CALCUTTA HIGH COURT

Assistant Collector of Customs

Vs

Soorajmull Nagarmull

(Harries, C.J. Banerjee , J.)

19.02.1952

JUDGMENT

Harries, C.J.

1. This is an appeal from a judgment and order of Bose J. dated February 16, 1951 granting a writ of certiorari quashing certain proceedings of the Sea Customs authorities.

2. The respondents imported from America certain oil in bulk which was described in the shipping documents as spindle oil. This oil was imported under a license which allowed them so to do. The oil came in two lots of 6500 and 750 drums and it actually arrived in the port of Calcutta on' March 6, 1950. A bill of entry was submitted to the customs authorities and on March 8 the respondents wrote that. on the authorities allowing them to take delivery they would agree to accept the result of the customs test of the samples of the oil which had been taken and to pay any extra duty leviable and any penalty if imposed should it be found from the test that the oil was not such as had been declared. The letter concludes with these words:

> "In the event of our failure to comply with the above undertaking, we agree to pay on demand (without any prejudice to our right in the matter) any duty and/or penalty (including fines) which may be imposed by you."

3. The respondents claimed that the rate of duty payable was 2 annas 6 pies per gallon under item 27(8) of the first schedule of the Indian Tariff Act, such being the rate for lubricating oil of the kind imported.

4. It appears that on March 16, 1950 the Customs authorities had this oil tested by chemists on their behalf and as a result of such test the authorities on the same. day wrote to the respondents that the oil in question had been misdescribed by the latter and that a chemical test had disclosed that the oil was mineral oil, assessable to duty as such under item 27(8) (27(3) ?), first schedule

of the Indian Tariff Act the rate being 27 per cent ad valorem. As the misdeclaration involved a loss of Rs. 75,925/- in duty the customs authorities called upon the respondents to show cause why the goods should not be confiscated and a penalty imposed under Section 167, Clause 37 of the Sea Customs Act. The respondents were requested to submit all correspondence and documents connected with the consignment and all the evidence in their possession corroborating their explanation.

5. On March 17, 1950 all the documents connected with the consignment were sent to the Customs authorities and on March 23 the respondents wrote that in consideration of the customs authorities allowing them to take immediate delivery of the goods they undertook to produce documents showing the use of the oil as lubricating oil within three months from the date of the letter, failing which they undertook to pay any extra duty or penalty without prejudice to their rights in the matter. The oil was released and the respondents executed a bond by which they bound themselves to pay the value of the goods in certain events. On March 30, 1950 the respondents paid the additional duty levied, namely Rs. 75,925/-.

6. On April 10, 1950 the respondents wrote that they had cleared the goods after paying the additional duty and they requested the customs authorities to forward to them a copy of the test report and further to look into the matter & make the necessary orders for the refund of the additional duty which had been levied.

7. On April 24, 1950 the respondents again wrote for a copy of the report of the analyst on this oil and that request was repeated on May 4,1950. On May 22, 1950 the customs authorities replied stating that the work of testing the samples had notbeen finished and the question of granting a copy of the test report would be considered after a final decision was arrived at.

8. No copy of this analyst's certificate was sent to the respondents, but on July 25, 1950 it appears that the Chief Chemist of the Central Revenues granted a certificate with respect to this oil. In the view of 'the Chief Chemist, the oil could not be classified as spindle oil as the official specifications required the minimum flash point of 150 centigrade The Chemist added that it would appear to be classifiable as a Diesel oil, but the responsibility for ascertaining whether or not it is used as such will rest with the Appraising Department.

9. It is to be observed that a copy of this certificate was not sent to the respondents but on September 22, 1950 the customs authorities wrote to the respondents informing them that the oil in question had been finally decided to be assessable under item 27(3) of the Indian Customs tariff as "mineral oil, other sorts."

10. On October 12, 1950 the respondents replied that the decision that the oil came within item

27(3) was erroneous and that the oil came within item 27(8) of the Indian customs tariff. They again asked for a refund of the excess duly levied and contended that the bond which they had executed was not in the circumstances enforceable. Their letter concludes with this paragraph:

"The order putting the oil into item 27(3) was passed without jurisdiction as there was no evidence on which the decision was taken, or none disclosed to us even after the order, nor were we heard on the evidence."

11. On November 17, 1950 the customs authorities wrote to the respondents informing them that on a chemical test the oil was found to be correctly assessable to duty at the rate of 27 per cent ad valorem under item 27(3) of the Indian Customs tariff as mineral oil not otherwise specified and not under item 27 (8) lubricating oil as declared in the bill of entry. The letter ends by calling upon the respondents to pay Rs. 4,65473-12-0 which was in fact a fine for the improper declaration.

12. On November 21, 1950 the respondents wrote asking the authorities to withdraw this demand for payment of the penalty and to accept their explanations. The authorities refused to do so and on December 7, 1950 this petition was filed in Court praying that the proceedings be quashed.

13. The matter came before Bose J. who came to the conclusion that the Assistant Collector of Customs in levying additional duty and a fine for misdeclaration was acting in a judicial or quasi judicial capacity. He further held that the findings of the Assistant Collector were 'mala fide' and were arrived at without compliance with the most elementary rules of natural justice. The materials upon which the findings were based were withheld from the respondents and they were called upon to pay additional duty and fined a very large sum of money without ever having been heard.

14. The learned Judge therefore came to the conclusion that the proceedings were wholly without jurisdiction and should be quashed.

15. It had been urged before the learned Judge that Section 198 of the Sea Customs Act was a bar to these proceeding, but in the learned Judge's view the acts of the customs authorities were such that it could not be said that what they did they purported to do under the Sea Customs Act. That being so he held that that section was no bar to these proceedings.

16. The learned Judge was also of opinion that the fact that the Sea Customs Act granted a remedy by way of appeal and revision and that in the circumstances a suit might lie were no bars to the Court granting in this case a writ of mandamus.

17. Mr. Daphtary, the Solicitor-General for India, on behalf of the appellants contended in the

first place that the learned Judge was wrong, in coming to the conclusion that the Assistant Collector of Customs was in this case acting in: a judicial or a quasi-judicial capacity. He urged that the act of levying additional duty and further imposing a fine upon the respondents for this alleged misdeclaration was a purely administrative act and therefore no writ of certiorari could lie. He further contended that as this was a purely administrative act, the respondents had no right whatsoever to claim to be heard and that the failure to give them an opportunity to be heard could not, in any way, affect the proceedings.

18. Lastly he urged that in any event the respondents had been heard because by a letter of March 16, 1950 they had been asked to submit all correspondence and documents connected. with the import of this oil and any evidence which they had corroborating their explanation. In the submission of the learned Solicitor-general, such was sufficient to comply with the rules of natural justice even if we held that the authorities were acting in a judicial or a quasi-judicial capacity.

19. I have no doubt whatsoever that the Assistant Collector of Customs in this case was acting in a judicial or a quasi-judicial capacity. Section 182, Sea Customs Act provides that 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 by certain officers.

20. The use of the word "adjudged" suggests that arriving at a decision that goods-should be confiscated or that they should bear an increased rate of duty or that a penalty should be demanded is a judicial matter or certainly a matter which requires a judicial approach.

20a. Section 187, Sea Customs Act, provides that all offences against this Act, other than those cognizable under Section 182 by officers of Customs, may be tried summarily by a Magistrate.

21. Section 188 provides for an appeal from the Assistant Collector of Customs to the Chief Customs authority and Section 191 provides for revision of any decision of the Chief Customs authority by the Central Government.

22. It would appear from these provisions that the decision is a judicial matter because an appeal is provided and a revision from the decision of the appellate authority. Further, it will be seen that trial of offences is dealt with in Section 187 which provides that all offences other than those cognizable under Section 182 by officers of Customs may be tried summarily by a magistrate. In short, offences under the Act are triable either by magistrates or officers of Customs and surely the trial of an offence is a judicial act. The goods were undoubtedly confiscated under Section

167, item 8 or 37. Contravening that item is referred to in Section. 167 as an offence for which the penalty is confiscation.

23. Section 183, Sea Customs Act, provides:

"Whenever confiscation is authorized 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 office thinks fit".

24. In the present case, the Assistant Collector of Customs adjudged that the goods be confiscated, 'but as the respondents had been allowed to take delivery of these goods on certain conditions that officer directed that in lieu of confiscation a fine of over Rs. 4,65,000/- being the value of the goods,/ should be imposed and earlier the respondents' had been directed to pay an increased duty of over Rs. 79,000/-.

25. Levying a fine of over Rs. 4 1/2 lacs is not a trivial matter and it is somewhat startling for a court to be told that that is a purely administrative matter over which the Court has no control whatsoever.

26. Fining a person is one of the ordinary modes of punishment for criminal offences and has always been so regarded in England. Littleton defined "fine" as follows:

" 'Fine' signifieth a pecuniarie punishment for an offence, or a contempt committed against the king and regularly to it imprisonment appertaineth. And it is called finis, because it is an end for that offience. And in this case a man is said 'facere finem detransgressione, & c. cum rege', to make an. end or fine with the king, for such a transgression."

27. It is to be observed that the Act refers to a misdeclaration in Section 167 (37) as an offence and that section imposes a penalty for the offence, namely, confiscation and a fine is levied in lieu of confiscation. The Sea Customs Act by Section 187 gives powers to customs officers and magistrates to try offences under the Act. Quite clearly magistrates in trying such offences would be acting in a judicial capacity and I can see no reason whatsoever for holding that Customs officers acting in a similar capacity would be acting otherwise than in a judicial or at least a quasi-judicial capacity. As I have said earlier an appeal and a revision is provided for decisions of customs officers and that procedure also suggests that the officers are acting judicially or in a quasi-judicial capacity.

28. The matter was considered by a Bench of the Bombay High Court in the case of 'GANESH MAHADEV v. SECY. OF STATE' 43 Bom 221. It was urged in that case that the Collector of Customs was not acting in a judicial-capacity, but both the members of the Bench who decided that case were clearly of opinion that a Collector in adjudging confiscation or fining was acting

judicially. At page 227 of the report, Heaton J. observed:

"The general nature of the proceedings of the Tribunal is indicated by the use of the word "adjudge" especially as it is used in connection with what is described as an offence. We have, therefore, to consider whether the Customs officer has really adjudged the confiscation and the penalty, in other words, we have to consider whether there has been an adjudication. Now, the plaintiff alleges that the officer who claims to have adjudged the confiscation and the penalty never himself took the evidence of the witnesses: that he never saw the plaintiff who may be described as the person accused or heard what he had to say; that the person who did take the evidence was a subordinate official; that he took it in the absence of the accused who had no opportunity of cross-examining the witnesses; and that the accused was not given any opportunity of adducing evidence in his own favour. * * * Now assuming them (that is the facts) to be true, it seems to me quite clear that there never was an adjudication of the kind contemplated by the Sea Customs Act. I will not attempt to define what such an adjudication should be beyond this; that it must be a fair hearing of both sides."

29. Hayward J. was also of the same view and he relied upon certain observations of distinguished English Judges in well-known eases.

30. In my judgment there can be no doubt that the view of the Bombay High Court is the right view. Where an Act empowers authorities to impose fines without any limit whatsoever for breaches of provisions of the Act which amount to and are actually described as offences, such officers act judicially and the proceedings before them must be held to be judicial proceedings or at the very lowest, proceedings of a quasi-judicial nature.

31. Holding as I do that these proceedings were of a judicial or a quasi-judicial nature, I must now consider whether or not the respondents were given a fair hearing or any hearing at all and whether the Assistant Collector of Customs observed in these proceedings the rules of natural justice. As I have stated earlier, the learned Solicitor General relied upon a letter written by the Assistant Collector of Customs on March 16, 1950 calling upon the respondents to submit all correspondence and documents connected with the import of this oil and all evidence corroborating their explanation. Why an officer of the standing of the Assistant Collector of Customs should refer to 'correspondences and evidences' it is somewhat difficult to say, but such is the language he uses.

32. It must be remembered that by this letter, the Customs authorities informed the respondents that there had been a misdeclaration and that had been discovered as a result of a test. If there had been a misdeclaration the goods were liable to confiscation or the respondents were liable to a fine, the amount of which would be entirely in the discretion of the customs authorities. The

respondents were not shown the results of any test and indeed they requested the authorities on a number of occasions to let them see the test report, but such was never disclosed. It appears to me that merely asking the respondents to forward all correspondence and documents relating to the import of this oil and any evidence which they had corroborating their explanation that it was spindle oil as declared, does not amount to giving these respondents a fair opportunity of meeting the charge that they had misdeclared the oil. As will be seen later, if these respondents had been shown a copy of the test report they would have been able to demonstrate beyond all doubt that the test report showed that there was no misdeclaration. But the test report was withheld and they were given no opportunity at all of contesting the test report or submitting that the test report was in fact in their favour.

33. Later, the respondents were informed that another report showed that there had been misdeclaration. This was the report of the Chief Chemist, Central Revenues. The respondents were never shown a copy of this report and the first time that report was disclosed to the respondents was in the Court of Bose J. An examination of that report would also show that there was no basis whatsoever for the contention of the Customs authorities.

34. It appears to me that before a citizen of this country can be fined any sum of money in respect of an offence he should be given a full opportunity of meeting the charge which is levelled against him and that should certainly be the case when a citizen can be fined an unlimited sum at the discretion of comparatively junior officials with possibly and very probably no judicial experience whatsoever. At least the facts said to constitute the offence and the evidence upon which such facts were based should have been disclosed to the" respondents and they should have been given an opportunity of dealing with those facts and with -the evidence said to support those facts. The evidence was withheld and. I am afraid withheld deliberately, because it must have been obvious to the customs authorities that if these certificates were disclosed they had no case whatsoever.

35. In acting in the manner in which the Assistant Collector of Customs acted in this case, I must hold that he failed to follow the most elementary rule of natural justice, namely, giving a person an opportunity of being heard and giving him a fair trial before adjudging him guilty of an offence and fining him a very large sum of money.

36. The record of this case was called for and was in the court of Bose J., and was in the appellate court when this appeal was heard. A perusal of that record makes this case an astounding one, because it is clear that in the view of a number of customs officials there had been no misdeclaration at all, and that the declaration of the respondents should be accepted.

37. The first certificate from the Chemist who sampled this oil on behalf of the customs

authorities is dated March 15, 1950. The Chemist who first sampled was Sri B. N. Banerjee. He gave the flash points as 217 degrees F and stated that the samples "are oily in consistency and immiscible with water. They are not suitable for use as illuminant in wick lamps. They are amber coloured oils". The Chemical Examiner for the Customs Authorities also signed this certificate as correct. On the face of the certificate the following words appear:

"The test results may kindly be seen. Assessment may please be confirmed."

38. Under these words appear initials which are illegible and the date 15-3-50.

39. It must be remembered that the respondents claimed the oil to be lubricating oil, and that duty should be payable under item 27(8) of the first schedule of the Indian Tariff Act. That item covers:

"Lubricating oil, that is, oil such as is not ordinarily used for any other purpose than lubrication, excluding any mineral oil which has its flashing point below two hundred degrees of the Fahrenheit thermometer by Abel's close test".

40. The flashing point given by this Chemist is 217 degrees F that is well above the limit stated in item 27(8). Further they said that the oil cannot be used as an illuminant and therefore it seems to me that there was nothing in this certificate to suggest that the oil was other than lubricating oil properly chargeable to duty under item 27(8).

41. It is clear from the record that the matter was referred back again to the Chemical Examiner to deal with the distillation range and he so dealt with it. But again there is nothing to show that the oil was other than a lubricating oil.

42. From the record it would appear that the matter was referred back to the Chemical Examiner because of a note which is in these terms:

"C. E.'s report shows that the oil in question is neither an illuminating oil nor a fuel oil. On the other hand the shipping documents clearly describe the oil as lubricating oil. The flash point by Abel's close test is 217 degrees F. In other words, there is no doubt that the flash point is over 200 degrees F. Lubricating oil with kerosene fraction is suitable for high speed spindles plain casings. A flash point much higher than 200 degrees F is not required, as the maximum working temperature of spindles never exceed 200 degrees F.

"In the circumstances it is difficult to contest party's declaration that the oil in question is a lubricating oil. If however there is any doubt still the goods may be allowed to be cleared on the party's executing a guarantee for production of evidence in support of use."

43. As I have said earlier, as a result of this note the matter was again referred to the Chemical Examiner and he reported on March 21, 1950 as follows:

"The L.A.G. (?) has only stated that 15 per cent, of oil distills below 300 degrees C. It does not necessarily follow from this that it is a kerosene fraction. This fraction may be the lowest fraction of light lubricating oil which are often blended with petroleum products".

44. From the above, it is clear that when the matter was sent back to the Chemical Examiner he still persisted in the view that this might well be lubricating oil and there is no evidence to the contrary. Apparently, the Customs Authorities were dissatisfied and seem to have asked for the opinion of the oil companies in Calcutta. It is indeed odd to ask for the view of competitors and even so the views expressed are by no means clear.

45. It appears from the record that the Assistant Collector was still dissatisfied and he points out that the amount of revenue involved was very large and further that the spindle oil imported was not according to Government specification and for these reasons he decided to have the matter referred to the Chief Chemist of the Central Revenues. As I have already stated, the report of that officer is dated July 25 and he found the flash point to be over 200 degrees F and found the oil unsuitable as illuminant in wick lamps. He then points out that:

"For spindle oils, the official specifications prescribe a minimum flash point of 150 degrees C (302 degrees F) by the Pensky-Martens Closed Tester. In view of these, the low flash point of the samples under reference, viz., 210 degrees F will preclude its being classed as a spindle oil."

46. The Chief Chemical Examiner then states:

"It would appear to be classifiable as a Diesel oil. But the responsibility for ascertaining whether or not it is used as such in Diesel engines will rest with the Appraising Department."

47. This certificate as I have said was never disclosed and it appears to me quite clearly that this is not a certificate to the effect that this is not a lubricating oil within item 27(8) of the First Schedule of the Indian Tariff Act. All it amounts to is that it cannot be regarded as spindle oil according to certain official Government specifications. It has never been suggested in this case that these Government specifications have been made part of the Indian Tariff Act. They are merely specifications for Government's own use and the Central Government cannot themselves by some executive order define the meaning of words in an Indian statute. Had the term 'lubricating oil' been defined by some legislative amendment different considerations would apply. But such is not the case. According to the official specifications nothing can be regarded as spindle oil with a flash point below 150 degree C that is over 300 degree F, but according to item 27(8) of the First Schedule of the Indian Tariff Act the minimum flash point is stated to be

200 degree F and admittedly the flash point of the oil imported was well above that figure, namely, 215 degree or 217 degree.

48. If the respondents had been given an opportunity of seeing these certificates or either of them they could have demonstrated to any impartial tribunal that the certificates were in their favour or certainly not against their contention. But as I have said the certificates were withheld and the only inference that I can draw is that they were deliberately withheld so as to deprive the respondents of any chance of establishing their contention. The best way of establishing innocence is to show that the evidence for the prosecution establishes the innocence of the accused and that, it appears to me, the respondents in this case could have established, had they been given the opportunity. But unfortunately for them they were deprived of that opportunity.

49. There is another significant feature, namely, that it is stated in the affidavit of the Assistant Collector of Customs that the imported oil bad a strong kerosene smell. An examination of the two certificates to which I have referred shows that the smell of this oil conveyed nothing to the chemists concerned and I should imagine that oil with a strong kerosene smell would at least convey to a chemist analysing the same that it might be more akin to kerosene than lubricating oil. There appears to have been nothing in the smell of this oil to warrant even a mention of the same in the certificates. Nevertheless, the Assistant Collector of Customs in his affidavit insists that it had a strong kerosene smell. This affidavit is the first disclosure to the respondents of this fact though there are references to it in the notes in the record. It appears to me that the nasal organs of Customs Authorities where large sums of revenue are involved are far more sensitive than the nasal organs of analytical chemists who are called upon to analyse samples of oil & to state whether such is lubricating oil or some other form of oil.

50. The materials before the Assistant Collector of Customs clearly show that no offence had been committed and I am constrained to say that the Collector of Customs, against the whole of the evidence, came to. a contrary conclusion and he seems to have been influenced not by the report of the analytical chemists, but rather by official Government specifications which could not affect the case. An officer in a note to the Collector dated March 24, 1950 makes that quite clear. In that note he points out that these specifications merely show the specifications of different types of oil purchased by the authorities and then adds:

"It cannot therefore be said that the flash point of a lubricating oil must necessarily be not less than 275 degree F. The tariff item 27(8) lays down the minimum flash point at 200 degree F by Abel's close test and we cannot raise this limit to 275 degree F. arbitrarily."

51. Nevertheless, the flash point appears to have been raised arbitrarily so as to make this oil to be other than lubricating oil within item 27(8) of the Schedule to the Tariff Act.

52. It must also be remembered that a certificate granted by American Chemists that the oil was of the nature declared was forwarded to the Customs Authorities with the papers connected with the shipment. One Mr. E. J. Breuleux of Messrs. R. V. Briggs & Co., a well-known firm of analytical chemists had analysed samples of this oil. for the respondents. In his view it was lubricating oil. The flash point was over 200 degree F, and the oil was not suitable as an illuminant. This opinion is dismissed by the Assistant Collector of Customs in paragraph 38 of his affidavit with the remark that it is the practice of the Customs Authorities not to rely on any tests made after the goods have left customs control. In other words all later tests made on behalf of importers must be presumed to be dishonest. This I think can hardly be described as a judicial approach to evidence.

53. In these circumstances, it cannot be said that this order was made bona fide. Bose J. has held that it was a mala fide order and I am constrained to agree with him. In spite of all the material which their own Chemists had placed before him, & in spite of their opinion, the Assistant Collector of Customs held that this was not a lubricating oil & imposed this extremely heavy penalty. He did it, I feel bound to say, in order to obtain the revenue and not to punish persons whom he regarded as having committed breaches of the law of the land. I cannot see how any person purporting to act judicially could ever have arrived at the decision he did upon the materials before him. The matter was a matter for expert opinion. He deliberately disregarded the expert opinion that he had obtained from the chemical examiner and purported to act upon the opinion of the Chief Chemist, Central Revenues, when all that opinion amounted to was that this was not spindle oil in accordance with certain Government specifications which, it had been pointed out to him, had nothing whatsoever to do with the case. Surely it must have been obvious to a man in the position of the Collector of Customs that what is lubricating oil, unless defined in the Act, is what is regarded in the trade as such and not what is regarded by Government for their own purposes. Further, he disregarded the minimum flash point as given in item 27(8) of the schedule to the Tariff Act and substituted for his own purposes quite arbitrarily the minimum limit imposed in these Government specifications, though it had been pointed out to him in his own office that he had no right whatsoever so to do. There is no escape from the conclusion that this finding was not bona fide and must be regarded as mala fide. I have anxiously considered whether the decision was only an erroneous one due possibly to obstinacy, stupidity or even ignorance, but I am unable so to hold. The views of the experts for the Customs at Calcutta were wholly disregarded as they favoured the view of the respondents. The Assistant Collector persisted in a view, though it had been pointed out to him that he could not arbitrarily fix what were the essentials of lubricating oil, and caused the respondents to be informed that chemical analysis supported the view when it was clear that it did not. With full knowledge that Government specifications could not affect the matter, he insisted that they should govern the question and 1 can find no explanation for his conduct other than a desire to obtain at all costs for

Government a very large sum of money by way of additional duty and a fine. The merits were wholly disregarded and much as I regret to say so it cannot be held that his decision was an honest decision on the facts of the case as presented to him.

54. It was then argued by the learned Solicitor General that in any event Section 198, Sea Customs Act, was a bar to these proceedings. That section is in these terms:

"No proceeding other than a suit shall be commenced against any person for anything purporting to be done in pursuance of this Act without giving to such person a month's previous notice in writing, of the intended proceeding and of the cause thereof; or after the expiration of three months from the accrual of such cause".

55. It is conceded that a month's notice was not given of this intended proceeding and that the proceeding was instituted within three months of the accrual of the cause for the proceeding.

56. Bose J. was of opinion that this proceeding was not in respect of anything purported to be done in pursuance of the Act, as what was done was mala fide. It had further been contended before Bose J., that this was not a "proceeding" within the meaning of that word as used in the section. But he held that it was a "proceeding".

57. English courts have held that applications for prerogative writs are not "proceedings" within the meaning of that word as used in the Public Authorities Protection Act. In the case of 'REX v. PORT OF LONDON AUTHORITY; EX PARTE KYNOCH, LTD.' (1919) 1 KB 176, the question arose as to whether an application for a prerogative writ was a proceeding within the meaning of the word as used in the Public Authorities Protection Act. Bankes, L. J. at page 186 observed:

"As to the effect of the Public Authorities Protection Act. 1893, I express no confident opinion without further considering the dicta cited, but my present impression is that the language of that Act does not extend to proceedings of this class. The essence of the prerogative writ of mandamus is a command to a tribunal to do something which it has omitted or refused to do, and an application for the writ is not an action, prosecution, or other proceeding for any act done in pursuance of execution or intended execution, nor, as 1 think, for any neglect or default in the execution, of any Act of Parliament or public duty or authority".

58. Warrington L. J. appears to have agreed with that view. Scrutton L. J. observed:

"As to the Public Authorities Protection Act, 3 893. the writ of mandamus, like that of certiorari and prohibition, is a high prerogative writ, and, a very valuable right in the Crown for keeping subordinate tribunals within their jurisdiction. Clear words are necessary to impair such a right,

and the words of this Act, 'action, prosecution, or other proceeding against: any person', are no such clear words as to have that effect. There is less inconvenience in corning to this decision because the Court has always a discretion to, refuse the writ of mandamus after an undue lapse of time."

59. The same view was taken by a Divisional Court consisting of Lord Hewart, C. J. and Avory and Swiff JJ., in the case of 'REX v. LONDON COUNTY COUNCIL' (1929) 141 LT 590 in which they held that an application for certiorari was not a proceeding within the meaning of that word as used in the Public Authorities Protection Act. At page 591 Lord Heward C. J. observed:

"We have come to the conclusion that the Public Authorities Protection Act, 1893 does not extend to certiorari. Our attention has been directed to a number of cases in which observations have been made upon this point and particularly to 'REX v. PORT OF LONDON AUTHORITY; EX PARTE KYNOCH LIMITED' (1919) 1 KB 176; 'REX v. MARSHLAND SMEETH AND FEN DISTRICT COMMRS.' (1920) 1 KB 155; 'REX v. KENSINGTON INCOME TAX COMMRS. (1913) 3 K B 870; 'REX v. CARTER' (1904) 68 J P 466; 'ROBERTS v. BATTERSEA, METROPOLITAN BOROUGH' (1914) 110 L T 566; 'REX v. HERTFORD UNION, EX PARTE POLLARD' (1914) 111 L T 716. No doubt the observations in these cases are in some degree of the nature of obiter dicta. But all the dicta point in one direction, and though there appear to be passages in text-books which indicate a contrary view, 1 am satisfied that the Public Authorities Protection Act, 1893 which provides by sect. 1, that an 'action, prosecution or other proceeding' against a public authority must be begun within six months after the act complained of does not extend so as to include 'certiorari' in the word 'proceeding'."

60. On the other hand, the learned Solicitor-General relied on a decision of their Lordships of the Privy Council 'ANNIE BESANT v. ADVOCATE GENERAL OF MADRAS' 43 Mad 146 (PC), where the question arose whether the words "criminal proceeding" excluded high prerogative writs. Their Lordships had to consider whether Section 22 of the Indian Press Act, 1910 excluded an application for a high prerogative writ to the High Court of Madras. The section was in these terms:

"Every declaration of forfeiture purporting to be made under this Act shall, against all persons, be conclusive evidence that the forfeiture therein referred to has taken place, and no proceeding purporting to be taken under this Act shall be called in question by any Court, except the High Court on such application as aforesaid and no civil or criminal proceeding, except as provided by this Act, shall be instituted against any person for anything done or in good faith intended to be done under this Act".

61. Lord Phillimore who delivered the judgment of the Board observed at page 160 as follows:

"As to this section it was contended on behalf of the appellant that as the writ of certiorari was not in terms said to be taken away, the right to it remained notwithstanding the very express but still general words of this section.

However that might be, according_ to English Law, where there is no such revision procedure as in India, their Lordships see no reason for narrowing the express words of the Indian Act. Certiorari, according to the English rule, is only to be granted where no other suitable remedy exists. If the order of the magistrate were a judicial order, it would have been made in the exercise either of his civil or of his criminal jurisdiction, and procedure by way of revision would have been open.

"Even were it to be said that the order was of that quasi-judicial kind to which certiorari has sometimes been applied in England or in India, the Press Act may quite reasonably have intended to take it away, and there is no reason why full effect should not be given to its language.

"It was contended in the High Court and. before this Board, that it was beyond the competency of the Indian Legislature to enact section 22 and possibly even to enact the Press Act. This argument which was mainly founded upon the language of Norman, J., in 'In re 'AMEER KHAN' (1870) 6 Beng LR 392 at p. 451, received some encouragement from the Officiating Chief Justice. But their Lordships find themselves unable to appreciate it".

62. There can be no doubt that this case does support the contention of the appellants. But it must be remembered that when that case was decided there was no written Constitution in India and there was nothing to prevent the legislature taking away the right to apply for a prerogative writ. As Lord Phillimore observed, they could not appreciate an argument to the contrary.

63. The circumstances however are different today. The right to apply to the High Court for a prerogative writ is given by Article 226 of the Constitution, and it appears to me that that right cannot be taken away by any statute because if it was, the courts would be bound to hold such a statute to be ultra vires Article 226. Further, it might well be contended that no statute could impose any restriction on the right to ask the High Court for a prerogative writ. The right to apply for high prerogative writs is now granted by the Constitution and the position in India today is stronger than the position in England where the law of that 'country gives the right to apply for a high prerogative writ though such can be repealed or altered by Parliament. In England, however, it has always been held that to take away the right to a certiorari, express words must be used, as was held in the cases to which I have already referred and it may well be that if the right to apply for a certiorari can be taken away at all, the English rule should now be applied to India having regard to the changed circumstances. In 'BESANT'S CASE', 43 Mad 146 PC, the right to a

prerogative writ was not expressly given in a written constitution and their Lordships held that the right could be taken away by a statute though no express words to that effect were used. I think the decision might well have been different had the right to a certiorari been expressly granted by the terms of a written constitution. In any event, it appears to me that to curb or fetter that right or to restrict it would be contrary to Article 226 and might be held to be ultra vires that Article. However, the courts might consider whether or not they should issue a writ if no notice of the intended proceedings had been given. That however would be a matter of discretion dependent upon the facts of the case. This point is not free from difficulty, but on the whole I am inclined to hold that Section 198 is not a bar to these proceedings.

64. Further, can Section 198 of the Act apply if the proceedings are held to be mala fide as Bose J. has held them to be, -and as I hold them to be? Can a mala fide act be an act which the Assistant Collector purported to do in pursuance of the Sea Customs Act;. Where an officer taking a mistaken view make's an order which is not under the Act he can be said to have made the order purporting to act under the Act though he in fact did not act under the Act. But can such be said of an officer who does not act in good faith and makes the order for reasons wholly unconnected with the Act? It seems to me very difficult to hold in such a case that the order was one which he purported to make under the Act. In such a case he merely uses the Act as a cloak to shield himself and to give his act an appearance of legality which he must have known his act could never possess. That being so, I think it must be held that Section 198 of the Sea Customs Act was no bar to these proceedings.

65. Lastly it was argued by the learned Solicitor General that in any event the Court should not grant a certiorari because the respondents had other remedies equally effective and convenient. As I have already pointed out, the appellants could have appealed to the Chief Customs authority under Section 188 and have applied to the Central Government in revision from any decision of that latter authority. These appeals and revisions are in the nature of appeals from Caesar to Caesar and might not be regarded with any great confidence by persons in the position of the respondents in this case. They were labouring under a serious grievance. They had been called upon to pay over Rs. 79,000/- additional duty and fined a sum of over Rs. 4,50,000/- without ever having had a reasonable opportunity of presenting their case. However there can be no doubt that these were remedies open to them.

66. Further it appears to me that a suit would lie for the recovery of the additional duty which they had been called upon to pay and for a declaration that the fine was levied without jurisdiction or in proceedings which were wholly void for failure to observe the rules of natural justice. Such were the proceedings contemplated in 'GANESH MAHADEV v. SECY. OF STATE'. 43 Bom 221 in which it was held that the jurisdiction of the civil court to hear a suit was

not ousted if it appeared that there had been no legal adjudication of the matter by the Collector in accordance with the provisions of the Sea Customs Act, 1878. Further, I think it, is clear from the decision of their Lordships of the Privy Council in 'Secy. of State v. Mask & Co.' 67 I. A. 222 (PC) that a suit would lie in circumstances similar to the present.

67. The principles upon which a certiorari should be granted were discussed by Maugham L. J (as he then was) in the case of 'Errington v. Minister Of Health' (1935) 1 KB 249. At page 279 the learned Lord Justice observed:

"The only question that remains is whether the Court should come to the conclusion that the interests of the applicants have been substantially prejudiced by what has been done, because the quashing of the Order is, of course a matter of discretion of the Court. I do not think it has been proved that the statements which were made to the Ministry in fact affected the decision of the Minister, or of his officials, and I certainly have no reason to doubt that the officials were acting in what they thought to be the public interest. On the other hand, it seems to me a matter of the highest possible importance that where a quasi-judicial function is being exercised, under such circumstances as it had to be exercised here, with the result of depriving people of their property, especially if it is done without compensation, the persons concerned should be satisfied that nothing unfair has been done in the matter, and that ex parte statements have not been heard before the decision has been given without any chance for the purpose concerned to refute those statements. That seems to me a matter of the greatest possible public importance, and, if I am right in the view that I have expressed as to the functions of the Minister being of a quasi-judicial character, I think it follows that in the special circumstances of this case, as I Understand them to be, the Court has no option "but to quash the Order, as my brother has suggested".

68. In that case, the learned Lord Justice was not satisfied that any,injustice had in fact been done. Nevertheless he was of opinion that a certiorari should issue because as he put it, it was a matter of the highest possible importance that where a quasi-judicial function is being exercised the persons concerned should be satisfied that nothing unfair had been done in the matter.

69. It is true that this was not a case where an alternative remedy was pleaded as a bar to certiorari. But, if the matter of the issue of the certiorari is a matter of the highest public importance, then it appears to me that if it can be issued when it is not established that no injustice has been done surely it should and must be issued when it is clearly proved that a grave injustice has been done, though an alternative remedy or remedies could be pursued. Where officials of Government have acted in the manner in which the Assistant Collector of Customs acted in this case it seems to me that in the public interest the courts should act immediately when the allegations made against the authority have been established as they have been before us.

70. At page 878 of the ninth volume of Halsbury's Laws of England, it is stated in paragraph 1481 as follows:

"Although the writ is not of course it will nevertheless be granted 'ex debito justitiae', to quash proceedings which the Court has power to quash, where it is shown that the Court below has acted without jurisdiction or in excess of jurisdiction, if the application is made by an aggrieved party and not merely by one of the public and if the conduct of the party applying has not been such as to disentitle him to relief; and this is the case even though certiorari is taken away by statute, and although there is an alternative remedy".

71. This view is supported by the case of the 'QUEEN v. JUSTICES OF SURREY' (1870)5 Q B 466. At page 472. Blackburn, J. who delivered the judgment of the Court observed:

"In the very analogous case of prohibition a distinction is taken, thus expressed by Cock-burn, C. J. in 'FORSTER v. FORSTER' (1863) 4 B & S 187 at p. 199: 'I entirely concur in the proposition that, although the Court will listen to a person who is a stranger, and who interferes to point out that some other court has exceeded its jurisdiction, whereby some wrong or grievance has been sustained, yet that is not ex debito justitiae, but a matter upon which the Court may properly exercise its discretion, as distinguished from the case of a party aggrieved, who is entitled to relief ex debito justitiae, if he, suffers from the usurpation of jurisdiction by another court',"

72. The English Courts in the case of 'KING v. POSTMASTER-GENERAL; EX PARTE CARMICHAEL' (1928) 1 K B 291, held that a certiorari would issue although there was an alternative remedy. Avory, J. at page 299 of the report observed that though there was an alternative remedy by way of an appeal, nevertheless a certiorari should issue. He observed:

"But even if that remedy is open to her (that is an appeal), it is undoubtedly good law that if the application for a certiorari is made by a party aggrieved then, it ought to be granted ex debito justitiae, and the Court has not the general discretion which it would have when the application is made by one of the public who is not personally concerned. That was decided long ago in the case of 'REG v. SURREY JUSTICES' (1870) 5 Q B 466, and on that principle, even although she has the remedy by appeal in this case, I am prepared to agree that the certiorari should go, seeing that the application is being made by the applicant as the party aggrieved".

73. A similar view was taken by a Divisional Court in England consisting of Viscount Caldecote, C. J. and Humphreys and Wrottesley, JJ. in the case of REX v. WANDSWORTH JUSTICES; EX PARTE READ' (1942) 1KB 281 in which it was held that where there has been a denial of natural justice before a court of summary jurisdiction, resulting in the conviction of a defendant, his remedy is not by case stated or appeal to quarter sessions, but by application to the

High Court for an order of! certiorari to remove and quash the conviction. At page 284 Viscount Caldecote, C. J. observed:

"It remains to consider the argument that the remedy of certiorari is not open to the applicant because others were available. It would be ludicrous in such a case as the present for the convicted person to ask for a case to be stated. It would mean asking this Court to consider as a question of law whether the justices were right in convicting a man without hearing his evidence. That is so extravagant an argument as not to merit a moment's consideration. As to the right of appeal to quarter sessions, it may be that the applicant could have had his remedy if he had pursued that course, but I am not aware of any reason why, if in such circumstances as these, he preferred to apply for an order of certiorari to quash his conviction, the court should be debarred from granting his application".

74. Humphreys, J. at page 284 observed:

"The only question which remains is whether there is some other remedy which, in the language in Short and Mellor's Practice of the Crown Office, is 'equally convenient' because there is ample authority for saying that this court will not grant writs of certiorari or mandamus where there is some other course equally convenient open to the applicant for the writ. For the reasons which my Lord has stated, it must be apparent on the facts of this case that the remedy by case stated was not available. It would be ridiculous to state a case on the only question of law which arose. In my opinion, this is also not the type of case which was intended to be the subject of an appeal to quarter sessions. Quarter sessions may, it is true, hear appeals on questions of law, but that court primarily exists in its appellate jurisdiction to deal with disputed questions of fact".

75. A similar view was taken in India in the case of 'KHURSHED MODY v. RENT CONTROLLER, BOMBAY', AIR 1947 Bom 46,in which it was held that the High Court would not refuse to issue a writ of certiorari merely because there was a right of appeal. Ordinarily, the High Court, it was said, would require the petitioner to have recourse to his ordinary remedies, but, if it found that there was a breach of a fundamental principle of justice, the High Court would certainly not hesitate to issue a writ of certiorari. This latter case was of course decided before the Indian Constitution came into force.

76. There can I think be no doubt that a court can refuse to issue a certiorari if the petitioner has other remedies equally convenient and effective. But it appears to me that there can be cases where the court can and should issue a certiorari even Where such alternative remedies are available. Where a court or tribunal which is called upon to exercise judicial or quasi-judicial functions discards all rules of natural justice and arrives at a decision contrary to all accepted principles of justice then it appears to me that the court can and must interfere. If public policy

affects the issue of a writ as stressed by Maugham, L. J. in the case which I have cited then clearly public policy demands in this case that we should issue a writ immediately and not compel the respondents to proceed by way of appeals to the customs authorities or by revision to the Executive Government or by the more cumbrous procedure of a properly constituted suit.

77. I am of opinion that the conduct of the Assistant Collector of Customs in this case was so gross and so contrary to the elements of justice that Bose, J. was bound to interfere and quash his order. That being so, this appeal must fail and I would dismiss it with costs.

78. Certified for two Counsel.

79. BANERJEE, J: I agree.

80. The learned Judge in this case has quashed the orders and the demands contained in the letters dated September 22, 1950, and November 17, 1950. He held that there was a denial of natural justice and violation of the fundamental principles of judicial procedure.

81. The Court does not make an order of mandamus or certiorari where there is an alternative remedy which is equally convenient. In this case the petitioner had an alternative remedy by way of appeal under the Sea Customs Act. But in 'R. v. WANDWORTH', JJ. Ex parte Read (1942) 1 All E R 56, Viscount Caldecote, L. C. J., issued a writ of certiorari inspite of the fact that there was an alternative remedy. In that case the applicant was charged before the justices with misrepresentation by means of tickets of the weight of meat offered by him for sale. At the hearing, the tickets complained of were not produced and objection was taken to the admission of evidence of their contents. The Magistrates retired to consider the question whether the non-production of these tickets had been satisfactorily explained. Upon returning into Court, they inadvertently not only gave their decision upon this evidence point, but at once proceeded to acquit the applicant on one summons and convict him on the other. The applicant was not heard, and he contended that he had a good answer to the summons on which he was convicted. In these circumstances the application was made for an order of certiorari to quash the conviction.

82. In course of the argument, the judgment of Lord Sumner in 'R. v. NAT BELL LIQUORS, LTD.' (1922) 2 A C 128, was cited, particular stress being laid on his Lordship's observation at p. 151:-

"It has been said that the matter may be regarded as a question of jurisdiction, and that a justice who convicts without evidence is acting without jurisdiction to do so. Accordingly, want of essential evidence, if ascertained somehow, is on the same footing as want of qualification in the magistrate, and goes to the question of his right to enter on the case at all. Want of evidence on which to convict is the same as want of jurisdiction to take evidence at all. This, clearly, is

erroneous. A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a Judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not".

83. The learned Lord Chief Justice said with reference to this passage:

"That passage, as I understand it, has nothing to say about a case such as this, where there has been a denial of natural justice to a party who has been convicted." To the argument that the applicant had not this remedy open to him, because he had another remedy, his Lordship observed: "I am not aware of any reason why, in such circumstances as these, if the applicant prefers to ask for an order of certiorari to quash the conviction obtained in the manner I have described, the Court should be debarred from making an order. In this case, it has been admitted by the justices that a mistake was made. This Court is in a position to remedy that mistake by making an order of certiorari to quash the conviction, and that is the proper order which I think this Court should make."

84. The other learned Judges agreed.

85. This is a judgment of a very high authority and we can safely follow it in our Courts here. Therefore, even though there was an alternative remedy open to the petitioner in the case before us, the Court may grant a writ of certiorari. Existence of an alternative remedy equally convenient does not present an insuperable bar to the issuing of the writ.

86. In this case the report on which the Customs authorities determined the liability of the petitioner was not shown to him. The petitioner was not allowed to make a representation on it. The Chemical test had been carried out. But no copy of it was furnished to the petitioner inspite of his repeated requests.

87. It was submitted to the learned trial Judge that as the petitioner had agreed by his letter dated 8th March, 1950, to accept the result of the chemical test carried out by the Customs authorities, it was not open to him to make a grievance if the copy was not supplied to him. To this argument the learned Judge said:

"I am not at all impressed by the suggestion The undertaking to accept the result of the test cannot be stretched to mean that if the chemical analysis is arbitrary, or mala fide or erroneous on the face of it, or is found to be actuated by extraneous considerations, even then, it will be binding on the petitioner and will preclude the petitioner from challenging the accuracy or validity of the same. Nothing can be more absurd than this".

88. In 'LAPOINTE'S CASE' (1906) A C 535 (PC), the rules of the respondent police pension society provided that every application for a pension should be fully gone into by the board of directors, and, in particular, that any member entitled thereto, who is dismissed from the police force or is obliged to resign, shall have his case considered by the board and his right thereto determined by a majority. On an application for a pension by the appellant, who had been obliged to resign, the board, without any judicial inquiry into the circumstances, resolved to refuse the claim, "seeing that he was obliged to tender his resignation." It was held in an action by the appellant in effect to compel a due administration of the pension fund, that this resolution was void and of no effect. Lord MacNaghten at p. 539 observed:

"It is obvious that the so-called determination of the board is void' and of no effect. It is hardly necessary to cite any authority on a point so plain. The learned counsel for the appellant referred to two well-known club cases before Sir George Jessel, M. R., 'FISHER v. KEANE'. (1878) 49 L J Ch 11 and 'LABOUCHERE v. EARL WHARNCLIFFE.' (1879) 13 Ch D 346. It may be worthwhile to mention a later case before the same learned Judge, in which he refers to the case of 'WOOD v. WOAD' (1874) 43 L J Ex 153, in the Exchequer and expresses regret that he was not acquainted with that case when those club cases were decided: see 'RUSSELL v. RUSSELL.' 'It contains' he says, 'a very valuable statement by the Lord Chief Baron as to his view of the mode of administering justice by persons other than Judges who have judicial functions to perform which I should have been very glad to have had before me on both those club cases that I recently heard, namely, the case of 'FISHER v. KEANE', and the case of 'LABOUCHERE v. EARL OF WHARNCLIFFE.' The passage I mean is this, referring to a committee: 'They are bound in the exercise of their functions by the rule expressed in the maxim 'Audi alteram partem' that no man should be condemned to consequences resulting from alleged misconduct unheard, and without having the opportunity of making his defence. This Rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals."

See also 'RUSSEL v. NORFOLK' (Duke) (1949) 1 All ER 109 at p. 119.

89. Now, take two illustrations from the Income tax cases. Though there is nothing in the Income-tax Act which imposes a duty on an Income-tax Officer who makes an assessment under section 23 (3) to disclose to the assessee the material on which he proposes to act, natural justice requires that he should draw the assessee's attention to it and give him an opportunity to show that the officer's information is wrong. 'GUNDA SUBBAYYA v. COMMR. OF INCOME-TAX. MADRAS', 1939 ITR 21 (Mad).

90. In 'GURMUKH SINGH v. COMMR. OF INCOME-TAX, LAHORE' 1944:12 ITR 393 (Lah), in which my Lord the Chief Justice was a party, it was held that in proceeding under

Section 23 (3), the Income-tax Officer is not bound to rely on such evidence produced by the assessee as he considers to be false; but if he proposes to make an estimate it} disregard of the evidence oral or documentary, led by the assessee, he should in fairness disclose to the assessee the material on which he is going to found that estimate. He may not disclose the source from which he got the information, but he must communicate to' the assessee the sub-stance of the information proposed to be utilised by him against the assessee to such an extent as to put the assessee in possession of full particulars of the case he is expected to meet and should further give him ample opportunity to meet it, if possible.?

91. This is so because it is elementary justice that no man should be condemned on evidence which he had no opportunity to meet or make his representation on.

92. In this case, though there were numerous documents on which the petitioner relied in support of his case, the document on which the Custom authorities relied and which in effect falsified the documents of the petitioner, was not shown to him nor his explanation asked on it. In my view nothing can be a greater violation of natural justice than this.

93. Therefore, if this Court has the jurisdiction, it will, following the English authority I have already cited, be disposed to quash the orders and the demands made by the Customs authorities based on evidence which the petitioner was not given any opportunity to meet,

94. The question therefore is whether this Court has jurisdiction to grant the writ of certiorari. For, if this Court has no jurisdiction to issue the writ, whatever injustice might have been done to the petitioner, the Court cannot rectify the wrong in these proceedings.

95. It appears from Blackstone (1844 edition vol-3, p. 703) that this writ originally issued out of the Court of Chancery, or a superior Court of the Common Law, directed in the King's (or Queen's) name to the Judges or officers of inferior courts of record, commanding them to return the record of a cause depending before them, to the end the party might have the more sure and speedy justice. This writ might be had either in criminal or civil cases.

96. It appears that in course of time the scope of the writ was extended. In 'RYOTS OF GARABANDHO v. ZAMINDAR OF PARLAKI-MEDI', 70 Ind App 129 (PC), Viscount Simon, L. C. said:

"This writ does not issue to correct purely executive acts but, on the other hand, its application is not narrowly limited to inferior 'courts' in the strictest sense. Broadly speaking, it may be said that if the act done by the inferior body is a judicial act, as distinguished from being a ministerial act, certiorari will lie."

97. The Customs authorities are not a 'court' in the strict sense of the term. The question is - did they act quasi-judicially. If they did, certainly, the writ may go.

98. This is the main point debated before us. The difference between an executive and a judicial or a quasi judicial act has been pointed out by the Supreme Court in the 'PROVINCE OF BOMBAY v. KHUSHALDAS S. ADVANI' (1950) SCR 621 Kenai, C. J., after a review of the cases, said at p. 633:

"It seems to me that the true position is that when the Jaw under which the authority is making a decision, itself requires a judicial approach, the decision will be quasi-judicial. Prescribed forms of procedure are not necessary to make an inquiry judicial, provided in coming to the decision the wellrecognised principles of approach are required to be followed. In my opinion, the conditions laid down by Slesser, L. J., in his judgment correctly bring out the distinction between a judicial or quasi-judicial decision on the one hand and a ministerial decision on the other"

99. The observation of Slesser, L. J. on which Kania C. J. relied is as follows:-

"There remains only the question whether here the remedy which has been sought by the respondents is or is not an appropriate remedy, that is, the remedy of certiorari. Atkin, J, J. (as he then was) in 'REX v. ELECTRICITY COMMISSIONERS' (1924) 1 K B 171, lays down four conditions under which a rule for a certiorafi may issue. He says: 'Wherever any body of persons' (first) 'having legal authority' (secondly) 'to determine questions affecting the rights of subjects, and' (thirdly) "having the duty to act judicially' (fourthly) 'act in excess of their 'legal authority' - (the sub-divisions are my own) - 'they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs".

100. But the question still remains - what is the meaning of the expression 'judicial approach' used by the learned Chief Justice? Is there any test which conclusively settles the matter. If so, what is the test?

101. 'Judicial approach' - means the manner in which judicial power is and should be exercised: But then what is judicial power?

102. In 'HUDDART, PARKER AND CO. v. MOOREHEAD', 8 CLR ,330 at p. 357, Griffith, C.J. observed:

"I am of opinion that the words "judicial power" as used in sec. 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a 'binding

and authoritative decision (whether subject to appeal or not) is called upon to take action."

103. Latham, C.J. in 'ROLA CO (AUSTRALIA) PTY LTD. v. COMMON WEALTH', G9 C L R 185 at p. 198-99 explained the definition:

"I am not satisfied that the words of Griffith, C J., are properly interpreted when it is said that they mean that a power to make binding and authoritative decisions as to facts is necessarily judicial power. I direct attention to the concluding words - 'is called upon to take action'. In my opinion, these words are directed to action to be taken by the tribunal which has power to give a binding and authoritative decision. The mere giving of the decision is not the action to which the learned Chief Justice referred. If a body which has power to give a binding and authoritative decision is able to take action so as to enforce that decision, then, but only then, according to the definition quoted, all the attributes of judicial power are plainly present."

'Judicial power' is not exercised by a tribunal of which the duty is to express an opinion on which a minister may take action, nor in ordering the registration or de-registration of a corporate body.

104. In 'SHELL CO. OF AUSTRALIA v. FEDERAL COMMR. OF TAXATION' (1931) A C 275, the Judicial Committee accepted the definition given by Griffith, C. J., as one of the best and observed:

"The authorities were clear to show that there are tribunals with many of the trappings of a Court, which, nevertheless, are not Courts in the strict sense of exercising judicial power".

105. It seems that their Lordships first laid down that the essential characteristic of 'Judicial power' was the authority to decide controversies and to determine rights relating to life, liberty or property. If the matter stood there we would have a clear definition of 'judicial power', which as a test would be very useful. But then they thought fit to lay down a series of negative propositions. 1. A Tribunal is not necessarily a Court in this strict sense because it gives a final decision. 2. Nor because it hears witnesses on oath. 3. Nor because two or more contending parties appear before it between whom it has to decide. 4. Nor because it gives decisions which affect the rights of subjects. 5. Nor because there is an appeal to a Court. 6. Nor because it is a body to which a matter is referred by another body.

106. In 'LABOUR RELATIONS BOARD OF SASKATCHEWAN v. JOHN EAST. IRON WORKS, LTD. 53 Cal WN 389', their Lordships of the Judicial Committee said (at p. 393) that:

"without attempting to give a comprehensive definition of judicial power, they accept the view that its broad features are accurately stated in that part of the judgment of Griffith, C.J. in 'HUDDART, PARKER & CO. v. MOORHEAD', 8 C L R 330, which was approved by this

Board in 'SHELL CO OF AUSTRALIA, LTD. v. FEDERAL COMMISSIONER OF TAXATION', 1931 AC 275. Nor do they doubt, as was pointed out in the latter case, that there are many positive features which are essential to the existence of judicial power, yet by themselves are not conclusive of it or that any combination of such features will fail to establish a judicial power if, as is a common characteristic of so-called administrative tribunals, the ultimate decision may be determined not merely by the application of legal principles to ascertained fats but by considerations of policy also".

107. Their Lordships it appears were reluctant to lay down a final and conclusive test of what 'judicial power' means.

108. In BOULTER v. KENT JUSTICES' (1897) A C 556 at p. 569, Lord Herschell expressed the views that in view of the fact that an objector who opposes the grant of a liquor licence by justices sitting as a confirming authority, is expressly made a party to litigation by Statute the latter proceedings are therefore judicial, for there is a lis inter partes. Lord Herschell seems to have thought that if there is a lis between A & B, and C has to decide the dispute -C is vested with a judicial power- a view which was adopted by this Court in 'PATRI SHAW v. R. N. ROY' 54 Cal W N 855.

109. But having regard to the Privy Council decisions one is forced to admit that there is no conclusive test for distinguishing judicial activities from administrative activities. This is so, because it seems there is no sharp dividing line between the two. In many cases they are inextricably mixed up.

110. Dr. Robson in his book on Justice and Administrative Law has admitted that it is difficult to discover an infallible test which shall immediately tell us which functions are judicial and which are administrative. For practical purposes, he has suggested the following tests of 'pure' judicial functions, by whomsoever exercised:

"(1) The power to hear and determine a controversy.

(2) The power to make a binding decision (sometimes subject to appeal) which may affect the person or property or other rights of the parties involved in the dispute.

Administrative functions, on the other hand, consist of those activities which are directed towards the regulation and supervision of public affairs and the initiation and maintenance of the public services."

111. In 'ADVANI'S CASE' (1950 SCR 621) (p. 725) Das J. stated the law on the point in these words:

"What are the principles to be deduced from the two lines of cases I have referred to? The principles, as I apprehend them, are:

(1) that if a statute empowers an authority, not being a court in the ordinary sense, to decide disputes arising out of a claim made by one party under the statute which claim is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other, there is a lis prima facie and in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a quasi-judicial act; and

(ii) that if a statutory authority has power to do any act which will prejudicially affect the subject, then, although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially."

In other words, while the presence of two parties besides the deciding authority will, prima facie and, in the absence of any other factor, impose upon the authority the duty to act judicially, the absence of two such parties is not decisive in taking the act of the authority out of the category of quasi-judicial act if the authority is nevertheless required by the statute to act judicially."

112. So far as we are concerned, the decision in 'ADVANI'S CASE', ,(1950 SCR 621) settles the law and binds us. The only point is what did the Supreme Court mean (Kania C. J.) by the expression 'judicial approach', and Das J. by the words 'to act judicially'.

113. It seems that if a matter is required to be approached with a judicial mind, then the decision on it is a judicial or quasi-judicial decision. There are not only the formal courts of law, but also the administrative tribunals, the Committees or the Councils or the members of trade unions, of members' clubs, and of professional bodies established by statute or Royal Charter, which, for the sake of convenience, are referred to as domestic tribunals. There are again tribunals called ad hoc tribunals - the procedure of which, as prescribed by the legislature, is of the most informal nature: Such tribunals may act on their own knowledge and on their own inspection and give decision without hearing either party, unless a party claims to be heard, See 'R. v. BRIGHTON AND AREA RENT TRIBUNAL,' (1.950) 1 All ER 946. Many persons exercise judicial functions besides those who are called Judges. Mere names are not a safe guide for discovering -where the judicial function exists. But an analysis of what takes place when a Judge in a court of law decides a dispute before him may kelp us perhaps to discover what in fact is meant by judicial activity or spirit, and thus may help us to understand, the meaning of the expression 'judicial approach' or 'acting judicially'.

114. Sir F. Pollock in his first book of Jurisprudence, P. 42, relates a story, which according to that great Jurist exemplifies the difference between adjudication and administration.

115. In Xeonophon's Cyropaedia, Astyages asks Cyrus to give an account of his last lesson. Cyrus answers thus: 'One of the boys of our school had a coat too small for him & gave it to one of his companions, a little smaller than himself, and forcibly took in exchange the latter's coat, which was too large. The preceptor made me Judge of the ensuing dispute & I decided that the matter should be left as it was, since both parties seemed to be better accommodated than before. Upon this, the preceptor pointed out to me that I had done wrong, for, I had been satisfied with considering the convenience of the thing, whereas I ought first to have considered the-justice of it.'

116. The Judge is enjoined to do right to all manner of people after the laws and usages of the realm without fear or favour, affection or ill-will. The right must be done according to the-laws and usages of the country. The Judge or the person sitting as a Judge cannot decide according to his personal inclination or what he-may consider fair and reasonable in the circumstances. He must decide according to law. His decisions must not be arbitrary or absolute. It must conform to the laws and usages of the realm.

117. The Judge must exercise his functions in a way which fulfils the need for consistency, for equality and for certainty, His administration must be objective and impartial and he must state explicitly the reasons for his decisions. He must suppress his personal emotions arid instinctive prejudices and encourage his sense of fairness. He must do right to all manner of men - 'without fear or favour, affection, or ill will'. He must come to the case with an open mind. Alertness, flexibility, curiosity must be the friends of his mind; caprice, rigidity and prejudice its enemies. He must be able to suspend judgment until he had systematically surveyed the circumstances of the case. But the possession of those qualities does not mean that the Judge is to be a mere logical machine, an intellectual abstraction. . (Robson). These are the qualities of a judicial mind.

118. It seems that 'judicial approach' or 'acting judicially' involves the exercise of all these qualities of mind. The person who has to give the decision must approach the subject with a judicial mind. But still we have not the test which clinches the matter.

119. The ultimate decision may be reached, as the Judicial Committee have observed, not merely by the application of legal principles to ascertained facts, but by consideration of policy also. For myself, I will be content for the present to accept the suggestions laid down by Dr. Robson for understanding what is meant by the expressions 'judicial approach' and 'acting judicially'. Once we understand that, there is no further difficulty. We simply apply the law laid down in 'ADVANI'S CASE', 1950 SCR 621.

120. My Lord the Chief Justice has noted in his judgment all the relevant sections of the Sea Customs Act from which he came to the conclusion that in this matter the Customs authorities acted in a quasi-judicial capacity. I cannot add anything to it. But, for the sake of completeness of this judgment, I may point out that Section 182 provide for 'adjudication of confiscations and penalties The confiscation, increased rate of duty or penalty may be 'adjudged'.....There has to be an adjudication. The word 'adjudge' is defined in the Oxford Dictionary to mean 'to decide judicially, to award, grant or impose judicially'. It appears that the words 'adjudge' and 'adjudicate' came, from the same Latin root 'adjudicare'.

The word 'adjudicate' means to act as a Judge, or a court of judgment. It follows from the section that the statute Imposes a duty on the authorities to act judicially. The primary and natural signification of 'the word 'adjudication' connotes a court of justice. The word has been used during the last 100 years at least to denote decisions of a quasi-judicial character. See 'ALLBUTT v. MEDICAL COUNCIL' (1889) 23 Q. B. D. 400, at p. 412 and 'LEESON v. GENERAL MEDICAL COUNCIL' (1890) 43 Ch. D. 366 at p. 383. In these cases the word or its variant 'adjudicate' had been so employed. Cotton L. J. in 'LEESON'S CASE', said in respect of the Medical Council that they "were not in the ordinary sense Judges, but they had to decide judicially". In 'ALLINSON v. GENERAL MEDICAL COUNCIL' (1894) 1Q. B. 750, Lord Esher M. R. Lopes L. J. and Davey L. J., all employed the term 'adjudication' as applicable to a decision of the Medical Council. There are other cases too. It seems the position of persons so adjudicating Is 'judicial' or 'quasi-judicial'. The tendency, greatly increasing of late years, is to invest administrative bodies with quasi-judicial functions without at all creating them Courts of Justice. See 'BOARD OF EDUCATION v. RICE' (1911) A. C. 179 at p. 182. 'REX v. LOCAL GOVT. BOARD; EX PARTE ARLIDGE' (1914) 1 K. B. 160. at p. 184. When ALDRIGE'S CASE', came before the House of Lords, Lord Haldane, L. C. held that though in deciding the appeal the board was bound to act judicially, the nature of the tribunal determined the principles to its procedure must conform. His Lordship said 'LOCAL GOVT. BOARD v. ALDRIGE' (1915) A. C. 120 at p. 132-

"In modern times, it has been increasingly common for Parliament to give an appeal in matters which really pertain to administration, rather than to the exercise of the judicial functions of an ordinary Court, to authorities whose functions are administrative and not in the ordinary sense judicial. Such a body as the local government board has the duty of enforcing obligation on the individual, which are imposed in the interests of the community.Its character is that of an organisation with executive functions. In this, it resembles other great departments of the State. When therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently".

(See Sawyer on Constitutional Cases in Australia p. 411-12.)

121. The word 'adjudge' and the marginal note 'adjudication of the confiscations and penalties' leave no doubt that officers in the section named, namely the Deputy Commissioner or Deputy Collector of Customs or the Customs Collector have got to act judicially. They have got to 'adjudge'. Section 186 provides that the award of any confiscation, penalty or increased rate of duty under this 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.

Section 187 provides that all offences against this Act other than those cognizable under Section 182 by Officers of Customs may be tried summarily by a Magistrate. Section 182 mention^ certain major offences under the Act. It is inconceivable that the lesser offences under the Act are triable by a Magistrate - who acts judicially, - whereas the greater offences may be the subject matter of executive or administrative orders.

Section 188 provides for appeal by the person aggrieved by any decision or order passed by an officer of Customs. We find in this section the words 'order' or 'decision'. That section also provides for making further enquiry by the Appellate authority and passing such other order as it thinks fit.

Then again the authorities are permitted to levy fine according to their discretion. In these circumstances, it is impossible to think that the Customs officers are to 'adjudge' matters without approaching them judicially.

These considerations leave no doubt in my mind that though these officers may not be 'courts' in the strict sense of the term, they are enjoined by the Act to act quasi-judicially, that is to say, they have got to approach matters which they have to decide in a judicial frame of mind. It is unnecessary to refer to other sections relied upon by the appellant's counsel to show that the order of the Customs authorities in this case was made in an administrative capacity.

122. As to the appellant's counsel's argument based on Section 198 of the Act, the matter has been exhaustively dealt with by my Lord. I have nothing to add.

123. In the result I entirely agree with what has fallen from my Lord. The appeal must be dismissed with costs. Certified for two counsel.