

# CALCUTTA HIGH COURT

S.K. Srivastava

Vs.

Gajanand Patriwalla

Criminal Revn. No. 124 of 1956

(Sen, J.)

06.03.1956

## ORDER

**Sen, J.**

1. This revisional application by the Assistant Collector of Customs, Calcutta, is directed against an order of the Chief Presidency Magistrate, Calcutta, dated 24-1-1956, For the return of the document seized in execution of two search warrants under Section 172, Sea Customs Act, 1878, to the opposite party Gajanand Patriwalla on his executing bond for Rs. 10,000/-.

2. The facts are briefly as follows : On 8-11-1955, the Assistant Collector of Customs made an application before the Chief Presidency Magistrate, Calcutta, For the issue of a search warrant with respect to premises No. 14, Netaji Subhas Road. Calcutta, under Section 172, Sea Customs Act, stating in the application that he believed that dutiable, prohibited, restricted and smuggled goods and documents relating thereto were secreted in the premises, and a search warrant was issued on the same day for search, and seizure of illicitly imported goods and documents relating thereto. On 9-11-1955, on another application a second search warrant was issued for search and seizure of goods and documents relating to illicit import as well as to illicit export. On the strength of the two search warrants the premises of Messrs. Palriwalla Brothers Ltd. and other premises at No. 14 Netaji Sub-has Road. Calcutta, were searched during the 9th, 10th, 11th, 12th and 14th November, 1955, and over 600 files, registers and other papers were seized along with rubber stamps, but no prohibited goods were found or seized. On 17-11-1955, the opposite party Gajanand Palriwalla made an application before the Chief Presidency Magistrate, Calcutta, For the immediate return of the documents seized and also for copies of the application by the Assistant Collector of Customs, Calcutta, the search warrants and the search lists. The learned Chief Presidency Magistrate passed an order for giving the copies out rejected the prayer for return of the documents at that stage and ordered detaining of the same till 28-11-1955. On 28-11-1955, the opposite party filed another petition for return of the documents. But after hearing the lawyer For the petitioner the learned Chief Presidency Magistrate granted time till 28-12-1955, to complete examination of the papers. On 28-12-1955, the opposite party renewed his prayer for return of the documents, while on behalf of the Customs Department. a petition was filed stating that the examination of all the papers would take a long time, that some papers which did

not appear to be incriminating had already been returned to the opposite party, and that as the papers had been seized in execution of search warrants under Section 172, Sea Customs Act it was not necessary to produce the documents before the Court, and that after scrutiny of the books and documents and disposal of adjudication proceedings by the Customs Collector the papers and goods would be disposed of according to the provisions of the Sea Customs Act. The learned Magistrate, however, granted time till 24-1-1956, to complete the examination of the papers. On 24-1-1953, the opposite party renewed his prayer for return of the seized books and papers. On behalf of the Customs Department another petition was filed, stating that the examination of the books and papers was not complete and repeating the contention that the books and papers were not required to be produced before the learned Magistrate but were to be disposed of by the Customs Department. The learned Magistrate thereupon observed that the books and papers had been seized under search warrants issued by him and he could not, therefore,, surrender his jurisdiction. He then passed the order complained against, namely, that the books, and papers be returned to the opposite party Gajanand Palriwalla on his executing a bond for Rs. 10,000/-.

3. Mr. Kar appearing For the Assistant Collector of Customs has urged that when goods and documents are seized in execution of a search warrant issued under Section 172, Sea Customs Act, they are not required to be produced before the Magistrate issuing the search warrant, and that the Magistrate has no jurisdiction to pass an order in respect of them and that they are to be produced before the Customs authorities and the Customs Collector is the proper authority to order the final disposal thereof. In support of his contention Mr. Kar relied upon two recent decisions of this Court, namely, the decision of Debabrata Mookerjee, J. in the case of *Calcutta Motor and Cycle Co. v. The Collector of Customs, Calcutta*<sup>1</sup>, and the decision of Sinha, J. in the case of *Calcutta Motor Cycle Co. v. Collector of Customs*<sup>2</sup>, The first case was concerned with the question, whether search warrants issued under Section 172, Sea Customs Act on the basis of applications by a Customs Collector stating his belief were legal and valid. The second case which was one under Article 226 of the Constitution was concerned mainly with the question whether Section 171A, Sea Customs Act providing for summons to produce documents were ultra vires of Article 20(3) of the Constitution; the question whether seizure could validly be made under a search warrant issued under Section 172, Sea Customs Act also came up for consideration in that case.

4. In the first case Mookerjee, J. dealt with the argument that the application by the Assistant Collector of Customs did not contain materials which might reasonably induce the Magistrate's satisfaction that the issue of search warrants was necessary and that the search warrants did not contain any indication of the goods or documents for which they had been issued. Mookerjee, J. pointed out that both the arguments were based on the decision of this Court in the case of *K. Hoshide v. Emperor*<sup>3</sup>, but that in that case the search warrant was issued on the application of an Assistant Commissioner of Police and not a Customs Collector and so the provisions of Section 172, Sea Customs Act were not considered. Mookerjee, J. held that the position of a search warrant issued under Section 172 of the Sea Customs Act was different from one issued under Section 96, Criminal Procedure Code, that upon an application by a Customs Collector stating his belief that

<sup>1</sup> Criminal Revn Case No. 693 of 1955, D/- 6-9-55

<sup>3</sup>44 Cal WN 82 : ( AIR 1940 Cal 97)

<sup>2</sup>60 Cal WN 67 : ( AIR 1956 Cal 253)

dutiable or prohibited goods or documents are secreted in any place it is the immediate duty of

the Magistrate to issue a search warrant, and that in such a search warrant it is not necessary to specify the documents to be searched for in strict compliance with the provisions of Section 96, Criminal Procedure Code, the warrant being issued under the wide powers conferred by Section 172, Sea Customs Act.

5. In the same case Mookerjee, J. dealt with another argument, namely, that in the absence of a proceeding there could be no issue of a search warrant. In doing so he observed that the real purpose of the Sea Customs Act was to proceed against goods and not against persons, and that proceedings against goods were clearly contemplated by the Customs authorities when they asked for the search warrant and this was sufficient to validate the search warrant. In the course of his discussion Mookerjee, J. observed that the things seized were not to be taken to the Magistrate but were to be delivered to the care of a Customs officer or taken to the nearest Customs House and thereupon the Customs authorities would proceed to adjudication of confiscation and penalties. Mr. Kar has particularly relied upon these observations. In the second case 60 Cal WN 67 : ( AIR 1956 Calcutta 253) Sinha, J. held that the provisions of Section 171A, Sea Customs Act in so far as they enable the authorities to compel a person accused of an offence to give evidence against himself and to produce documents for that purpose offend against Article 20(3) of the Constitution and are bad. He also held that a search warrant issued under Section 172, Sea Customs Act for the search of offending goods and documents implied the power of seizure thereof. At page 30 Sinha, J. observed as follows :

"In a search warrant under Section 172, Sea Customs Act, it would not be necessary to produce the things in Court, because at that stage, proceedings would not be pending therein. The form of the warrant must, therefore, be suitably modified so as to authorize the Sea Customs authorities to seize the articles and take possession thereof." In the present case the forms of the warrant were modified to provide that goods and documents should be produced before the Collector of Customs. Mr. Kar has urged that in the circumstances it would follow all the more that it was not necessary to produce the things in Court and that therefore, the Magistrate had no jurisdiction to make an order disposing of the documents.

6. In the two cases cited above the High Court was not called upon to decide the question whether the Magistrate issuing a search warrant under Section 172, Sea Customs Act had jurisdiction to pass orders regarding disposal of the goods and documents seized by executing the search warrant. The question cannot be decided on stray observations made in the above two decisions and has to be considered independently.

7. Normally a Magistrate issues a search warrant under Section 96 and under Section 98, Criminal Procedure Code and when doing so has to see that the conditions prescribed in the appropriate Section are satisfied and for this purpose he may hold such enquiry as he thinks fit and the scope of the search warrant must be such as is mentioned in the appropriate Section. Section 172, Sea Customs Act provides that a Magistrate may act on an application by a Customs-Collector stating his belief, and the scope of such a warrant is what is mentioned in Section 172, namely to search for dutiable or prohibited goods or documents that are supposed to be secreted in, a particular place. The scope is similar to that of a search warrant issued under

Section 98, Criminal Procedure Code, but is independent of that Section, and there is no need also to try to bring the scope of the search warrant within the terms of the third sub-clause of a 98(1) of the Code. But it is not possible to accept the proposition that on an application by the Customs-Collector stating his belief, a Magistrate must immediately issue a search warrant. Section 172, Sea Customs Act says that a Magistrate "may issue" on such application. The Magistrate has a discretion, and if he thinks fit he may hold an enquiry before deciding whether or not he should issue a search warrant under Section 172, Sea Customs Act in any particular case. Normally no doubt when there is no reason to suspect mala fides the Magistrate will issue the search warrant on the application of a Customs Collector stating his belief, but this does not alter the fact that the Magistrate has discretion under the law and he may refuse to issue the search warrant unless he is satisfied as to the *bona fides* on enquiry. When a Magistrate issues a search warrant he acts judicially and cannot be deemed to be acting like a rubber stamp. He must retain ultimate responsibility for seeing that the search warrant is not abused. Section 172, Sea Customs Act itself provides that a search warrant issued under that Section shall be executed in the same way and shall have the same effect as a search warrant issued under the Code. This provision must be given its full meaning and it supports the conclusion that the Magistrate must retain responsibility for and control over the search warrant which he issues. He must see that it is executed in same manner as a search warrant issued under the Code, that the property seized is produced before him or temporarily disposed of under his order as property seized in execution of a search warrant under the Code and that the final disposal of property seized is also done by him under Sections 517 to 523 of the Code subject to any express provision of the Sea Customs Act. Under the Code a search warrant issued by a Presidency Magistrate must be directed to a police officer, vide Section 101 taken with S, 77 of the Code. In this case the search warrant was directed to and executed by the Rummaging Inspector. There is no material before me to show whether the Rummaging Inspector is a police officer. In any case, the point was not argued before me and I shall assume that the irregularity, if any, is cured by Section 537 of the Code. Normally the police must execute a search warrant issued under Section 172, Sea Customs Act though the departmental officers of the Customs may help. After seizure by the police in execution of the search warrant, the goods and documents must normally be produced before the Court issuing the search warrant. That is implied by the issue of a search warrant by a Magistrate for search of a place within his jurisdiction and is expressly provided for in the prescribed forms for search warrant under Sections 96 and 93 of the Code. The case where a search warrant is executed beyond the jurisdiction of an issuing Magistrate is clearly provided for in Section 99 of the Code. Since the Search warrant issued under Section 172, Sea Customs Act must be executed in the same way and shall have the same effect as a search warrant issued under the Code, the requirement of producing the goods and papers seized before the issuing Magistrate must attach also to a search warrant issued under Section 172, Sea Customs Act. I am unable to agree with the observations of Sinha, J. made in the case in 60 Cal WN 67 : ( AIR 1956 Calcutta 253) that in execution of a search warrant it would not be necessary to produce the things in Court because at that stage no proceeding would be pending. When a search warrant is issued under Section 98 at the Code it is not necessary that any proceeding should be pending; still the thing seized must be produced before the Magistrate. Further, even when a search warrant is issued under Section 96 of the Code it has been held that it is not necessary that any proceeding should be pending; Vide *Clarke v. Brojendra Kishore*<sup>4</sup>, It is sufficient that a search warrant should be issued in view of an enquiry about to be made. The non-existence of a pending proceeding in Court can, therefore, be no reason for holding that the production of the thing seized before the Court of the Magistrate is not necessary. It is no doubt true that when at the instance of the prosecution,

documents of the accused are seized in execution of a search warrant, the prosecution must be given an opportunity to scrutinise the documents. If authority is needed I may refer to the cases of *Mahomed Jackariah and Co. v. Ahmed Mahomed*<sup>5</sup>, and *Ajoy Krishna Sarkar v. S.G. Bose*<sup>6</sup>. The executing officer may with the express or tacit consent of the Magistrate take the goods and documents seized to the prosecutor for examination without first producing them before the Magistrate, but this does not affect the power of the Magistrate to pass orders For the return of the documents to the party from whom they were seized. Similarly in this case though the Magistrate has ordered that the documents seized be produced before the Customs Collector that cannot affect the power of the Magistrate to pass an order regarding their disposal. Any express provision of the Sea Customs Act as to final disposal would no doubt have to be given effect to in respect of the dutiable and prohibited goods seized in execution of a search warrant. Section 179, Sea Customs Act provides that all things seized on the ground that they are liable to confiscation under this Act shall, as soon as conveniently may be, delivered into the care of any Customs officer authorized to receive the same. The terms of Section 179, Sea Customs Act are not inconsistent with seizure by the police and production before the Magistrate. They rather imply that procedure, and provide for what the Magistrate or the police with the Magistrate's consent should do in respect of the disposal of the particular class of goods seized. There is no such provision, however, in respect of the documents seized in execution of a search warrant under Section 172, Sea Customs Act. Accordingly, in respect of the documents the issuing Magistrate's jurisdiction remains unfettered. He must no doubt allow the Customs authorities at whose instance the seizure was made sufficient opportunity to scrutinize the books and papers, but ultimately the disposal of the books and papers must be under the Magistrate's order. There is nothing in the Sea Customs Act to show that the Customs-Collector is the final authority to dispose of the 'papers and books seized in execution of a search warrant under Section 172, sea Customs Act.

8. In the present case no dutiable or prohibited goods were actually seized. Only books, files and other papers were seized under the impression that they would show that Messrs. Palriwala Brothers were engaged in illicit import of prohibited goods through other firms situated in various parts of India. If examination of the books and papers reveals sufficient material to sustain such a charge which would be punishable under Section 167, item 81, Sea Customs Act, a complaint in writing by the Chief Customs Officer or by an Assistant Collector of Customs or other officer duly authorised by the Chief Customs Officer would have to be filed before a Magistrate. The Customs Officer might proceed also under item 8 of Section 167, Sea Customs Act, in which case the Customs authority may dispose of the case. In either case, however, the Magistrate who issued the search warrant has power to insist that the examination is completed within a reasonable time, that papers and books not required For the purpose of the case contemplated be returned promptly to the party from which they were seized and, that the case contemplated, if any, is proceeded with expeditiously. I must hold that the Customs authorities have been wrong in insisting that the learned Magistrate had no power to pass an order directing

<sup>4</sup>39 Cal 953 (PC)

<sup>6</sup>33Cal WN 369 : ( AIR 1929 Cal 176)

<sup>5</sup>15 Cal 109

return of the papers and books seized. They should have applied for time to complete examination of the books and papers on the footing that the learned Magistrate has such power.

9. On the other hand, the interests of justice may be frustrated toy giving effect to the order passed by the learned Magistrate for return of all the books and papers on execution of a bond. If the bond be to produce any document when called upon to do so and the document is of such a

nature that it may be used as evidence against the opposite party in a proceeding under Section 167, item 81, Sea Customs Act or any other penal provision, the opposite party would plead that in view of Article 20(3) of the Constitution he cannot in spite of his bond be compelled to produce the documents and in the circumstances the prosecution would be helpless. The opposite party and his Company would take good care to see that the incriminating documents, if any, cannot be seized again in execution of a search warrant. On the other hand, if any of the documents be innocent or such as would be irrelevant as evidence in a case under Section 167, item 81, Sea Customs Act or any other penal provision, there would be no need on the part of the Customs authorities to move the Magistrate to call For the production thereof in accordance with the terms of the bond.

10. In the circumstances the order passed by the learned Chief Presidency Magistrate directing return of all the books and documents cannot be allowed to stand and must be set aside. The matter will go back to the learned Chief Presidency Magistrate who will allow sufficient opportunity to the Customs authorities to scrutinise the papers and Books seized and to detain For the purpose of any case to be filed the books and papers required for such case and to return all other books and papers. The Customs authorities must co-operate in the matter and decide as soon as possible whether they will file any case and what books and papers may reasonably be required for such a case and indicate what books or papers they do not require. In the meantime if any book or paper is urgently required For the current business of Messrs. Patriwala Brothers, the learned Magistrate may under appropriate conditions permit them to inspect the books and papers In the custody of the Customs authorities and to take necessary copies. It will be open to the learned Chief Presidency Magistrate to extend the time allowed to the Customs authorities for examination if satisfied that such extension was required and it will be open to him to direct return of all books and papers if he finds that the Custom authority is unduly dilatory. Where the number of books and papers is very high and there is an allegation that there is widespread conspiracy to evade customs duty and import or export prohibited goods, the examination cannot be expected to be completed in the course of 21/2 months. The learned Magistrate must give reasonable time in view of all the circumstances, but ultimately he must decide on materials placed before him what would be the reasonable time in this case.

11. This Rule is disposed of accordingly. The order of the learned Chief Presidency Magistrate, directing return of the books and papers on execution of a bond for Rs. 10,000/- is set aside taut the matter is remitted to him to be dealt with by him in the light of the observations made above. In view of the order it is not necessary to go into the further question whether the books and papers could be given to the opposite Daily Gajanand Patriwala in his individual capacity. Order accordingly.