta Mill Workers' Union*, ; *Dayalbagh Co-operative Society v. Sultan Singh*, Civil Appeal No. 654 of 1965, D/- 6-1-1006 (SC) unreported].

16. We, therefore, conclude that the Amendment Ordinance of 1969 cannot be given retrospective effect so as to affect the Respondent and that the law which is applicable to the instant case is Section 12 (1) as it stood prior to the amendment and as interpreted in *Union of India (UOI) and Others Vs. Rai Bahadur Shreeram Durga Prasad (P) Ltd. and Others*, and (1970) 1 SCWR 303. If that law be applicable, the judgment of the Court below cannot be assailed with respect to Section 167 (8).

17. II. Mr. Kar, therefore, advanced his second contention that *Union of India (UOI) and Others Vs. Rai Bahadur Shreeram Durga Prasad (P) Ltd. and Others*, has no application in the instant case inasmuch as though the Additional Collector in his order at pp. 119-120 of the Paper Book referred to both Sections 167 (8) and 167 (37) of the Customs Act, the appellate authority, i. e., the Central Board had observed (p. 140) that the Respondent had committed a separate offence u/s 167 (37), which is independent of Section 167 (8) and that the Revisional authority simply rejected the revision application (p. 136).

18. In order to appreciate this argument, it is necessary to refer to the provisions in Section 167 (8) and (37).

"Section 167. The offences mentioned in the first column of the following Schedule shall be punishable to the extent mentioned in the third column of the same with reference to such offences respectively:

(8) If any goods, the importation of which is for the time being prohibited or restricted by or under Chap. IV of this Act, be imported into or exported from India contrary to such prohibition or restriction.....

such goods shall be liable to confiscation ; any person concerned in any such offence shall be liable to a penalty not ex- ceeding three times the value of tho

goods or not exceeding one thousand rupees.

(37) If it be found, when any goods are entered at, or brought to be passed through, a custom-house, either for importation or exportation, that.....

Section of this Act to which offence has reference : 86 & 137

such packages... shall be liable to confiscation, and every person concerned in any such offence shall be liable to a penalty not exceeding one thousand rupees.

(b) the contents thereof have been wrongly described in such bill or application as regards the denominations, characters or conditions according to which such goods are chargeable with duty, are being imported or exported :

(c) the contents of such packages have been misstated in regard to sort, quality, quantity or value....."

19. In connection with Section 167 (37), it is necessary to read Section 137, which imposes the substantive liability upon the exporter to state the required particulars in the prescribed form, as follows:

"137. No goods shall be shipped for exportation until-

(a) the owner has delivered to the Customs Collector, or other proper officer, a shipping bill of such goods..... in such form and containing such particulars in addition to those specified in Section 29 as may from time to time be prescribed by the Chief Customs Officer;

(b) such owner has paid the duties (if any) payable on such goods; and

(c) such bill has been passed by the Customs collector"

The question is whether the offence u/s 167 (37), read with Section 137 of the Sea Customs Act has been committed in the instant case. As has been held in *Girdharilal Bansidhar Vs. Union of India (UOI)*, , in the absence of any procedural irregularity, the findings arrived at by the Customs Authorities cannot be disturbed by the High Court, sitting under Article 226 of the Constitution.

20. In the case before us, a complaint as to violation of natural justice was raised at some stage, but it has been established beyond doubt that it was at the instance of the Respondent Company that the formalities for adjudication by issuing notice etc. were dispensed with. The impugned orders were, however, made after hearing the Respondent.

21. The findings arrived at by the Appellants cannot, therefore, be reopened by this Court. Those findings, as appear from the order of the Board of Revenue (pp. 139-140), are-

(i) the contract disclosed by the Respondent did not relate to the disputed goods and that the Respondent has not disclosed the relevant contract, as required by the relevant Forms etc.;

(ii) the value of the goods declared in the Form prescribed was not correct.

22. If these two findings stand, an offence u/s 167 (37), read with Section 137, is established. It was, however, contended on behalf of the Respondent that misstatement cannot be an offence u/s 167 (37) (a), unless there is a substantive provision requiring the exporter to make a correct statement. But though that requirement cannot be found in Section 137 itself, Clause (a) of that section refers to Section 29, namely, that the Bill must contain "such particulars in addition to those specified in Section 29 as may be prescribed". The requirement to state the correct value in the Bill has therefore to be drawn from Section 29, and "real value", for this purpose, is defined in Section 30. The relevant portions of the provisions in these two sections are:

"29. Owner to declare real value, etc. of goods in bill of entry or shipping bill. -- On the importation into, or exportation from, any customs-port of any goods, whether liable to duty or not, the owner of such goods shall, in his bill of entry or shipping bill, as the case may be, state the real value, quantity and description of such goods to the best of his knowledge and belief, and shall subscribe a declaration of the truth of such statement at the foot of such bill.

Power to require production of invoice, etc. -- In case of doubt, the Customs Collector may require any such owner or any other person in possession of any invoice, broker's note, policy of insurance or other document, whereby the real value, quantity or description of any such goods can be ascertained, to produce the same, and to furnish any information relating to such value, quantity or description which it is in his power to furnish. And thereupon such person shall produce such document and furnish such information:

.....

30. For the purposes of this Act the real value shall be deemed to be-- (a) the wholesale cash price, less trade discount, for which goods of the like kind and quality are sold, or are capable of being sold, at the time and place of importation or exportation, as the case may be, without any abatement or deduction whatever, except (in the case of goods imported) of the amount of the duties payable on the importation thereof: or

(b) Where such price is not ascertainable the cost at which goods of the like kind and quality could be delivered at such place, without any abatement or reduction except as aforesaid."

23. It was, therefore, contended on behalf of the Respondent that the change was not that the Respondent had failed to state the "real value" within the meaning of Section 29 of the Sea Customs Act but that his declaration u/s 12 (1) of the Foreign Exchange Act was wrong. This, however, is not correct. From the Respondent's own pleading in the petition under Article 226, it is clear that, for the sake of expedition, he had agreed to dispense with a formal charge in writing but that the charges were explained to him verbally and on the footing of that he

had filed his explanation or statement (paras. 18-19), and that the adjudication proceeded on that foundation. That "statement" of the Petitioner is to be found at pp. 171-2 of the Paper Book. What charges were communicated to the Respondent are stated at (i) and (ii) of p. 173. It is true that the first charge was that "the FOB value declared by us on the Shipping Bills and on the GRI Forms do not represent the full export value of the goods as defined in Section 12 (1) of the Foreign Exchange Act and the notifications issued there under, but the second charge was that-

"We have also been told that the declaration of a lower value as a full value on the Shipping Bill is a misdeclaration of value attracting penal action u/s 167 (37) of the Sea Customs Act."

24. It is quite evident that though Section 29 or 137 of the Sea Customs Act was not specifically mentioned, the Respondent was told that by understating the value, he had also committed an offence u/s 167 (37), which must be read with Sections 29 and 137 of the Sea Customs Act and that his defence as well as the proceeding for adjudication proceeded on this twofold basis. It is, therefore, not correct to say that the petitioner was charged only with a violation of Section 12 (1) of the Foreign Exchange Act, and this contention of the Respondent is rejected.

25. III. We are not to deduce the conclusions from the findings so far arrived at, in order to determine the relief, if any, which the Respondent could get in his petition under Article 226.

26. The order at pp. 119-120 clearly shows that -

- (a) The order of confiscation was made both u/s 167 (8) and 167 (37);
- (b) The option to redeem the goods on payment of a fine was offered u/s 183 which is relatable to both Section 167 (8) and (37);
- (c) The penalty of Rs. 35,000 was purported to be imposed under both Section 167 (8) and (37).

27. (a) We have held that the order, in so far as it was founded on Section 167 (8) was without jurisdiction, on the footing of the decision in Union of India (UOI) and Others Vs. Rai Bahadur Shreeram Durga Prasad (P) Ltd. and Others, but that it was intra vires so far as it was founded on Section 167 (37). 28. Since the order of confiscation was founded both on items (8) and (37) of Section 107, the order of confiscation cannot be struck down even though the charge of violation of Section 12 (1) of the Foreign Exchange Act fails. The bearing of the impugned order to Section 167 (37) was not considered by the Court below (p. 187). Hence, the order of the Court below quashing the confiscation, as well as the direction to refund the fine of Rs. 20,00,000 which the Respondent had paid in order to redeem the confiscated goods cannot be upheld.

29. (b) As regards the personal penalty of Rs. 35,000, however, it must be

pointed out that though the additional Collector relied upon both items (S) and (37) of Section 167, a sum as big as 35,000 could not prima facie be imposed under that item which specifies the maximum of Rs. 1,000/-. The impugned order of penalty must, therefore, be regarded as one under item (8) of Section 167 and its validity must be determined with reference to that item.

30. As has been held by the Supreme Court in *Ranchhoddas v. Union of India* AIR 1961 SC 35, though that item mentions two alternatives in Col. 3, it is competent for the Customs Authority to exceed the lower alternative of Rs. 1,600/- and impose a penalty up to three times the value of the goods concerned, where that amount exceeds Rs. 1,000/-. In the instant case, the penalty of Rs. 35,000 was, therefore, within the alternative maximum prescribed in Section 167 (8), but since, we have held that in the case before us, the appellants had no jurisdiction to proceed u/s 167 (8), the order imposing the penalty of Rs. 35,000 must be quashed.

31. Subject to the preliminary objections raised by Mr. Kar in be taken up just now, the Respondent has a case for refund to the extent of Rs. 35,000, following from the order imposing the personal penalty being quashed, according to our decision.

32. IV. When all is said, Mr. Kar contended, the Court below was not justified in directing the Appellants to refund any amount realised from the Respondent, in a proceeding under Article 226 of the Constitution.

33. The claim for refund arises out of the finding of this Court that the imposition and recovery of the penalty in question was without jurisdiction since there was no violation of Section 12 (1) of the Foreign Exchange Act out of which the offence under Section 167 (8) of the Sea Customs Act arose. Since the jurisdiction of the Appellants to do so was statutory, a duty to refund arises as soon as it is held that the impugned order was ultra vires. Such a claim in a proceeding for mandamus has been allowed in England in *R. v. Income Tax Special Purposes Commrs.*, (1888) 21 QBD 313 and in numerous cases in India e.g., *Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf*, ; *The State of Orissa and Another Vs. Chakobhai Ghelabhai and Company*, (maintainability not questioned); *State of Kerala v. Aluminium Industries Ltd.* (1965) 10 STC 680 (SC). On this point, the observations of the Supreme Court in the case of *Union of India (UOI) Vs. A.V. Narasimhalu*, , though obiter, are illuminating. In this case, the claim had been made by still, but a suit was barred by Section 40 of the Sea Customs Act. It was on this ground that the suit was dismissed, but at the same time, the Supreme Court observed-

"If the plaintiffs had moved the High Court in exercise of its jurisdiction under Article 220 the Union had practically no defence. The Union could without loss of face acceded to the request of the plaintiff to refund the amount collected. . . . This was essentially a case in which when notice was served the Central Government should instead of relying upon technicalities have refunded the

amount collected....."

34. Mr. Kar, however, relies upon the observations of the Court in *Suganmal v. State of Madhya Pradesh* AIR 1865 SC 1740. But this decision, when closely read, does not establish the proposition that an order of refund cannot, under any circumstances, be made in a petition under Article 220, but only that refund cannot be made the sole relief in a petition under Article 226. In that case, there was no judicial decision invalidating the imposition or collection, but the assessment had been quashed by an administrative appellate authority. Founding his claim upon that administrative decision, the Petitioner brought his mandamus petition with the sole prayer that the Taxing Authority be directed to refund the amount illegally collected. The Court rejected this prayer on the ground, *inter alia*-

"We therefore, hold that normally petitions solely praying for the refund of the Shite by a writ of mandamus are not to be entertained" (para 9, p. 1742, *ibid.*).

35. On the other hand, that the Court, in a proceeding for mandamus., has the jurisdiction in direct refund, as an ancillary relief, is clearly laid down by the Court in *Bhailal's cast*) AIR 1904 SC 1006 para 16 thus-

". . . . we are clearly of opinion that the High Courts have power for the purpose of enforcement of fundamental rights and statutory rights to give consequential relief by ordering the payment of money realised by the Government without the authority of law".

36. In *Backer Gray's case* (1970) 1 SCWR 303 refund has been ordered by the Supreme Court, as ancillary relief, in an appeal by special leave (under Article 136 of the Constitution) against an order of the Central Board of Excise and Customs.

37. Needless to say, the collection of customs duty on exports or imports is a restriction upon the fundamental right of a citizen guaranteed by Article 19(1) (g), and such restriction, therefore, can only be justified under authority of a law, under Clause (6) of Article 10. Where the imposition or collection is *ultra vires*, the fundamental right of the citizen under Article 19(1)(g) is infringed: *Mohammad Yasin Vs. The Town Area Committee, Jalalabad and Another*, : *Captain Ganpati Singhji Vs. The State of Ajmer and Another*, . The claim for refund, again is not the only relief claimed in the proceeding before us; hence, the contention of Mr. Kar, in this behalf must be rejected.

38. V. Mr. Kar finally contended that though the Addl. Collector had founded his order upon both items (8) and (37) of Section 107, the appellate authority, -- the Board. -- had relied upon item (37) only so that the Respondent could not get any relief on the footing that the impugned order was made also under item (8). This is not factually true, since the appellate authority dismissed the appeal in toto (p. 141) and merely stated that the offence u/s 167 (37) was an offence "independent" of Section 167 (8). That the Board, too, relied upon both items 8

and 37 of Section 167, is apparent from the following words in para 6 of the Board's order (p. 140) -

"In this regard, the Board observed that since the facts disclosed two separate offences, there was nothing to bar actions being taken under the provisions of both Sections 167 (8) and 167 (37) of the Sea Customs Act".

39. But, as we have just field, the personal penalty amounting to Rs. 35,000 could not be imposed u/s 167(37) at all, it must be held to be founded u/s 167 (8) and, therefore, must be quashed as being without jurisdiction, in the facts of the case before us.

40. In the result, this appeal is allowed in part and the order of the Court below is modified as follows:

41. There will be a writ in the nature of certiorari quashing only that part of the impugned order of the Additional Collector which imposed a personal penalty of Rupees 35,000 upon the Respondent and a writ in the nature of Mandamus directing the Appellants to refund to the Respondent the sum of Rs. 35,000/-, within a period of two months from this date. In view of the divided success, we make no order as to costs.

42. In view of the above decision the amount of Rs. 2,00,000 out of Rs. 2,35,000 which is lying deposited with the Registrar, Original Side, in pursuance of the Court's order at the time of interim injunction dated 31-3-1969 and 1-4-69 be now refunded to the appellants on their making a proper application in that behalf.

Ajay K. Basu, J.

43. I agree.