Shewpujanrai Indrasanrai Ltd.

Vs

The Collector of Customs & Others

Civil Appeal No. 256 of 1954

(CJI S. R. Bose, Vivian Bose, N. H. Bhagwati, S. K. Sarkar, K. Subha Rao JJ)

09.05.1958

JUDGMENT

S. K. DAS J. -

This appeal has come to us on a certificate granted by the High Court of Judicature at Calcutta that the case is a fit one for appeal to this Court.

The appellant is Shewpujanrai Indrasanrai Ltd., a private limited company incorporated under the Indian Companies Act, 1913, and carrying on business at 69, Manohar Das Street, Calcutta. Respondents 1 and 3 are the Customs authorities concerned; respondent 2 is the Union of India, and respondents 4 and 5 are two banks, called respectively Nationale Handels Bank N.V., a foreign company carrying on business at 1, Royal Exchange Place, Calcutta, and Bharat Bank Ltd., a company incorporated under the Indian Companies Act, 1913, and having its registered office at 143, Cotton Street, Calcutta.

The material facts are these. The appellant Company carries on business as a bullion merchant and in that capacity used to buy gold and silver in the Calcutta and Bombay markets and sell the same either direct or through bankers at the aforesaid two places. It is stated that between November 14, 1950, and November 20, 1950, the appellant Company, in the usual course of its business, purchased about 9,478 tolas of gold, and in respect of the said purchases, borrowed money from respondents 4 and 5. The gold so purchased was deposited with the respondent banks as security for the loans taken, 7,044 tolas being deposited with respondent 4 and about 2,437 tolas with respondent 5. With the consent of the appellant Company, the two Banks respondents 4 and 5, sent the gold to the Calcutta Mint for the purpose of assaying. On November 20, 1950, the Collector of Customs, Calcutta, asked the Mint authorities not to part with the gold, and on November 21, 1950, the gold was seized at the instance of the Customs authorities, Calcutta, in pursuance of a search warrant issued by the Chief Presidency Magistrate, Calcutta. On the same day, certain books of account of the appellant Company were also seized from its place of business at 69, Manohar Das Street. On November 22, 1950, the appellant Company received a letter signed by one Jasjit Singh of the Customs Department, requesting the presence of the appellant at the Customs House on November 27, 1950, for opening and checking the bags of bullion which had been seized from the Mint. Thereafter followed some correspondence, details whereof are not necessary for our purpose, between the Customs authorities and Messrs. Sawday & Co., acting on behalf of the appellant Company. On December 19, 1950, the appellant Company made an application in the High Court of Calcutta under Art. 226 of the Constitution in which it asked for the issue of appropriate writs or orders quashing the orders of seizure and detention of its gold and books of account, and for a further direction that the Customs authorities be prohibited from giving effect to the said orders of

detention and seizure or from taking any steps in connection with the gold or the books of account seized. This writ application was heard and disposed of by an order made by Bose J. of the Calcutta High Court on April 23, 1951, the result of which was that the rule was made absolute to this extent only that the seizure of the books of account was declared to be illegal and a direction was made that the books be returned forthwith the appellant Company. No order was made about the gold seized and detained.

On June 20, 1951, the Customs authorities sent a notice to the appellant Company which was in these terms :-

> "Subject :- Seizure of 9,478.19 tolas of gold at the Government of India Mint, Strand Road, Calcutta.
>
> I have been directed by the Collector of Customs to inform you that the above case has been placed before him for adjudication by the Superintendent, Preventive Service. A copy of the note submitted by the latter together with copies of the assay reports therein referred to are enclosed herewith.
>
> 2. You are requested to show cause in writing within fourteen days from date hereof why penal action should not be taken against you and the 9,478.19 tolas of gold in question under the provisions of sections 167 clause 8 and 168 of the Sea Customs Act, 1878, for alleged violation of section 19 of the same Act read with section 8 of the Foreign Exchange Regulation Act, 1947.
>
> 3. You are also requested to send copies of all documentary evidence including all books of account, vouchers etc., along with your explanation.
>
> 4. On receipt of your explanation, the Collector has directed me to further inform you that in this case a date and time will be fixed for hearing at which you will be required to produce all oral evidence in support of your explanation and also to make your submissions."

This notice was issued on the strength of an information contained in a note which the Superintendent, Preventive Service of the Customs authorities, submitted and which said that the gold in question had been smuggled into India in violation of the provisions of the Sea Customs Act, 1878 (hereinafter referred to as the Sea Customs Act) and the Foreign Exchange Regulation Act, 1947 (hereinafter referred to as the Foreign Exchange Act) and that the gold had been sent to the Mint for processing; that is, for melting and casting the same into bars, weighing and stamping the same with the Mint Marks, and also assaying small portions thereof. On July 3, 1951, the appellant Company submitted its explanation in answer to the aforesaid notice. The parties were then heard by the then Collector of Customs, Sri Raja Ram Rao; but before the hearing could conclude, Sri Raja Ram Rao was transferred. His successor, Mr. J. W. Orr, heard the parties on some days; but on October 11, 1951, Mr. Orr was succeeded by Sri A. N. Puri. This latter officer heard the parties afresh and concluded the hearing on February 8, 1952. On May 14, 1952, Sri A. N. Puri passed the order impugned in this case, in which he came to the conclusion that the gold in question (9,478.19 tolas) was smuggled gold and that there was a contravention of the provisions of section 19 of the Sea Customs Act read with section 8 of the Foreign Exchange Act. The final order which he made was in these terms :-

> "I accordingly order that the entire quantity of the gold seized on the 21st November, 1950, amounting to 9,478.19 tolas be confiscated under section 167(8) of the Sea Customs Act. In lieu of confiscation, however, I give the owner of the said gold an

> option under section 183 ibid to pay a fine of Rs. 10,00,000 (Rupees ten lakhs only) in addition to the proper customs duty and other charge leviable thereon within four months from the date of the despatch of this order. The release of the gold will be further subject to the production of a permit from Reserve Bank of India within the aforesaid period."

On June 19, 1952, the appellant Company filed a second writ petition in the High Court of Calcutta in which it asked that (a) a writ of certiorari do issue against respondents 1 to 3 calling upon them to produce the record of the proceeding resulting in the impugned order of May 14, 1952, and for quashing the same; (b) a writ of mandamus do issue requiring respondents 1 to 3 to forbear from giving effect to the orders of seizure, detention and confiscation of the appellant's gold and further requiring the said respondents to return the gold to the appellant; and (c) a writ of prohibition do issue retraining the said respondents from taking any further steps in pursuance of the order of confiscation etc. This second writ application was dealt with and disposed of by Bose J. by his order dated August 5, 1952. Broadly speaking, the two main grounds on which he held the impugned order to be bad were these. The learned Judge held that by purporting to proceed under section 182 of the Sea Customs Act in the present case, the Customs authorities had acted in prejudice to the provisions of section 23 of the Foreign Exchange Act and this was in violation of section 8(3) of the Foreign Exchange Act as it stood at the relevant time. He said :

> "If the petitioners had not been implicated in the charge it might have been open to the Customs authorities to proceed under section 182 if steps were intended to be taken only against the offending goods but the notice to show cause makes it clear that that is not the case. Although I am not prepared to go to the length of holding that section 23 of the Foreign Exchange Regulation Act altogether excludes the operation of section 182 of the Sea Customs Act and although I have no doubt, that in appropriate cases where section 23 is not attracted, recourse can be had to section 182 of the Sea Customs Act, the present case is one in which adoption of the procedure under section 182 of the Sea Customs Act has prejudiced section 23 of the Foreign Exchange Regulation Act. The entire proceedings before the Customs authorities must therefore be held to be without jurisdiction."

Secondly, he held that the conditions which the Collector of Customs had imposed in the impugned order for release of the confiscated gold were not warranted by the statute, and as the impugned order was one composite order, different parts whereof could not be severed one from the other, the entire order must be held to have been made without jurisdiction. On these findings, the rule was made absolute, the impugned order was quashed and respondents 1 to 3 were directed to forbear from giving effect to the order.

Then there was an appeal which was heard by a Division Bench consisting of Das and Mookerjee JJ. That Bench held that the proceeding under the Sea Customs Act was in the nature of a proceeding in rem and an order of confiscation or penalty passed in such a proceeding was not a quasi judicial act, but an administrative or executive act, in respect of which no application for the issue of a writ of certiorari under Art. 226 of the Constitution lay. On a construction of section 8(3) of the Foreign Exchange Act, as it stood at the relevant time, it held that the restrictions mentioned therein had a double effect and the remedies available under section 167(8) of the Sea Customs Act and under section 23 of the Foreign Exchange Act were cumulative in nature. It said :

> "The former remedy (meaning the remedy under the Sea Customs Act) is intended to

> levy the customs duties and is mainly directed against the goods; the latter is penal, intended to punish the person concerned in the act of smuggling. There is thus no question of the former proceeding prejudicing the latter proceeding."

Accordingly the Division Bench held that the first ground on which Bose J. had held the impugned order to be bad was not sustainable. With regard to the conditions imposed in the impugned order for the release of the confiscated gold, it held that the invalidity, if any, of the imposition of such conditions did not affect the main order of confiscation. It said :

> "Section 183 casts an imperative duty on the officer adjudging confiscation to give the owner of the goods an option to pay such a fine as the officer thinks fit in lieu of confiscation. The duty so cast is an exercise of jurisdiction by the officer concerned quite separate from the exercise of his jurisdiction under section 167(8) imposing confiscation and penalty. If any illegality has attached in the matter of exercise of his jurisdiction under section 183, the illegal condition may be set aside."

In the result, it accepted the appeal and set aside the judgment and order of Bose J.

The present appeal is from the aforesaid judgment and order of the Division Bench dated July 3, 1953.

There are two preliminary points which we may conveniently dispose of here, before we go on to the main contentions urged on behalf of the appellant Company. In giving a certificate in this case the learned Chief Justice, with whom Das Gupta J. agreed, expressed the view that the question whether the proceeding in which the order appealed from was made was of a civil or criminal nature, or was, in the language of Art. 132 of the Constitution, 'other proceeding' was not free from difficulty; he added that, in any event, Art. 135 of the Constitution applied in the present case, because it was not disputed that certain questions of interpretation of the Constitution were involved and, therefore, the case was clearly one where an appeal would lie to the Federal Court immediately before the commencement of the Constitution. The learned Solicitor-General, who has appeared before us on behalf of respondents 1 to 3, has not accepted as correct the view that Art. 135 justified the grant of a certificate in this case. He has not, however, pressed us to decide in this case the question of the competency of the certificate given by the High Court, and has raised no objection to a decision of the appeal on merits. The question whether a proceeding on a writ application is of a civil or criminal nature within the meaning of those expressions in Arts. 133 and 134 of the Constitution has led to some divergence of opinion in the High Courts, and we understand that it is one of the questions for decision in some cases which we have recently admitted. In the view which we have taken of the present case on merits and the further circumstances that it is open to us to give special leave to the appellant under Art. 136 of the Constitution, we do not think that it is necessary in the present case to decide the question mooted by the learned Chief Justice in his order dated December 1, 1953, and we prefer not to express any opinion thereon.

The other point relates to the view expressed by the High Court in the order under appeal that an order of confiscation or penalty under the Sea Customs Act is a mere administrative or executive act, in respect of which no application for a writ of certiorari lies. It is necessary to state that the point is now concluded by two recent decisions of this Court. In F. N. Roy v. Collector of Customs, Calcutta ([1957] S.C.R. 1151), this Court held that the imposition of a fine under section 167(8) of the Sea Customs Act was really a quasi-judicial act and in the later decision of Leo Roy Frey v. The Superintendent, District Jail, Amritsar and another ([1958] S.C.R. 822), it has been held that in

imposing confiscation and penalties under the Sea Customs Act, the Collector acts judicially. Therefore, the view that an order of confiscation or penalty under the Sea Customs Act is a mere administrative or executive act is no longer tenable.

Now, we proceed to a consideration of the two main points urged on behalf of the appellant Company. It has been argued before us that on a proper construction of section 8(3) of the Foreign Exchange Act (as it stood at the relevant time) read with section 19 of the Sea Customs Act, it was not legally open to the customs authorities in the present case to take any action against the appellant Company under the Sea Customs Act, as such action prejudiced the provisions of section 23 of the Foreign Exchange Act. To appreciate this point it is necessary to read some of the relevant sections of the Foreign Exchange Act and the Sea Customs Act.

Sub-sections (1) and (2) of section 8 of the Foreign Exchange Act, impose restrictions on import and export of currency and bullion. Sub-section (1) states, inter alia, that the Central Government may, by notification in the official gazette, order that, subject to such exemption, if any, as may be contained in the notification, no person shall, except with the general or special permission of the Reserve Bank, bring or send into the States any gold or silver. Such a notification was published on August 25, 1948, which said in substance that except with the permission of the Reserve Bank, no person shall bring into the States from any place outside India any gold, bullion, etc. Sub-section (3) was at the relevant time in these terms -

> "8(3) The restrictions imposed by sub-sections (1) and (2) shall be deemed to have been imposed under section 19 of the Sea Customs Act, 1878, without prejudice to the provisions of section 23 of this Act, and all the provisions of that Act shall have effect accordingly."

The aforesaid sub-section was later deleted by Act VIII of 1952, and a new section, namely, section 23A, was introduced which provided inter alia that the restrictions imposed by sub-sections (1) and (2) of section 8 shall be deemed to have been imposed under section 19 of the Sea Customs Act and all the provisions of that Act shall have effect accordingly except that section 183 thereof shall have effect as if for the word "shall" therein, the word "may" were substituted. At the time relevant for the purpose of the present case, sub-section (3) of section 8 was in full force and effect and the question under our consideration has to be decided with reference to that sub-section. We then come to section 23 of the Foreign Exchange Act which at the relevant time was in these terms :-

> "23. Penalty and Procedure. - (1) Whoever contravenes any of the provisions of this Act or of any rule, direction or order made thereunder shall be punishable with imprisonment for a term which may extend to two years or with fine or with both, and any Court trying any such contravention may, if it thinks fit and in addition to any sentence which it may impose for such contravention, direct that any currency, security, gold or silver, or goods or other property in respect of which the contravention has taken place shall be confiscated.
>
> #(2) .....##
>
> (3) No court shall take cognisance of any offence punishable under this section..... except upon a complaint in writing made by a person authorised in this behalf by the Central Government or the Reserve Bank by a general or special order :

Provided that where any such offence is the contravention of any of the provisions of this Act or any rule, direction or order made thereunder which prohibits the doing of an act without permission, no such complaint shall be made unless the person accused of the offence has been given an opportunity of showing that he had such permission.

> (4) If the person committing an offence punishable under this section is a company or other body corporate, every director, manager, secretary, or other officer thereof shall, unless he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent its commission, be deemed to be guilty of such offence."

Turning now to the Sea Customs Act, we start with section 19 which is in Chapter IV. It says -

> "19. The Central Government may, from time to time, by notification in the Official Gazette, prohibit or restrict the bringing or taking by sea or by land goods of any specified description into or out of India across any customs frontier as defined by the Central Government."

Section 167 occurs in Chapter XVI of the Sea Customs Act and in so far as it is relevant for our purpose, it states -

> "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 :-
>
> #---------- Section of Offences. this Act to Penalties. which offence has reference.---------- ..... 8. If any goods, Such goods shall the importation or be liable to confis-exportation of cation; and any which is for the time person concerned in being prohibited or any such offence restricted by or 18 & 19. shall be liable to a under Chapter IV penalty not exceed-of this Act, be importeding three times the into or exported from value of the goods, India contrary to such or not exceeding prohibition or restri- one thousand rupees.ction;----------##

Section 182 of the Sea Customs Act deals with adjudication of confiscation and penalties referred to in section 167 aforesaid. It states -

> "182. In every case, except the cases mentioned in section 167, Nos. 26, 72 and 74 to 76, both inclusive, in which, under this Act, anything is liable to confiscation or to increased rates of duty; or any person is liable to a penalty, such confiscation, increased rate of duty or penalty may be adjudged -
>
> (a) without limit, by a Deputy Commissioner or Deputy Collector of Customs, or a Customs-collector;
>
> (b) up to confiscation of goods not exceeding two hundred and fifty rupees in value, and imposition of penalty or increased duty, not exceeding one hundred rupees, by an Assistant Commissioner or Assistant Collector of Customs;

(c) up to confiscation of goods not exceeding fifty rupees in value, and imposition of penalty or increased duty not exceeding ten rupees, by such other subordinate officers of Customs as the Chief Customs-authority may, from time to time, empower in that behalf in virtue of their office :

Provided that the Chief Customs-authority may, in the case of any officer performing the duties of a Customs-collector, limit his powers to those indicated in clause (b) or in clause (c) of this section, and may confer on any officer, by name or in virtue of his office, the powers indicated in clauses (a), (b) or (c) of this section."

Section 183 has an important bearing on one of the questions urged before us and is in these terms :

"183. Whenever confiscation is authorised by this Act, the officer adjudging it shall give the owner of the goods an option to pay in lieu of confiscation such fine as the officer thinks fit."

Section 184 of the Sea Customs Act states that whenever anything is confiscated under section 182, such thing shall thereupon vest in Government, and the officer adjudging confiscation shall take and hold possession of the thing confiscated and every officer of police, on the requisition of such officer, shall assist in taking and holding such possession. Section 186 of the Sea Customs Act states, inter alia, that the award of any confiscation, penalty or increased rate of duty under the Act by an officer of Customs shall not prevent the infliction of any punishment to which the person affected thereby is liable under any other law.

Now, the argument urged on behalf of the appellant arising as it does out of section 8(3) of the Foreign Exchange Act and section 19 of the Sea Customs Act is this. Under sub-section (3) of section 8 a restriction imposed by a notification made under sub-section (1) of the section shall be deemed to have been imposed under section 19 of the Sea Customs Act and all the provisions of the Sea Customs Act shall have effect accordingly; but the argument is that this deeming provision is subject to an important qualification contained in the words 'without prejudice to the provisions of section 23 of this Act', meaning thereby the Foreign Exchange Act. The contention is that though the restriction imposed under sub-section (1) of section 8 is to be deemed to have been imposed under section 19 of the Sea Customs Act, such deeming is to be without prejudice to, that is, subject to the provisions of section 23 of the Foreign Exchange Act; therefore, where a contravention of any of the provisions of the Foreign Exchange Act has taken place such as is punishable under section 23 thereof, the only remedy available in such a case is the one under section 23 and it is not open to the Customs authorities to take action against the offender under sections 167(8), 182 and 183 of the Sea Customs Act. It is contended that this is the true scope and effect of sub-section (3) of section 8 of the Foreign Exchange Act, if due regard is paid to the clause 'without prejudice to the provisions of section 23 of this Act' occurring therein. It is further pointed out that there is power under section 23 itself to confiscate the goods in respect of which the contravention has taken place.

On behalf of respondents 1 to 3, however, it is contended that the clause "without prejudice to the provisions of section 23" does not mean "subject to the provisions of section 23" and its true effect is merely this : when there is contravention of the restrictions imposed by sub-section (1) and (2) of section 8, which restrictions are deemed to have been imposed under section 19 of the Sea Customs Act, the contravention may have a double effect; it involves a violation of the provisions of the Sea Customs Act and may at the same time involve a violation of the provisions of the Foreign Exchange Act and, if the offender is known, two remedies may be available to the authorities

concerned; one remedy is to proceed under the relevant provisions of the Sea Customs Act and the other under the relevant provisions of the Sea Customs Act and the other under the relevant provisions of the Foreign Exchange Act. These two are concurrent remedies, which are not mutually exclusive, though in the matter of punishment the question may arise whether a person can be punished twice for the same act or offence.

On a careful consideration of these rival contentions we have come to the conclusion that it is not necessary on the facts of the present case to decide the larger question as to whether two remedies are available to the authorities concerned in respect of a contravention which comes both under the Sea Customs Act and the Foreign Exchange Act and if so, to what extent the two remedies are concurrent, cumulative or otherwise. Let us confine ourselves to the application of sub-section (3) of section 8 of the Foreign Exchange Act to the facts of this case. That sub-section states firstly, that the restrictions imposed by sub-sections (1) and (2) shall be deemed to have been imposed under section 19 of the Sea Customs Act; secondly, it states that the aforesaid deeming provision shall be without prejudice to the provisions of section 23 of the Foreign Exchange Act; and thirdly, it states that all the provisions of the Sea Customs Act shall have effect accordingly. The construction put forward on behalf of the appellant Company is that where section 23 of the Foreign Exchange Act is applicable, any other remedy under the Sea Customs Act is barred; because that is the effect of the second part of the sub-section which says that the deeming provision shall be without prejudice to the provisions of section 23 and the concluding part of the sub-section which says that all the provisions of the Sea Customs Act shall have effect accordingly is controlled by the second part, as is indicated by the use of the word 'accordingly' therein. The learned Solicitor-General has put forward a different construction. According to him, the second part of the sub-section when it says 'without prejudice to the provisions of section 23' merely means that the remedy under section 23 is also available in an appropriate case, but it does not bar the remedy available under the Sea Customs Act; otherwise, the third and concluding part of the sub-section is rendered otiose. He has further supported his contention by a reference to section 23A, inserted in 1952, which repeats the phraseology of deleted sub-section (3) of section 8 but makes it sufficiently clear what the meaning of the clause 'without prejudice to the provisions of section 23' is.

We do not so decide, but let us assume that the construction put forwarded on behalf of the appellant is the one that should be accepted in this case. The question then is - does section 23 of the Foreign Exchange Act apply to the facts of this case and could the appellant Company be proceeded against under that section ? A distinction must at once be drawn between an action in rem and a proceeding in personam. Section 23 of the Foreign Exchange Act is a proceeding against the offender, and is applicable to the person who contravenes any of the provisions of that Act, even though on a conviction for such contravention, the Court may, if it thinks fit and in addition to any sentence which it may impose for such contravention, direct that the goods in respect of which the contravention has taken place be confiscated. In substance it is a proceeding against a person for the purpose of penalising him for a contravention of the provisions of the Foreign Exchange Act, and such a proceeding is available when the offender is known. Take, however, a case where the offender (the smuggler, for example) is not known, but the goods in respect of which the contravention has taken place are known and have been seized. Section 167(8) of the Sea Customs Act contemplates a case of this nature, when it describes the offence in col. 1 in the following words -

> "If any goods, the importation or exportation of which is ..... prohibited or restricted be imported into or exported from India contrary to such prohibition or restriction."

The penalty provided is that the goods shall be liable to confiscation. There is a further provision in the penalty column that any person concerned in any such offence shall be liable to a penalty not exceeding three times the value of the goods etc. The point to note is that so far as the confiscation of the goods is concerned, it is a proceeding in rem and the penalty is enforced against the goods whether the offender is known or not known; the order of confiscation under section 182, Sea Customs Act, operates directly upon the status of the property, and under section 184 transfers an absolute title to Government. Therefore, in a case where the Customs authorities can proceed only against the goods, there can be no question of applying section 23 of the Foreign Exchange Act and even on the construction put forward on behalf of the appellant Company as respects section 8(3), the remedy under the Sea Customs Act against the smuggled goods cannot be barred; when on the facts of the case section 23 can have no application, no question of prejudicing its provisions by the adoption of the procedure under the Sea Customs Act can at all arise.

Bose J. was fully aware of this distinction between section 23 of the Foreign Exchange Act and section 167(8) of the Sea Customs Act. Indeed, he expressly said that he had no doubt that in appropriate cases where section 23 is not attracted, recourse can be had to section 182 of the Sea Customs Act; but he thought that the notice which was issued to the appellant Company in this case on June 20, 1951, showed that the intention was to proceed against the offender also, and this, according to him, made a difference and brought in section 23. We are unable to agree. We have quoted the notice in an earlier part of this judgment. The notice asked the appellant to show cause why penal action should not be taken against it and the gold under the provisions of section 167(8) for alleged violation of section 19, Sea Customs Act, and section 8, Foreign Exchange Act. Neither the notice, nor the note of the Superintendent, Preventive Service (enclosed with the notice) suggested that the appellant was the smuggler and, therefore, liable to penalty under section 23 of the Foreign Exchange Act. Section 167(8) of the Sea Customs Act provides for two kinds of penalties when contraband goods are imported into or exported from India; one is confiscation of the goods which is an order in rem and the other is a penalty on the person concerned in any such offence; that is, the offence described in column 1 of item (8). Taking the view most favourable to the appellant, it may be said that the notice contemplated both kinds of proceedings namely one in rem and the other in personam and asked the appellant to show cause against the imposition of both penalties mentioned in the third column of section 167(8); but the notice did not show any intention, nor did it suggest even a possibility, of proceeding against the appellant under section 23 of the Foreign Exchange Act. There is, we think, an appreciable difference between the expression 'any person concerned in any such offence' occurring in the third column of section 167(8) of the Sea Customs Act and the expression 'whoever contravenes any of the provisions of this Act' occurring in section 23 of the Foreign Exchange Act. A person may be concerned in the importation of smuggled gold, without being a smuggler himself or without himself contravening any of the provisions of the Foreign Exchange Act. In this sense, the scope of section 167(8), Sea Customs Act, is different from that of section 23 of the Foreign Exchange Act. Moreover, in the case under our consideration, the only penalty imposed under section 167(8) was the confiscation of the gold which indicates that the authorities proceeded with the proceeding in rem and dropped the proceeding in personam; therefore, no question of prejudicing the provisions of section 23, Foreign Exchange Act, arose in this case. We think that Bose J. was in error in thinking that the adoption of the procedure under the Sea Customs Act prejudiced in any way the provisions of section 23, Foreign Exchange Act, in the present case.

On this finding, it is unnecessary to go into any of the larger questions which were canvassed before us in the course of arguments. We were addressed at some length on (i) what would happen to the smuggled goods if the offender died in the course of a trial under section 23 and the provisions of

the Sea Customs Act were not available; (ii) what would be the position if two contradictory findings were given with regard to the goods - one by the Customs authorities under the Sea Customs Act and the other by the Court under section 23, Foreign Exchange Act - in case two concurrent remedies were open; and (iii) what would happen to the safeguards given to an accused person under section 23, if it were open to the Customs authorities to by-pass section 23 and proceed under the Sea Customs Act. These are interesting and, may be, important question is; and we have no doubt that they will be decided when they really fall for decision in an appropriate case. In the case under present consideration, it is sufficient to state that on the facts found, no prejudice was caused to the provisions of section 23 by adopting the procedure resulting in the impugned order of confiscation, and the contention of the appellant that the Customs authorities had no jurisdiction to adopt the procedure under the Sea Customs Act cannot be accepted as correct.

This brings us to the second main contention urged on behalf of the appellant. By the impugned order the Collector of Customs confiscated the gold, and in lieu thereof gave the appellant an option to pay a fine of Rs. 10,00,000 (Rupees ten lakhs). It is not disputed that the impugned order up to the extent stated above was within his jurisdiction to make. The Collector, however, imposed two other conditions for the release of the confiscated gold; one was the production of a permit from the Reserve Bank of India in respect of the gold within four months from the date of despatch of the impugned order and the other was the payment of proper customs duties and other charges leviable in respect of the gold within the same period of four months. The High Court held, rightly in our opinion, that the Collector had no jurisdiction to impose the aforesaid two conditions. It has been fairly conceded by the learned Solicitor-General that there is no provision in the Foreign Exchange Act or the Sea Customs Act under which the Reserve Bank could give permission in respect of smuggled gold with retrospective effect; if it could, there would be no offence under section 167(8) and the order of confiscation itself would be bad. As to the second condition of payment of customs duty etc., the learned Solicitor-General referred us to a decision of the Bombay High Court in Keki Hormasji Elavia v. The Union of India (Civil Application No. 1296 of 1953 decided on August 18, 1953) referred to in a Compilation of Judgments in Customs Cases, published by the Central Board of Revenue, and submitted that customs duty was payable under section 88 of the Sea Customs Act. As in the Bombay case. The facts of the Bombay case were entirely different; it was found there that the goods, which were toilet and perfumery goods, had been smuggled through the port of Kantiajal near Surat without payment of any duty and in those circumstances, it was held that section 88 applied. In the case before us there is no finding by what means the gold was smuggled - by sea or land - and it is difficult to see how section 88, which relates to goods not cleared or warehoused within four months after entry of vessel, can be any help in the present case.

We are, therefore, of the view that the Collector of Customs had no jurisdiction to impose any of the two conditions mentioned above. What then is the result ? On behalf of the appellant it has been argued that the order being a composite and integrated order, it is not severable; and secondly, it is contended that on an application for a writ of certiorari, the superior Court must quash the whole order when it is found to be bad and in excess of jurisdiction even as to a part thereof. The question of severability does not present any great difficulty. It has been the subject of consideration in more than one decision of this Court, and in the recent decision in R. M. D. Chamarbaugwalla v. Union of India ([1957] S.C.R. 930) the principles governing it have been summarised. Applying those principles we find no difficulty in holding that the invalid conditions imposed by the Collector are not so inextricably mixed up that they cannot be separated from the valid order of confiscation and fine in lieu thereof; there is also no doubt that the Collector would have passed the order of confiscation and fine in lieu thereof on his finding that the gold was smuggled gold, even if he realised that the conditions he was imposing were invalid; it is also clear that the conditions do not

form part of a single scheme which can be operative has referred us to the sixth rule enunciated in Chamarbaugwalla's decision (supra) and has contended that if the invalid conditions are expunged, what remains of the impugned order cannot be enforced without making an alteration or modification as to the time limit fixed, and therefore the whole order must be struck down as void. We are unable to agree. The sixth rule aforesaid is based on the ground that the Court cannot make alterations or modifications in order to enforce what remains of a statute after expunging the invalid portions thereof; otherwise it will amount to judicial legislation. No such consideration arises in the case before us. There is no legal difficulty in enforcing the rest of the impugned order after difficulty in enforcing the rest of the impugned order after separating the invalid conditions therefrom; on the passing of the order of confiscation, the gold vests in Government and section 183 does not make it obligatory on the Collector to fix a time limit for payment of the fine in lieu of confiscation. It is really for the benefit of the owner that a time is fixed for payment of the fine. Even if the time limit is altered, by no stretch of imagination can it be said that such alteration amounts to judicial legislation. For these reasons we agree with the Division Bench of the High Court that the invalid conditions imposed by the Collector in this case are severable from the rest of the impugned order.

Learned counsel has relied on the decision in The King v. Willesden Justices, Ex parte Utley ([1948] 1 K.B. 397) for his contention that the High Court has no power, on certiorari, to amend the impugned order by striking out the invalid conditions; nor has this Court, on an appeal from an order on an application for the issue of a writ of certiorari, and power higher than that of the High Court. He has contended that the essence of the remedy of certiorari is that it necessarily involves revising the decision of the inferior court to which it is directed in one of three ways : (a) by quashing it; (b) by removing the case and trying it in a court of competent jurisdiction; or (c) by causing it to be reheard. According to English precedents, so argues learned counsel, certiorari involves an examination of a decision of the Court to which it is addressed to see "What of right and according to the law and custom of England we shall see fit to be done" (see Short and Mellor's Practice of the Crown Office, 2nd Edn. pp. 504-505). We do not think that we are called upon in this case to go into the early history of the prerogative writ of certiorari in England or even to decide what is the extent of the power of the High Court, on a prayer for the issue of a writ in the nature of a writ of certiorari, under Art. 226 of the Constitution. Broadly speaking, it is true that the control which is exercised through it over judicial or quasi-judicial tribunals or bodies is not in an appellate but supervisory capacity. This Court observed in T. C. Basappa v. T. Nagappa and Another ([1955] 1 S.C.R. 250), at p. 257 -

> "In granting a writ of certiorari the superior Court does not exercise the powers of an appellate Tribunal. It does not review or reweigh the evidence upon which the determination of the inferior Tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views for those of the inferior Tribunal. The offending order or proceeding so to say is put out of the way as one which should not be used to the detriment of any person."

In the same decision, it was also observed :

> "In view of the express provisions in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges. We can make an order or issue a writ in the nature of certiorari in

> all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law."

In King v. Willesden Justices (supra) the applicant was convicted and fined pounds 15 for failure to stop his vehicle on being so required by a police constable in uniform, contrary to the Road Traffic Act, 1930, section 20, sub-section 3. The ground for the application was that the maximum penalty prescribed by section 20, sub-section 3, for the offence in question was a fine of pounds 5 and that therefore the penalty of pounds 15 imposed by the justices was bad in law and in excess of their jurisdiction. Lord Goddard C.J. said :

> "Our attention has been called to several cases, including Reg. v. Stade, (1895) 64 L.J. (M.C.) 232, Reg. v. Kay, (1873) L.R. 8 Q.B. 324, and Reg. v. Cridland, (1857) 7 E.&B. 853, but having considered them all, my opinion remains as it was at the outset, that if a sentence be imposed which is not authorised by law for the offence for which the defendant is convicted, that makes the conviction bad on its face and being a bad conviction, it can be brought up here to be quashed, and when so brought up, must be quashed, for this court has no power, and never has had any power, on certiorari, to amend the conviction."

It is worthy of note that the decision proceeded on the footing that the man had a penalty imposed upon him which the law did not permit him to suffer and that made the conviction bad; and the conviction being bad, the applicant was entitled to his order of certiorari.

But we think that there is a more convincing answer to the contention urged on behalf of the appellant. In an earlier part of this judgment we have quoted in extenso the prayers which the appellant had made in its petition in the High Court. The appellant did not confine itself to asking for a writ of certiorari only, but asked for a mandamus requiring respondents 1 to 3 to forbear from giving effect to the orders of seizure, detention and confiscation of the gold and further requiring them to return the gold, and also asked for a writ of prohibition restraining respondents 1 to 3 from taking further steps in pursuance of the order of confiscation. These prayers were neither unnecessary nor a mere surplusage; they were appropriate for the purpose of avoiding the conditions which the Collector had imposed for release of the gold. It is well settled that where proceedings in an inferior court or tribunal are partly within and partly without its jurisdiction, prohibition will lie against doing what is in excess of jurisdiction. (see Halsbury's Laws of England, 3rd Edn. vol. 11, para 216, p. 116). In the recent decision in Dalmia's case, Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar and others ([1959] S.C.R. 279), this Court held a part of a notification made under section 3 of the Commission of Enquiry Act (LX of 1952) to be bad, and holding that it was severable from the rest of the notification, deleted it and held that rest of the notification to be good.

Therefore, we do not see any insuperable difficulty in the present case in prohibiting respondents 1 to 3 from enforcing the two invalid conditions which the Collector of Customs had imposed for release of the gold on payment of the fine in lieu of confiscation, and the time limit of four months fixed by the Collector must accordingly run from the date of this order.

The only other points that require consideration are the points urged on behalf of the two banks, respondents 4 and 5. These respondents say that though the general property in the goods pledged remained with the pledgor, a special property passed to the pledgee in order that he might be able to sell the pledge if and when his right to sell arose. They complain that they have been deprived of

this special property by reason of the proceeding resulting in the impugned order, adopted under the Sea Customs Act by the Collector of Customs; they contend that their right is guaranteed under Art. 19(1)(f) of the Constitution, and the provisions of the Sea Customs Act in so far as they take away the pledgee's right without providing for a notice to the pledgee or an option to pay the fine in lieu of confiscation are not reasonable restrictions in the interests of the general public within the meaning of cl. (5) of the said Article. Our attention has been drawn to section 19A of the Sea Customs Act which enables the Central Government to make regulations, either general or special, respecting the detention and confiscation of goods the importation of which is prohibited, and the conditions, if any, to be fulfilled before such detention and confiscation, and also to sub-section (1) thereof under which the Chief Customs Officer may require the regulations to be complied with and may satisfy himself in accordance with those regulations that the goods are such as are prohibited to be imported. It is pointed out that no regulations have yet been made, and in the absence of any regulations the Customs officers have an uncontrolled and unguided power in the matter of detention and confiscation of goods.

So far as the Nationale Handels Bank N. V., respondent 4, is concerned, it has no right under Art. 19. Assuming that a company can be a citizen as defined in the Constitution, respondent 4 admittedly is a foreign Company possessing no rights of a citizen of this country. On the same assumption the Bharat Bank Ltd., respondent 5, being an Indian Company may have the rights of a citizen under Art. 19; but in the circumstances which we shall presently state, we do not think that its complaint as to the infraction of a fundamental right can be raised at this stage. Apart altogether from the considerations which the learned Solicitor-General has pressed (as to which it is unnecessary for us to express any final opinion), namely, (i) that a pledgee cannot have a right higher than that of the pledgor, (ii) that the pledgor does not cease to be the owner by reason of the pledge, and (iii) that in an action in rem the order operates directly upon the status of the property and, as in this case, vests the property absolutely in Government, there are certain other circumstances which militate against the claim now put forward by respondent 5. The order of the Collector shows that all throughout the adjudication proceedings respondent 5 was represented by counsel before the Collector. The Collector passed his order on May 14, 1952, and a copy was forwarded to respondent 5. The respondent took no steps against the order, but was content with its position as respondent to the application which the present appellant filed in the High Court. It is also to be noticed that the Collector's orders shows that he was not fully satisfied with the story of the appellant that the gold had been pledged with the Banks in the manner suggested. So far as the transaction with the Bharat Bank are concerned, he said :

> "The Majud Bahi (stock book) of the firm showed a closing balance of gold weighing tolas 2,457-6-0 as lying with the Bharat Bank Ltd., on 17th November, 1950, whereas the closing balance on that date according to the Bank's statement was tolas 4,651-14-0. The firm's representative gave reasons for this difference which was mainly that instructions were given to the Bharat Bank on the 17th November, 1950 to send gold weighing tolas 2,236-7-0 to Sewadin Bansilal of Bombay but the actual delivery of this gold to this person at Bombay did not take place until the 22nd November 1950. The Auditors, however, observed that they had not seen any correspondence with the Bank in support of the above information which they received verbally."

In the High Court when the case was before Bose J. respondent 5 challenged the order of the Collector on several points including the alleged infraction of his fundamental right. This objection was not, however, accepted, and Bose J. allowed the writ application on two other grounds which

we have mentioned earlier. In the appeal before the Division Bench, respondent 5 again relied on Art. 19(1)(f), and the Division Bench affirmed the finding of Bose J. that as the Sea Customs Act did not directly legislate in respect of the freedom guaranteed by Art. 19(1)(f), that Article had no application. Again, respondent No. 5 took no steps against the judgment and order of the Division Bench dated July 3, 1953 - a judgment and order which it now challenges as incorrect. All along the line, it preferred to sail with the appellant but figuring as a respondent only; it was the appellant who moved the High Court for a certificate, obtained such certificate and brought this appeal to this Court. Respondent 5 took no action against the judgment and order of which it now complains. In these circumstances, we do not think that respondent 5 can now be allowed to complain of a violation of its fundamental right, apart from and independently of the appellant.

The result, therefore, is as follows. The impugned order is goods as to the confiscation of the gold and the payment of fine in lieu thereof. The Collector of Customs had jurisdiction to make that order on his finding that the gold was smuggled gold. He, however, had no jurisdiction to impose the other two conditions which he imposed for the release of the gold. Though the High Court held on appeal that the invalid conditions were severable from the rest of the order, it did not give any appropriate direction regarding those conditions as it should have done, but allowed the appeal and dismissed the writ application in toto. We think that the appropriate order to pass in this case is to dismiss the writ application in so far as it seeks to quash the impugned order of confiscation of the gold and the payment of fine in lieu thereof, and to allow it in so far as it wants a direction restraining respondents 1 to 3 from enforcing the two invalid conditions imposed by the Collector of Customs, which the Collector had no jurisdiction to impose. The time limit of four months given by the Collector will accordingly run from the date of this order.

The appeal is accordingly allowed to the very limited extent indicated above but dismissed as to the rest, and in the circumstances of this case, particularly in view of the invalid conditions imposed by the Collector, we direct that the parties must bear their own costs of the hearing in this Court.

Appeal allowed in part.

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