Indo-China Steam Navigation Co. Ltd.

Vs

Jasjit Singh, Additiional Collector of Customs & Ors.

Civil Appeal No. 770 of 1962 and Petition No. 138 of 1961

(CJI P.B. Gajendragadkar, K.N. Wanchoo, K.C. Das Gupta, J.C. Shah, N. Rajgopala Ayyangar JJ)

03.02.1964

JUDGMENT

GAJENDRAGADKAR C. J. –

This appeal by special leave raises a short question about the true scope and effect of section 52A of the Sea Customs Act, 1878 (No. 8 of 1878) (hereinafter called 'the Act'). The appellant, the Indo-China Steam Navigation Co. Ltd., which carries on the business of carriage of goods and passengers by sea, owns a fleet of ships, and has been carrying on its business for over 80 years. One of the routes plied by its ships is the Calcutta-Japan-Calcutta route. An order has been passed by the Customs Authorities confiscating the appellant's motor vessel "Eastern Saga" under section 167(12A) of the Act, and giving the appellant the option under s. 183 of paying a fine of Rs. 25 lakhs in lieu of confiscation. The appellant contends that this order has been based upon a misconstruction of the provisions of s. 52A.

The vessel "Eastern Saga" has 6,631 gross registered tons, and 4,441 net registered tons. It has an overall length of 475'-2-1/2" a breadth of 59'-3" and a summer draft of 24'-7". It carries a crew of 14 officers and 56 seamen. It appears that the vessel has 119 separate rooms, including 34 crews' cabins, 8 passengers' cabins, a sailor's mess, a fireman's mess, a comprador's office, a hospital, a boys' mess, a ship's office, an engineer's office, a saloon, lounge, pantry, chart-room, radio officer's cabin, captain's cabin, wheel house, alleyways, and stairways. It is clear that the vessel is a well equipped big vessel. It has also domestic refrigeration compartments which are lined by insulated walls. All crew accommodation in the vessel has been insulated as required by statutory regulations. Such insulation consists of a sheathing or paneling of fibre board or similar material tacked to wooden frames inserted between the stiffeners jutting out from the steel bulkheads or walls of the said vessel, in consequence of which hollow spaces are left between the panelling and the walls of the vessel. The said panelling or sheathing formed a removable feature or furnishing of the said vessel.

The 'Eastern Sage' arrived at Calcutta from the Far East on October 29, 1957. In the course of its ordinary voyage, as a cargo vessel carrying a legitimate cargo of 24,815 packages of general merchandise weighing 1,506 tons, it was rummaged by Calcutta Customs Officers on the 30th and 31st October and on the 12th November, 1957. On search being made of the vessel's domestic refrigeration compartments, a two-tier white painted shelf was found fixed to the insulated wall of the handling room. The screws which seemed like holding the shelf to the wall, in fact, did not do so they had been hammered flat and could not be turned by a screw driver; the shelf was held by some wooden plugs which had been hidden below a coat of paint; below the shelf, there was a hole in the panelling closed with a plug; this hole gave access to the insulation space of the compartment;

it was of the size 7" X 4-1/2". Nothing was found hidden in that space.

A cabin on the forecastle of the vessel was then searched and two rectangular openings in the cabin wall panelling were discovered behind a steel cloths locker which was screwed to the wall. One of these was closed with a wooden cover. They measured 5" X 13" and 5" X 5" respectively. Nothing was found hidden in either of these two spaces. The cabin marked "Compradores" was also searched, and when a wooden bench which was screwed to the wall panelling was removed, two rectangular holes were found in the panelling behind the bench. These holes which were covered with wooden plugs and overpainted, measured 5" X 4-1/2" and 8" X 2-1/2". Nothing was found in these spaces either. The cabin of No. 1 Fitter was then searched and two rectangular holes were found in the visible part of the wall panelling which had been filled in and overpainted; they were respectively 7-1/2" X 10-1/2" and 12" X 12" in size. Nothing was found hidden in these space. That took the searching party to the sailors' accommodation where a hole measuring 2-1/2" X 5-1/2" was found in the wall panelling behind the back batten of a wooden seat which had been screwed to the wall. This hole was covered with a piece of wood and over painted. The hole opened into a space and in that space, the Customs Officers found a large quantity of gold in bars. Further search in the sailors' accommodation led to the discovery of a hole in the wall panelling behind a steel clothes locker which was closed with a wooden plug. Nothing was found in it. That is how a search was made by the customs officers on Eastern Saga and in one of the holes a large quantity of gold in bars was discovered.

On November 12, 1957, notices were served on the owners' Agents at Calcutta, M/s. Jardine Henderson and Co. Ltd., and on the master of the vessel, Captain Kiunear, respectively to show cause why the vessel should not be confiscated under s. 167(12A) since it had contravened s. 52A of the Act and penal action should not be taken against the agents and the master in that behalf. On the same day, a notice in similar terms was issued to Kwok Cho, a member of the crew of the Eastern Sage who had come forward to claim the gold which was discovered as a result of the search. On November 13, 1957, a further notice to show cause was served on the master in regard to another hole which had been discovered after the issue of the first notice.

The agents and the master thereupon sent elaborate replies setting forth their pleas that, in law, no action could be taken against them. The master pleaded that he had no knowledge of the presence of gold or unauthorised holes in the ship and had taken all reasonable precautions in accordance with the Company's instructions. He fully adopted the other pleas made by the agents. The agents substantially relied on a report by M/s. Norman Stewart and Co., Maine Surveyors, Naval Architects and Consulting Engineers, and urged that unless special, extensive, time-consuming and uneconomic detailed searches were carries out, it was impossible to discover special hiding places like the ones discovered on the search made by the customs authorities. They also urged that they had no knowledge about the holes or about the gold which was discovered from one of them. They referred to the statement made by Kwok Cho and alleged that the said statement showed that gold could be smuggled by a smuggler without the knowledge of the master and the owners of the ship. The ship moves on High-seas from place to place during the course of business, and it was impossible that the master, though in the ship, would know anything about the criminal activities of a smuggler carried on in nooks and corners of the ship, and it was inconceivable that the owners of the ship would ever know what was happening on the ship during its travel on the High-seas. They also relied on the fact that they had taken all the precautions which could be taken reasonably and had issued express and definite instructions to their crew against committing any offence like smuggling.

On receiving the relies sent by the agents, the master, and Kwok Cho, the Additional Collector of Customs heard the appellant, and on November 23, 1957, he passed the impugned order. He held that having carefully considered the written explanations tendered and oral arguments urged before him, he was satisfied that the preventive measures taken by the owners, the agents, and the master proved to be hopelessly inadequate and ineffective. He accepted their plea that they need not be regarded as persons concerned in the illegal importation of gold into India within the meaning of s. 167(8) of the Act. He also upheld their plea that the openings found in the cabin of No. 1 Fitter did not attract the provisions of s. 167(12A). In regard to other matters, the explanations offered appeared to him to be unsatisfactory and unacceptable. His conclusion, therefore, was that the vessel had clearly rendered itself liable to confiscation under s. 167(12A) because it had infringed the provisions of s. 52A. The quantity of gold found on the vessel was approximately of the value of Rs. 23,79,490/80 nP. @ Rs. 109/24 nP. per tola, and he noticed the fact that this was the recovery made in one of the several cavities found on the ship. He was, therefore, inclined to infer several holes discovered in the vessel indicating the extent to which the hiding places were used for contravening s. 52A. That is why he confiscated 1,358 gold bars discovered as a result of the search absolutely under s. 167(8) read with s. 23A of the Foreign Exchange Regulation Act. He also imposed a personal penalty of Rs. 10,000 on the sailor Kwok Cho. In regard to the ship, he directed that Eastern Saga be confiscated under s. 167(12A) and in lieu thereof, he gave the owners of the ship an option to pay a fine of Rs. 25 lacs which he directed should be paid within 30 days of the date of the despatch of the order, or such extended time as may be allowed. In passing this order, the Additional Collector observed that he had taken into consideration the fact that the agents had already suffered some loss due to the vessel's detention at the port.

The appellant then preferred an appeal before the Central Board of Revenue. The Board considered the matter and came to the conclusion that none of the contentions raised by the appellant was either warranted or supported by the law as it stands. The Board expressed its concurrence with the conclusions of the Additional Collector that the offence under s. 52A of the Act had been proved, and the appellant was liable to be dealt with under s. 167(12A) of the Act. In regard to the grievance made by the appellant that the fine imposed by way of option was excessive, the Board observed that having regard to the quantity and value of the smuggled gold and other relevant facts, it was not inclined to make any change in the said order. The penalty imposed on the master, said the Board, was also not so large as to need any revision. It is not disputed that the value of the ship is very much more than the amount of Rs. 25 lacs imposed by way of fine under s. 183. This order was pronounced on May 12, 1959. The appellant's attempt to move the Government of India in its revisional jurisdiction failed and its application was dismissed on December 20, 1960. The appellant then moved this Court for special leave and it is with the special leave granted by this Court that the present appeal has come before us.

At the hearing of this appeal, the learned Additional Solicitor-General has urged a preliminary objection. He contends that none of the Customs Authorities which had dealt with the appellant's case is a tribunal under Art. 136(1) of the Constitution, and so, the appeal preferred by the appellant is incompetent. It is true that special leave has been granted to the appellant by this Court, but there can be little doubt that even in cases where special leave has been granted at the ex parte hearing of the matter on the petition of the appellant for special leave, the respondent can at the final hearing, raise a preliminary contention that special leave should not have been granted, since the decision, judgment, or order appealed against, has not been pronounced either by a Court or Tribunal within the meaning of Art. 136(1). The Additional Solicitor-General argues that neither the Customs Collector, nor the Central Board of Revenue, nor the Central Government is a Tribunal, and so, special leave granted to the appellant should be revoked on that ground.

It is settled by decisions of this Court that the Customs Officer who initially acts under s. 167(12A) is not a Court or Tribunal, though it is also settled that in adjudicating upon the question as to whether s. 52A has been contravened by any ship and by such contravention the said ship has made itself liable to confiscation under s. 167(12A), the Customs Officer has to act in quasi-judicial manner. In Shewpujanrai Indrasanarai Ltd. v. Collector of Customs and Others ((1959) S.C.R. 821) this Court has held that an order of confiscation or penalty passed under the Sea Customs Act is not a mere administrative or executive act, but is really a quasi-judicial act, and, therefore, an application for a writ of certiorari lies in respect of such order under Art. 226 of the Constitution. In expressing this conclusion, S. K. Das J. who spoke for the Court, has referred to two earlier decisions where this point had been considered and it was held that in holding his proceedings under the Sea Customs Act, the Collector acts judicially, vide F. N. Roy v. Collector of Customs, Calcutta, ((1957) S.C.R. 1151) and Leo Roy Frey v. The Superintendent, District Jail, Amritsar and Anr. ((1958) S.C.R. 822). Similarly, in Thomas Dana v. State of Punjab ((1959) Supp. (1) S.C.R. 274), this Court has observed that the Collector and other Officers in the hierarchy mentioned by the Sea Customs Act may have to act judicially in the sense of having to consider evidence and hear arguments in an informal way; even so, the Act does not contemplate that in doing so, the said authorities are functioning as a Court.

In Maqbool Hussain v. The State of Bombay etc., ((1953) S.C.R. 730. at p. 742) while dealing with the impact of the confiscation of goods under the relevant provisions of s. 167 of the Act on the question as to the constitutionality of a subsequent prosecution launched against a person whose goods had been confiscated, this Court had occasion to consider the effect of the order of confiscation in relation to the provisions of Art. 20 of the Constitution, and it was held that the proceeding before the Sea Customs Authorities under the Act was not a prosecution and the order of confiscation was not a punishment inflicted by a Court or Judicial Tribunal within the meaning of Art. 20(2), and so, the impugned prosecution was not incompetent or invalid. It would thus be seen that one of the points which this Court had to consider in that case was whether the Collector who had passed the order of confiscation, was a Judicial Tribunal within the meaning of Art. 20, and the answer rendered by this Court was in the negative. It is true that in giving this answer this Court has observed that the Customs Officers are not required to act judicially on legal evidence tendered on oath and they are not authorised to administer oath to any witness. The appeals, if any, lie before the Chief Customs Authority which is the Central Board of Revenue and the power of revision is given to the Central Government which certainly is not a judicial authority. It would be noticed that the last observation is purely in the nature of an obiter observation because the status of the Central Board of Revenue or the Central Government is dealing with the appeals or revision applications under section 190 and 191 of the Act did not fall to be considered in that case, was not argued, and naturally has not been examined; and so, this observation cannot be treated as a decision on the question which has been argued before us in the present appeal. The result, therefore, is that it is no longer open to doubt that the Customs Officer is not a Court or Tribunal, though in adjudicating upon matters under s. 167 of the Act, he has to act in a judicial manner. It may be conceded that neither the Central Board of Revenue, nor the Central Government is a Court within the meaning of Art. 136.

The question which then arise is, can the Central Board of Revenue exercising its appellate power under s. 190 of the Act, or the Central Government exercising its revisional jurisdiction under s. 191, be held to be a Tribunal under Art. 136 ? It is clear that before an appeal can be entertained in this Court under Art. 136, two conditions have to be satisfied; the order impugned must be an order of a judicial or quasi-judicial character and should not be purely an administrative or executive order; and the said order should have been passed either by a Court or a Tribunal in the territory of

India. It is difficulty to lay down any definite or precise test for determining the character of a body which is called upon to adjudicate upon matters brought before it. Sometimes in deciding such a question, courts enquire whether the body or authority whose status or character is the subject-matter of the enquiry, is clothed with the trappings of a court. Can it compel witnesses to appear before it and administer oath to them, is it required to follow certain rulers of procedure, is it bound to comply with the rules of natural justice, is it expected to deal with the matters before it fairly, justly and on the merits and not be guided by subjective considerations; in other words, is the approach which it is required to adopt judicial or quasi-judicial approach ? If all or some of the important tests in that behalf are satisfied, the proceedings can be characterised as judicial proceedings and the test of trappings may be said to be satisfied. But apart from the test of trappings, another test of importance is whether the body or authority had been constituted by the State and the State has conferred on it its inherent judicial power. If it appears that such a body or authority has been constituted by the legislature and on it has been conferred the State's inherent judicial power, that would be a significant, if not a decisive, indication that the said body or authority is a Tribunal. It is in the light of these considerations that we have to examine the question as to whether the Central Board of Revenue and the Central Government is a Tribunal or not under Art. 136.

Before doing so, however, we may refer to some of the decisions which were cited at the Bar on this point. In M/s. Harinagar Sugar Mills Ltd. v. Shyam Sunder Jhunjhunwala and Others ((1962) 2 S.C.R. 339) the question raised before this Court was whether the Central Government while exercising its powers under section 111(3) of the Companies Act, 1956 (No. 1 of 1956) is a Tribunal within the meaning of Art. 136, or not. In dealing with this question, this Court first enquired whether, while exercising its powers under s. 111 of the Companies Act, the central Government was required to act judicially or not. The scheme of s. 111 was then analysed and it was observed that in an appeal preferred under s. 111, there was a list or dispute between the contesting parties relating to their civil rights, and the Central Government was invested with the power to determine that dispute according to law. This dispute was in regard to the claim made by a transferee of a Company's shares to have his transfer registered in the Company's register, and the view which this Court took was that when such a dispute goes before the Central Government under s. 111, it has to consider and decide the proposal and the objections in the light of the evidence, and not on grounds of policy or expediency. That is why this Court came to the conclusion that the Central Government was a Tribunal under Art. 136 of the Constitution.

In support of the view taken on this point, this Court referred to an earlier decision in Shivji Nathubhai v. The Union of India and Ors., ((1960) 2 S.C.R. 775) where it was held that the Central Government exercising power of review under r. 54 of the Mineral Concession Rules, 1949 against an administrative order of the State Government granting a mining lease was subject to the appellate jurisdiction of this Court, because the power to review was judicial and not administrative. Thus, these, two decisions show how the character of the adjudication made by the Central Government either under s. 111(3) of the Companies Act, or under r. 54 of the Mineral Concession Rules, 1949, was determined by this Court. As illustrations of cases where the application of the said tests leads to the conclusion that certain authorities cannot be held to be tribunals, we may refer to the decisions of this court in Jaswant Sugar Mills Ltd., Meerut v. Lakshmi Chand and Ors. ((1963) Supp. 1 S.C.R. 242) and Engineering Mazdoor Sabha and Anr. v. Hind Cycle Ltd. ((1963) Supp. 1 S.C.R. 625). It is in the light of these decisions that we will proceed to consider whether the Central Board of Revenue and the Central Government can be said to be a Tribunal under Art. 136 of the Constitution.

In considering this matter, let us briefly examine the procedure prescribed by the Act in relation to the adjudications made under its provisions. Before we do so, however, we ought to refer to the authorities that function under the Act. Section 3 of the Act refers inter alia, to three authorities which function under it. The Chief Customer Authority is the Central Board of Revenue constituted under the Central Board of Revenue Act, 1924. The Chief Customs Officer is the Chief Executive Officer of Sea-customs for any port to which the Act applies; and the Customs Collector includes every officer of Customs for the time being in separate charge of a custom-house, or duly authorised to perform all, or any special duties of an officer so in charge. It is by reference to these three categories of officers that the producer prescribed by the Act has to be considered. Chapter XVII of the Act deals with the procedure relating to offences, appeals, etc. Section 169 confers on the Customs Officers power to search on reasonable suspicion. Section 170A confers power on the Customs Officer to screen or X-ray bodies of persons for detecting secreted goods. Section 171 prescribes the powers of Customs Officer for boarding and searching such vessels. Section 171-A lays down the powers of Officers of Customs to summon persons to give evidence and produce documents. The power to summon a person to give evidence would include the power to administer oath to him under s. 4 of Act I of 1873. An enquiry held by the Officer of Customs under s. 171A is by sub-section (4) of s. 171-A deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code. Under s. 183, the officer adjudging the matter brought before him under s. 167 of the Act is empowered to give an option to a person to pay a fine in lieu of confiscation.

Having thus broadly referred to the provisions relating to adjudication by the Customs Officer, we would now examine the provisions in regard to appeals and revisions made by the Act. Section 188 provides for an appeal against any decision or order passed by any officer of Customs, and it requires that the said appeal must be filed within three months from the date of the order or decision challenged. This appeal lies to the Chief Customs Authority, or in such cases as the Central Government directs, to any Officer of Customs not inferior in rank to a Customs Collector and empowered in that behalf by name or in virtue of his office by the Central Government. The section further provides that the appellate authority may make such enquiry and pass such order as it thinks fit, confirming, altering or annulling the decision or order under appeal. The proviso to this section makes it clear that no order passed in appeal can impose upon the person any greater confiscation, penalty or rate of duty than has been adjudged against him in the original decision or order. The section adds that every order passed in appeal shall be final, subject to the power of revision conferred by s. 191. It is thus clear that the orders passed by the Officers of Customs are made appealable, and the appellate authority is required to reconsider the matter, hold additional enquiry if through necessary and decide the contentions raised by the appellant on the merits.

Section 189 refers to the requirement of the deposit of duty demanded which has to be made by the appellant pending the appeal, and it naturally provides that if as a result of the decision of the appeal, the whole or any portion of the amount deposited is not leviable, the Customs Collector shall return such amount or portion, as the case may be, to the owner of such good on demand by such owner.

Section 190 confers upon the Chief Customs Authority the power to remit penalty or confiscation. Section 190A deals with the revisional powers of the Chief Customs Authority and the Chief Customs Officer; and s. 191 prescribes for the revisional powers of the Central Government. Both the revisional powers specified by s. 190A and s. 191 can be exercised either suo motu by the revisional authority, or on an application made by an aggrieved party in that behalf. That, briefly, is the scheme of appeals and revisions contemplated by the Act. There is a regular hierarchy of

authorities beginning with the Customs Officer who deals with the problems of adjudication initially and ending with the Central Government which is the final revisional authority. We may also incidentally refer to Rule 49 of the Rules framed by the Central Government in exercise of powers conferred on it by s. 9(c) of the Act. This Rule provides that every appeal presented to the Chief Customs Authority under s. 188 and every application made to the Governor-General-in-Council under s. 191 shall be accompanied by a copy of the decision or order by which the appellant or the applicant is aggrieved. The question which we are considering at this stage is whether the appellate authority acting under s. 188 and the revisional authorities acting under sections 190A and 191 can be said to be tribunals within the meaning of Art. 136.

It is thus clear that after the order of confiscation is made under s. 167(12A) and an opinion is given to the owner of the offending ship under s. 183, the initial proceedings taken under the Act come to an end and a stage is reached for making an appeal against the order of confiscation or the imposition of fine. In the present appeal, we are concerned with the subsequent stage of the proceedings, because what we have to decide on the preliminary objection raised by the Additional Solicitor-General is the status or character of the appellate authority or the Central Government which exercises its revisional jurisdiction. In our opinion, having regard to the scheme of the sections which we have just cited, there is no difficulty in holding that the Central Board of Revenue which functions as an appellate authority, and the Central Government which exercises revisional powers are both Tribunals within the meaning of Art. 136 of the constitution. A dispute is raised either by way of appeal or revision by the party aggrieved by the order passed by the Custom Officers, and that dispute has to be tried by the appellate or the revisional authority in the light of the facts adduced in the proceedings and according to law. All the proceedings under the Act, whether before the Customs Officer, or whether in appeal or revision, have to be conducted in accordance with the principles of natural justice and they are in that sense judicial or quasi-judicial proceedings. The fact that the status of the Customs Officer who adjudicates under s. 167(12A) and s. 183 of the Act is not that of a tribunal, does not make any difference when we reach the stage of appeal or revision. A period of limitation is prescribed for the appeal, a procedure is prescribed by Rule 49 that the appeal or revision must be accompanied by a copy of the decision or order complained against, and the obvious scheme is that both the appellate and the revisional authorities must consider the matter judicially on the evidence and determine it in accordance with law. It is obvious that heavy fines are imposed in these proceedings and the confiscation orders passed may affect ships of very large value. By his appeal or revisional application the ship-owner naturally contends that the order of confiscation is improper or invalid and he sometimes urges that the fine imposed is unreasonable and excessive. Where disputes of this character are raised before the appellate or the revisional authority, it would be difficult to accede to the argument that the authority which deals with these disputes in its appellate or revisional jurisdiction is not a tribunal under Art. 136. These authorities are constituted by the legislature and they are empowered to deal with the disputes brought before them by aggrieved persons. Thus, the scheme of the Act, the nature of the proceedings brought before the appellate and the revisional authorities, the extent of the claim involved, the nature of the penalties imposed and the kind of enquiry which the Act contemplates, all indicate that both the appellate and the revisional authorities acting under the relevant provisions of the Act constitute Tribunals under Art. 136 of the Constitution, because they are invested with the judicial power of the State, and are required to act judicially. Therefore, we must over-rule the preliminary objection raised by the Additional Solicitor-General and proceed to deal with the appeal on the merits.

That takes us to the principal question as to the construction of s. 52A of the Act which has been elaborately argued before us by Mr. Sachin Choudhury. Section 52A provides that no vessel

constructed, adapted, altered, or fitted for the purpose of concealing goods shall enter, or be within the limits of any port in India, or the Indian customs waters. This section is the only section included in Chapter VIA and it was inserted by Act 10 of 1957. The plain construction of this section appears to be that whenever a ship answering the description contained in its first part enters or is within the limits of any port in India, of the Indian customs waters, it contravenes the prohibition prescribed by it. The prohibition is against the construction, adaptation, alteration or fitting for the purpose of concealing goods. What has to be proved against a vessel which is charged with having contravened s. 52A is that there has been a construction, adaptation, alteration of fitting, and that the said construction, adaptation, alteration of fitting has been made for the purpose of concealing goods. Therefore, if an alteration in a vessel made for the purpose of concealing goods is proved, the contravention of s. 52A must be inferred. In other words, the section prohibits absolutely the entry of vessels which show that there has been any construction, adaptation, alteration or fitting made in them for the purpose of concealing goods.

Mr. Choudhury contends that the contravention of s. 52A cannot be established unless the mens rea is proved against the persons responsible for the alleged contravention. In that connection he has relied on the fact that the section makes no difference between concealed goods which are not contraband and those which are contraband. In other words, the argument is that if an alteration is proved to have been made for the purpose of concealing goods which are legitimately carried by the vessel, even so the contravention would attract the provisions of s. 167(12A) of the Act. That being so if the sweep of the prohibition prescribed by s. 52A is so wide, it is necessary to import the requirement of mens rea in determining its scope. He has also relied on the well-recognised principle of criminal jurisprudence that unless a statute creating an offence and providing for its punishment clearly, or by necessary implication, rules out mens rea as an essential part of the offence, no person should be found guilty of the said offence unless his guilty mind is proved. There is no doubt that in Ravula Hariprasada Rao v. The State ((1951) S.C.R. 322), this Court speaking through Fazl Ali J., has accepted the observations made by the Lord Chief Justice of England in Brend v. Wood ((1946) 110 J.P. 317, 318) that "it is of the utmost importance for the protection of the liberty of the subject that a Court should always bear in mind that unless the statute, either clearly or by necessary implication, rules out mens rea as a constituent part of a crime, a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind". (vide also Sherras v. De Rutzen ((1895) 1 Q.B. 918, 921)).

It may also be conceded that offences in respect of which mens rea is not required to be established, are usually of a comparatively minor character and sentences imposed against the offenders are, therefore, not of a severe type; and in the present case, it cannot be disputed that the confiscation of the ship may mean a serious loss to the owner of the ship, or imposing a fine against him by way of giving him option in lieu of the confiscation of his ship may also involve the payment of a very large amount; and so, prima facie, there is some force in Mr. Choudhary's argument that the element of mens rea should not be excluded in considering the scope and effect of s. 52A of the Act.

On the other hand, the scheme of s. 167 supports the contention of the Additional Solicitor-General that if we read s. 52A along with s. 167(12A), it would be clear that the legislature intends, by necessary implication, the exclusion of mens rea in dealing with the contravention of s. 52A. Section 167(12A) provides that if a vessel constructed, adapted, altered or fitted for the purpose of concealing goods under s. 52A, enters or is within the limits of any port in India or within the Indian Customs waters such vessel shall be liable to confiscation and the master of such vessel shall be liable to a penalty not exceeding Rs. 1,000. It would be noticed that in column 1, s. 167(12A) reproduces the material words of s. 52A and does not add the words "knowingly or wilfully". It is

significant that the words "knowingly or wilfully" are used in several other provisions contained in s. 167. Section 167(14) and s. 167(61) use the word "wilfully" in respect of the commission of the offences there specified. Similarly s. 167(3) and s. 167(81) use the word "knowingly" and s. 167(78) uses the word "intentionally". Similarly, in s. 167(8), though the words "knowingly or wilfully" are not used, we have the expression "concerned in", and that may introduce considerations of mens rea. Thus, where the legislature wanted to introduce the knowledge or intention actuating the commission of the offence as an essential element of the offence, it has used appropriate words to indicate that intention. The failure to use a similar word in s. 167(12A) cannot, therefore, be regarded as accidental, but must be held to be deliberate. In our opinion, there is some force in this argument as well.

Besides, there can be no doubt that in construing a section, it would be relevant for the Court to consider whether the construction for which Mr. Choudhary contends would not make the provisions of s. 52A read with s. 167(12A) substantially nugatory. If it appears that the adoption of the said construction would substantially defeat the very purpose and intention of the legislature in enacting the said section, that would be a legitimate reason for rejecting the said construction. If the words used in s. 52A are capable of only one construction and no other, and that construction is the one suggested by Mr. Choudhary, the fact that by adopting the said construction the section would be rendered nugatory, would not be of any material significance. If, on the other hand, two constructions are reasonably possible one of which leads to the anomaly just indicated, while the other does not and helps the effectuation of the intention of the legislature, it would be the duty of the Court to accept the latter construction.

The intention of the legislature in providing for the prohibition prescribed by s. 52A is, inter alia, to put an end to illegal smuggling which has the effect of disturbing very rudely the national economy of the country. It is well-known, for example, that smuggling of gold has become a serious problem in this country and operations of smuggling are conducted by operators who work on an international basis. The persons who actually carry out the physical part of smuggling gold by one means or another are generally no more than agents and presumably, behind them stands a well-knit organisation which, for motives of profit making, undertakes this activity. That is why s. 52A makes an absolute prohibition against the entry of a vessel which contains, inter alia any alteration made for the purpose of concealing goods. Entry of contraband gold with the help of ships has thus become a serious problem and in intended to be checked by this absolute prohibition. If it was held that the knowledge of the owners of the offending vessel or of its master should be proved before s. 52A is held to be contravened, in a majority of cases, the offending vessels will escape punishment. It is not difficult to imagine that mens rea or guilty mind could rarely be established against the owners of vessels which are travelling on the High-seas and it may not be always easy to prove the guilty knowledge even of the master of the ship. If the guilty mind is made as essential constituent of the section, it would be very easy both for the owners and the master of the ship to plead that the alleged alteration, adaptation or fitting was made without their knowledge and even contrary to their instructions. It is not difficult to realise in this connection that it would be almost impossible for the customs authorities to establishments rea in the manner suggested by the appellant. Section 52A refers to the construction for the purpose of concealing goods, but it is obvious that no vessel would ordinarily be constructed initially for the purpose of concealing goods. Like the adaptation, alteration or fitting, the construction also would be made in such a manner as would not be easily detected or discovered. Therefore, it seems to us plain that if we are to accept the construction suggested by Mr. Choudhary, mens rea would rarely be proved against the owners of the vessel, or even its master and the section, in substance, would remain a dead letter on the statute-book.

In this connection, it is necessary to bear in mind that as the heading of the Chapter shows, what s. 52A aims at is the entry of the vessels and that, in fact, is the manner deliberately adopted by the legislature in prescribing the prohibition. It is the entry of the vessel that is prohibited and the use of the negative form adopted by the legislature in enacting s. 52A is intended to show that the prohibition is not concerned with the owner of the vessel or the master; the prohibition is concerned with the vessel itself and it provides that a vessel is prohibited from entering the limits of any port in India or the Indian Customs Waters, or remaining there, provided it answers the description mentioned in the first part of s. 52A.

The only safeguard which is legitimately available to the vessel in resisting the charge that it has contravened s. 52A is provided by the requirement that the alleged alteration, for instance, must be shown to have been initially made for the purpose of concealing goods. If the alteration is shown to serve any operational or functional purpose in the ship, that would clearly justify the plea that it was not made for the purpose of concealing goods. It may be that if the alleged alteration, adaptation or construction is proved to have been initially made for a functional or operational purpose, and it is shown that subsequently it has been used without the knowledge of the master or the owners for the illegal purpose, that may raise a triable issue as to whether the alteration falls within the description of s. 52A; but where the alteration is not shown to serve any functional or operational purpose and its very nature suggests that it was intended to serve some secret purpose, it would be easy to draw the inference that its purpose was to conceal goods. Therefore, in our opinion, there is no doubt that the Customs Authorities were right in holding that the mere fact that the owners of the vessel or the master were not shown to have been privy to the alteration etc. or the concealment of gold bars recovered from the offending ship would not take the case of appellant outside the purview of s. 52A. The knowledge of the owners, or even of the master is, in the context of s. 52A, entirely irrelevant. What is relevant is the proof of the fact that the vessel answering the description prescribed by s. 52A entered within the limits of Calcutta which is a port in India.

Mr. Choudhary further argued that the alteration on which the case against the appellant is based in the present case cannot be said to be an alteration contemplated by s. 52A, because it is not an alteration of the vessel. He suggests that the construction, adaptation, alteration or fitting must be of the vessel as a whole, or, at any rate, of any part of the vessel which can be regarded as its integral or essential part; the panelling wall in which the apertures were made, cannot be treated as a part of the vessel, and so, the alternation in question cannot be said to attract s. 52A. That, in substance, is another argument which has been pressed before us on behalf of the appellant. In support of this argument, Mr. Choudhary referred us to the certificate issued by Mr. B. Hill who is a Surveyor to Lloyds Register of Shipping united with the British Corporation Register. In this certificate Mr. Hill purports to say that in his opinion the panelling the lining constitute no part of the vessel & the expression "vessel" is understood for the purpose of its being assigned the notation 100 AI or any other class notation in the Register Book of Lloyds Register of Shipping or for the purpose of the issue of a Loadline Certificate under the Merchant Shipping Acts and that such panelling or lining is not required to be shown in the ship's official plans submitted to Lloyds Register of Shipping in connection with the above purposes. He adds that such panelling is customarily installed in British Vessels for the health and comfort of crew as a method of insulating accommodation.

We are not prepared to accept Mr. Choudhary's argument that there is any material on the record to show that the panelling is not a part of the vessel. A vessel is defined by s. 3(f) of the Act as including anything made for the conveyance by water of human beings or property; and there seems to be no reason to hold that the panelling is not its integral part. Mr. Hill who has purported to give this certificate has not given evidence in the present proceedings and the statements made by him in

his certificate have, therefore, not been tested. Besides, his opinion that the panelling does not form part of the vessel as understood for the two purposes mentioned by him in his certificate cannot assist us in determining whether it can be held to be a part of the vessel under s. 52A. For whatever purpose panelling may be constructed, once it is constructed it becomes a part of the vessel and as such, any alteration made in the panelling would attract the provisions of s. 52A. We must therefore, reject Mr. Choudhary's argument that even if an alteration is proved to have been made in the panels of the vessel, s. 52A could not be applied. The contention which Mr. Choudhary faintly urged before us, that the holes made in the panelling walls do not constitute an alteration at all is, clearly ill-founded, because the manner in which the holes were made and the use which was obviously intended to be made of the said holes, leave no doubt that they constitute alteration within the meaning of s. 52A. Thus, our conclusion is that the Customs Authorities were right in holding that the facts proved in the case showed that the appellant's vessel Eastern Saga contravened the provisions of s. 52A when it entered the port of Calcutta and as such, incurred liability prescribed by s. 197(12A) of the Act.

What is the nature of the liability prescribed by s. 167(12A) is the next question which calls for an answer in the present appeal. We have already seen that s. 167(12A) provides that if a vessel contravenes s. 52A, it shall be liable to confiscation and the master of such vessel shall be liable to a penalty not exceeding Rs. 1,000. Can it be said that the penalty prescribed by s. 167(12A) may in any given case not be imposed against the ship on the ground that the contravention proved against it is of a very trivial character, or has been the result of an act on the part of a criminal who acted on his own contrary to the instructions of the master of the ship ? The words used in the third column of cl. 12A are that "such vessel shall be liable no confiscation". The context seems to require that it is not open to the Customs Authority to refuse to confiscate the vessel on the ground that there are any extenuating circumstances surrounding the contravention of s. 52A in a given case and that it would be unfair to impose the penalty of confiscation. Two penalties are prescribed, one is the confiscation of the ship, and the other is a fine against the matter. In regard to the latter penalty, it is within the discretion of the Customs Authority to decide what amount of penalty should be imposed; just as in the case of the first penalty it is not open to it to say that it would not impose the penalty of confiscation against the offending ship, so in the case of the second penalty it is not open to it to say that it will not levy any penalty against the master. In its discretion, it may impose a very small fine against the master if it is satisfied that the master was innocent and despite his best efforts, he could not prevent the contravention of a s. 52A. If the two penalties prescribed by clause 12A had been alternative, the position may have been different; but they are independent penalties, one is against the ship and the other is against the master; and so, there is no scope for contending that the Customs Authority may refuse to impose one penalty and impose the other, or may refuse to impose either of the two penalties. It must be regarded as an elementary requirement of clause 12A that as soon as the offence referred to in column 1 of the said clause is proved, some penalty has to be imposed and cl. 12A indicates that two penalties have to be imposed and not one, there being discretion in regard to the penalty imposable against the master as regards the amount of the said penalty. Therefore, we do not think it would be possible to take the view that if there are extenuating circumstances attending the contravention of s. 52A in a given case the Customs Authority can refrain from confiscation the vessel Confiscation of the vessel is the immediate statutory consequence of the finding that the offence under clause 12A is established, just as the imposition of some penalty against the master is another statutory consequence of the same contravention. In fairness, we ought to add that Mr. Choudhary did not support the view which appears to have been taken by Sinha J. in the case taken before him under Art. 226 by the Everett Orient Line Incorporated (vide W.P. No. 121/1959 and C.A. No. 374/1961 which have been heard along with

this appeal and will be dealt with separately). It appears that in that case Sinha J., held that there was discretion in the Customs Authority in the exercise of which it may, in a proper case refuse to confiscate the offending vessel. In our opinion, this view is not justified by the words of clause 12A of s. 167.

But the confiscation of the offending vessel under clause 12A is not the end of the matter. In dealing with the offence adjudicated under cl. 12A of s. 167, the Customs Officer has also to exercise his jurisdiction under s. 183 of the Act. In fact, s. 167(12A) and s. 183 have to be read together and the adjudication proceedings have to be dealt with in the light of the provisions of the said two sections. Section 183 lays down that whenever confiscation is authorised by this Act, the officer adjudicating it shall give the owner of the goods an option to pay in lieu of confiscation such fine as the officer thinks fit. It is thus clear that in dealing with offences under s. 167(12A), an obligation is imposed upon the Customs Officer to give the owner of the goods an option to pay fine in lieu of confiscation. It is not disputed, and rightly, that the word "goods" used in s. 183 includes vessels, and so, when the adjudicating officer was dealing with the present case, it was his duty to indicate the fine which the owners of the ship can, in their option, choose to pay. That is why the construction of clause 12A of s. 167 which leaves no discretion in the adjudicating officer in the matter of confiscating the ship, does not finally determine the matter. Though confiscation is a statutory corollary of the contravention of s. 52A, the legislature realised that confiscation of the vessel may cause unnecessary hardship to the owners of the vessel, and so s. 183 expressly requires the adjudicating officer to give an option to the owners of the offending vessel. Confiscation is no doubt authorised and required by s. 167(12A), but the statutory obligation makes it necessary for the officer to give an option to the owners, and so, in substance, the ultimate penalty which may be imposed on the owners does fall to be determined in the discretion of the said officer. Section 183 confers discretion on the officer to determine what amount of fine should be imposed in lieu of confiscation, and in doing so, he will undoubtedly have to take into account all relevant and material circumstances, including the extenuating factors on which the owners may rely. Thus, the confiscation of the offending vessel which has been taken out of the domain of the Customs Officer's discretion under clause 12A, is indirectly brought within his discretion under s. 183. Indeed, the scheme of s. 183 shows that the only penalty which in law, the officer can impose is one of confiscation. Having done that, he gives an option to the owners of the vessel to pay a fine in lieu of confiscation. There is little doubt that this scheme has been adopted, because if the imposition of fine was made an alterative penalty, difficulties would have arisen in the way of recovering the fine; and so, the legislature has provided that the offending ship should be detained; if the offence is proved, it should be confiscated and the owner of the vessel should be given an option to get his vessel released by paying the fine which may be imposed on him under s. 183. The very fact that an option has to be given to the owner shows that the fine imposed under s. 183 is not a matter of penalty imposed by the officer as such, but is only an option given to the owner. Therefore, we are satisfied that on a fair reading of s. 167(12A) and s. 183 of the Act, the course adopted by the Customs Authorities is not open to any challenge.

Mr. Choudhary then attempted to argue that on the merits the Central Board of Revenue was in error in holding that s. 52A had been contravened by the appellant's vessel Eastern Saga. We have already indicated in brief the findings recorded by the customs authorities. It is true that the Additional Collector of Customs accepted the plea of the appellant that the owners of the vessel were not concerned with the illegal importation of gold into India within the meaning of s. 167(8) of the Act; but he has also found that the preventive measures taken by the owners, the agents and the master for stopping smuggling on board their vessel proved hopelessly inadequate and ineffective. He has also examined the nature of the alteration made and he has concluded that the alterations were made

for the purpose of concealing goods. In fact, the presence of so many alterations on this vessel itself would justify the conclusion that they were made for the illegal purpose prohibited by s. 52A. But when gold bars 1,358 in numbers were actually recovered from one of the holes made in the panelling wall, it is impossible to resist the conclusion that the said alteration had been made for the purpose of concealing the said gold. It is clear that the said alterations serve no operational or functional purpose in the ship and the manner in which the said alterations have been made unmistakably indicates the design for concealing goods. If the goods intended to be concealed were not contraband, this elaborate designing of the alteration would be wholly unnecessary. Therefore, we see no substance in the argument that the Customs Authorities were in error in finding that s. 52A had been contravened in the present case. Besides, there is no doubt that the question as to whether s. 52A had been contravened is substantially a question of fact and this Court would not ordinarily reconsider the matter on evidence with a view to decide whether the said finding is right or not.

Mr. Choudhary has then argued that the imposition of a fine of Rs. 25 lacs is excessive and should be modified by us. He suggests that if such a heavy fine is imposed against a vessel, it may indirectly and eventually affect the trade of the country. Besides, he urges that the fine appears to be so unreasonable that it may be characterised as vindicative. Incidentally, he has argued that in imposing the fine, the Additional Collector of Customs took into consideration an irrelevant fact inasmuch as he bore in mind the loss suffered by the appellant during the period that the vessel was detained. There is no difficulty in rejecting the last argument, because if the consideration in question was irrelevant, it has operated in favour of the appellant and not against it. If that consideration had not weighed in the mind of the Additional Collector, he would obviously have imposed a higher fine. Then, as to the extent of the fine, we are not prepared to hold that the fine is unreasonable or excessive. We have already noticed the value of the gold illegally imported and we have seen the presence of many suspicious alterations in the panelling walls and other parts of the vessel. It is not easy to detect the illegal importation of gold, and so, if the Customs Authorities took the view that having regard to the value of the gold imported, the presence of a large number of alterations and the value of the ship, Rs. 25 lacs should be imposed as a fine, we cannot entertain the argument that a case is made out for our interference under Art. 136 of the Constitution. After all, the imposition of the fine merely gives an option to the appellant to pay the fine and secure the release of the vessel. Since the amount of the fine imposed is very much less than the value of the vessel, it is in the interests of the appellant to get the vessel released. Besides, the question as to propriety of the fine imposed by the Additional Collector of Customs has been examined by the appellant and the revisional authorities and they have seen no reason to interfere with the amount of fine. In such a case, the appellant cannot be heard to complain against the impugned order of fine in an appeal under Art. 136, when no question or principle of law is involved.

In this connection, we may mention one consideration which was weighed in our mind. It is true that modern criminology does not encourage the imposition of serve or savage sentences against criminals, because the deterrent or punitive aspect of punishment is no longer treated as a valid consideration in the administration of criminal law. But it must be remembered that ordinary offences with which the normal criminal law of the country deals are committed by persons either under the pressure of provoked and unbalanced emotions, or as a result of adverse environments and circumstances, and so, while dealing with these criminals who, in many cases, deserve a sympathetic treatment and in a few cases, are more sinned against than sinners, criminal law treats punishment more as a reformative of corrective than as a deterrent or punitive measure. But it may not be appropriate to adopt the same approach in dealing with every offence committed by a vessel which contravenes s. 52A. Illegal importation of gold has assumed the proportions of a major

problem faced by the country, and the manifold, clever and ingenious devices adopted in carrying out these illegal operations tend to show that the organisation which is responsible for them is inspired merely by cupidity because it conducts its operations solely for the purpose of making profit, and so, it would be open to the Customs Authorities to rake the view that the best way to check the spread of these illegal operations is to impose deterrent fines wherever these offences are discovered and proved. Having regard to this aspect of the matter, if the Customs Authorities took the view that the fine of Rs. 25 lakhs was called for in the present case, we see no reason whatever to entertain the plea made by Mr. Choudhary that the said fine should be reduced. The argument that the impact of such heavy fines may adversely affect the trade of the country, seems to us to be wholly misconceived and ill-founded.

There is one more point which must be mentioned before we part with this appeal. Mr. Choudhary attempted to argue that if mens rea was not regarded as an essential element of s. 52A, the said section would be ultra vires of Articles 14, 19 and 31(1) and as such, unconstitutional and invalid. We do not propose to consider the merits of this argument, because the appellant is not only a company, but also a foreign company, and as such, is not entitled to claim the benefits of Art. 19. It is only citizens of India who have been guaranteed the right to freedom enshrined in the said article. If that is so, the plea under Art. 31(1) as well as under Art. 14 cannot be sustained for the simple reason that in supporting the said two pleas, inevitably the appellant has to fall back upon the fundamental right guaranteed by Art. 19(1) (f). The whole argument is that the appellant is deprived of its property by operation of the relevant provisions of the Act and these provisions are invalid. All that Art. 31(1) provides is that no person shall be deprived of his property save by authority of law. As soon as this plea is raised, it is met by the obvious answer that the appellant has been deprived of its property by authority of the provisions of the Act and that would be the end of the plea under Art. 31(1) unless the appellant is able to take the further step of challenging the validity of the Act, and that necessarily imports Art. 19(1)(f). Similarly, when a plea is raised under Art. 14, we face the same position. It may be that if s. 52A contravenes Art. 19(1)(f), a citizen of India may contend that his vessel cannot be confiscated even if it has contravened s. 52A, and in that sense, there would be inequality between the citizen and the foreigner, but that inequality is the necessary consequence of the basic fact that Art. 19 is confined to citizens of India, and so, the plea that Art. 14 is contravened also must take in Art. 19 if it has to succeed. The plain truth is that certain rights guaranteed to the citizens of India under Art. 19 are not available to foreigners and pleas which may successfully be raised by the citizen on the strength of the said rights guaranteed under Art. 19 would, therefore, not be available to foreigners. That being so, we see no substance in the argument that if s. 52A is constructed against the appellant, it would be invalid, and so, the appellant would be able to resist the confiscation of its vessel under Art. 31(1). We ought to make it clear that we are expressing no opinion on the validity of s. 52A under Art. 19(1)(f). If the said question were to arise for our decision in any case, we would have to consider whether the provisions of s. 52A are not justified by Art. 19(5). That is a matter which is foreign to the enquiry in the present appeal.

The result is the appeal fails and is dismissed with costs.

The appellant has also filed W.P. No. 138 of 1961 challenging the validity of the order passed by the Central Government in the same matter. Since the appeal preferred by the appellant against the said order is dismissed, the writ petition also fails and is dismissed. There would be no order as to costs in the writ petition.

Appeal and petition dismissed.

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