CALCUTTA HIGH COURT

Everett Orient Line Incorporated

Vs.

Jasjit Singh

Matter No. 212 of 1957

(D.N. Sinha, J.)

11.09.1958

ORDER

D.N. Sinha, J.

1. The facts in this case are shortly as follows : The petitioner, the Everett Orient Line Incorporated, is stated to be a Company incorporated under the laws of Liberia, having its registered office at Monrovia in Liberia and its principle office at 310, Sansome Street, San Francisco in the United States of America. No one seems to know where Liberia is situate or Monrovia. While it is not possible to say that they do not exist, it seems that considerable mystery surrounds their location. The Company carries on business in India through its Agent, the Everctt Steamship Corporation, which has its office at No. 35, Royal Exchange Place (Extension), Calcutta. The Company owns a number of ships and has been carrying cargo between Japan and Calcutta via all important ports in Far East and Burma. One of the vessels belonging to the petitioner Company and with which we are concerned in this case, is M/V "Rebeverett". The vessel, in its voyage No. 41, departed from Kobe on 15-6-1957 and after touching at Hongkong, Singapore, Penang and Rangoon as also other places, arrived at the Sand-Head in Calcutta on 11-8-1957 at 12.00 hours, On 12-8-1957 a party of Customs Officers boarded the vessel in the lower reaches of the river Hooghly and kept her under guard whilst she proceeded up-stream to Calcutta. Upon arrival at Panchpara, which is a Customs Boarding Station, Guard Officers and Rummaging Officers searched the vessel and discovered a specially made recess in the roof of the meat-room of the domestic reefer compartment. The recess was ingeniously concealed by a Steel bracket painted with aluminum paint which was so made up as to look like a bracket normally used for the hanging of meat carcasses. The opening to the recess was approximately 9" x 2½" and was kept closed by a wooden plug. The steel bracket was found to have a number of screw-heads welded to it, to appear like genuine screws fastening the steel bracket to the roof of the meat room. The Customs Officers while searching, removed "this bracket and opened up the recess when it was found to contain a number of packets wrapped and fastened with cellophane tapes. In these packets were found 132 bars of gold weighing approximately 2117 Tollas 1 anna 1 pie valued at Rs. 2,11,700 approximately, involving duty amounting to Rs. 31,755/- approximately. These gold bars were not declared in the store list or in the list of private properties of the vessel, as required under the law. Neither the recess nor the

opening are shown in the official plan of the ship. On the finding of these 132 bars of gold, a Mess boy Ma Tseig Shing came forward voluntarily and made a confessional statement to the Customs Officers before the Master of the vessel admitting that the gold was brought on board by him for smuggling into India. He later on retracted this confession. On 24-8-1957 a show cause notice was issued by the Assistant Collector of Customs and Superintendent, Preventive Services, to the owners of the vessel, a copy whereof is annexure-"C" to the petition. It was inter alia pointed out that the presence of the recess specially constructed by removing part of the insulation of the roof of the meat room of the domestic reefer compartment was for the purpose of concealing contraband gold and in which in fact gold was actually found concealed, constitution an offence under Section 52A of the Sea Customs Act and was punishable under Section 167(12A). Sea Customs Act, which rendered the vessel itself liable to confiscation. The owner was called upon to explain and show cause why the gold should not be confiscated and penal action taken against him under Section 167(8) of the Sea Customs Act read with Section 23 A (Foreign Exchange Regulation Act. 1947 and under Section 167(16) and (37) of the Sea Customs Act and why the vessel should not be confiscated under Section 167(12A) of the Sea Customs Act for contravention of the provisions of Section 52A of the said Act The petitioner showed cause. The stand taken by it was that its owners knew nothing about any construction or modification of the ship for the purposes of concealment of contraband gold, nor did they know or were concerned with the smuggling thereof. So far as the owners were concerned, it was alleged that they took all possible precautions to stop any kind of smuggling of contraband goods. It was pointed out that strict instructions have been given to Masters to make searches during the voyage, prior to every departure and arrival from or to any port and that in fact such searches are made with strict care. It was stated that in spite of such warnings the owners have become victims in the hands of wicked criminals and that they were not responsible for any of the alleged offences. Thereupon, there was an enquiry and on 5-9-1957 the Additional Collector of Customs passed an order that the vessel be confiscated under Section 167(12A), of the Sea Customs Act. In lieu of confiscation, however, the Assistant Collector of Customs imposed under Section 183 of the Sea Customs Act, a fine of rupees four lacs only. A personal penalty of Rs. 500/- was imposed upon the Master of the offending vessel under Section 167(12A) of the said Act. A personal penalty of rupees one thousand was also passed against the mess boy Ma Tseng Shing. The petitioners paid a sum of rupees four lacs under protest and the ship was allowed to leave Hawrah. The gold was confiscated. This Rule was issued against the Respondents on 4-12-1957 to show cause why a Writ in the nature of Certiorari should not issue quashing the said order dated 5-9-1957 and why a Writ in the nature of Mandamus should not be issued calling upon the Respondents to forbear from giving effect to the said order and/or why the amount paid should not be refunded to the petitioners and for other Writs. Before me also the same stand is taken by the petitioners as they took before the Additional Collector of Customs. It is stated that the petitioner Company had taken every precaution that could possibly have been taken by the owners to prevent any smuggling or any contravention of the provisions of the Sea Customs Act. In spite of all reasonable precautions, some criminals had surreptitiously constructed a place of concealment and had smuggled goods on board. It is alleged that if a search party of 8 persons went on searching the vessel continuously for 8 hours a day, it would take no less than 40 days to cover the ship on each occasion, if it was expected that such surreptitious actions should be discovered. Under the circumstances it is alleged that the order that has been made for confiscation of the vessel and a fine imposed in lieu thereof is excessively severe and further that it is in contravention of the law. As far as the severity of punishment is concerned that I think cannot be decided in this jurisdiction. If the Customs Officers are within the bounds of the law

taken it is their discretion and not mine which must be exercised to suit the punishment to the offence. It will, however, be necessary to consider whether the order is otherwise in accordance with law, I might mention here that the only part of the order which is challenged before me is the order of confiscation of the vessel and the fine of four lakhs imposed in lieu thereof. Neither the confiscation of the unclaimed gold, nor the other parts of the order are challenged.

2. Mr. Meyer on behalf of the petitioner has taken the following points;

> (1) Section 52A of the Sea Customs Act 1878 read with Section 167(12A), in so far as it renders a vessel liable to confiscation, is ultra-vires, us constituting an unreasonable restriction on the right of shipowners to carry on their trade and business and infringes the provisions of Article 19(1)(g) and Article 14 of the Constitution.
> (2) That the Additional Collector of Customs has committed an error inasmuch as he has come to the conclusion that the only mitigating circumstances that can be considered in such a case must be in defence of the vessel and not of the owners thereof and in holding that the complicity or knowledge of the owners in the commission of the offence is irrelevant for purposes of imposition of the penalty.
> (3) That in any event, the imposition of a penalty of four lakhs is bad.

3. Before I deal with the points raised, I might mention here the principal provisions of the Sea Customs Act, 1878 upon which the case hinges.

4. The first provision is Section 52A, which runs as follows :

> "No vessel constructed, adapted, altered of fitted for the purpose of concealing goods, shall enter, or be within, the limits of any port in India, or the Indian Customs waters."

5. This section, which constitutes Chapter VIA of the Act, was introduced by Section 3 of the Sea Customs (Amendment) Act, 1957 (Act 10 of 1957). The Chapter is entitled, "Prohibition of entry of vessels constructed, etc., for concealing goods."

6. The provisions of Section 167 (12A) of the Act was also introduced by Section 4 of the same Amendment Act. It runs as follows :

> "If a vessel constructed, adapted, altered of fitted for the purpose of concealing goods, enters or is within the limits of any port in India or within the Indian Customs Waters,

12A
Such vessel shall be liable to confiscation and the master of such vessel shall be liable to a penalty not exceeding one thousand rupees."

7. Under Section 178 of the Act, anything liable to confiscation under the Act may be seized in any place in India by any officer of Customs or other persons duly employed for prevention of smuggling.

8. Under Section 183, 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 officer thinks fit.

9. The whole confusion in this case has arisen from the fact that a clear distinction has not been kept in mind between the offence and the penalty. As will appear from the provisions mentioned above, the prohibition is against a vessel which is constructed, adapted, altered or fitted for the purpose of concealing goods, from entering or being within the limits of any port in India or the Indian Customs waters. If a vessel is constructed, adapted, altered or fitted for the purpose of concealing goods and if such a vessel enters or is within the limits of any port in India or the Indian Customs waters, then there is a contravention of Section 52A of the Act. Once a vessel contravenes this provision, it is a" offending vessel, or a "tainted vessel", as it has been called and conies within the mischief of Section 167(12A). So far as the commission of the offence is concerned, the knowledge or complicity of the owners or the builders or of anybody else is immaterial. The question is not whether anybody knows or is responsible for the construction, adaptation, alteration, or fitting of such a vessel for the purpose of concealing goods, but whether the vessel, in fact, is so constructed, adapted, altered or fitted. In the defense that was put up by the owners in this case, as also in the petition before me, it was, inter alia, urged that the offence itself requires deliberateness on the part of the owners. This must, however, be rejected at once. The knowledge or intention of the owners is not a necessary ingredient of the offence and, in fact, is irrelevant for the purposes of considering whether the vessel is a tainted vessel or not. In order to consider whether the offence has been committed, what is to be considered is the physical condition of the vessel. On the other hand, the penalty which has been provided under Section 167(12A) is that the vessel shall be "liable" to confiscation. It is not that confiscation automatically must follow. This is the confusion that has been made in this case and to this aspect I shall presently revert.

10. I shall, first of all, deal with the first point, namely, that these provisions for confiscation are ultra-vires because they infringe Articles 19(1)(g) and 14 of the Constitution. So far as Article 14 is concerned, no such ground has been alleged in the petition, nor has any foundation been made to establish any discrimination. So far as Article 19 is concerned, the fundamental rights conferred by Article 19 of the Constitution are only available to citizens of India. The petitioner company is a company incorporated outside India and is certainly not a citizen. Consequently this defence is not open to the petitioner.

11. Article 5 of the Constitution defines citizenship and it is not disputed that the petitioner cannot be deemed to be a citizen of India. In order to meet this point, Mr. Meyer has cited a Bench decision of the Bombay High Court, *Yusuf Abdul Aziz v. State of Bombay*[1], In that case, the petitioner who was not a citizen of India was charged under Section 497 of the Indian Penal Code. His contention was that Section 497 offended

[1] AIR 1951 Bom 470

against the provisions of Articles 14 and 15 of the Constitution and, therefore, Section 497 was bad and he could not be prosecuted under that section. Chagla, C.J., said as follows :

> "Reliance is also placed upon Article 15. Mr. Rahimtoola, on behalf of respondent No. 1 has taken a preliminary point and that point is that the petitioner is not a citizen and not

being a citizen, he cannot avail himself of the fundamental right embodied in Article 15(1), which enures only for the benefit of citizens Mr. Rahimtoola is right that as far as Article 15(1) is concerned it is only a citizen who can come to this Court for the enforcement of the fundamental right guaranteed to him under Article 15(1). A person who is not a citizen cannot come to this Court for assistance, invoking his right under Article 15(1). But we do not think it right to say that Mr. Peerhhoy's client has come to this Court for enforcement of the fundamental right under Article 15(1). Mr. Peerbhoy's contention is that inasmuch as the law discriminates against citizen and citizen on grounds only of sex, the law is void under Article 13 and as he is being prosecuted under a void law, his prosecution is bad and he cannot he convicted of an offence under a void law. To that extend even a non-citizen may rely on any of the fundamental rights, not indeed for the purpose of enforcing those rights, but merely in order to point out to the Court that a particular law being in violation of any of these fundamental rights is bad, inoperative and no penal consequence can follow from the breach of such a law. If Mr. Peerbhoy could satisfy us that this particular piece of legislation does discriminate contrary to what is provided under Article 15(1), then undoubtedly it would be our duty to say that Section 497 is bad and as Mr. Peerbhoy's client is being prosecuted under a void law, the prosecution must He quashed."

12. This case went up on appeal to the Supreme Court. The decision of Chugla C.J., dismissing the application was upheld by the Supreme Court on other points, but the point as to whether a non-citizen could invoke Article 15 of the Constitution, was left open and not decided see *Yusuf Abdul Aziz v. State of Bombay*[2]*,*

13. With great respect, I fail to see how a non-citizen could take advantage of such fundamental rights as are given only to citizens. Articles 15 and 19 are rights which are only granted to citizens, whereas Article 14 applies to all persons whether they are citizens or not. Where a fundamental right is granted to citizens only, it follows that non-citizens nave no such fundamental right. Therefore, even if a particular legislation can be called into question by those who have such rights, I do not see how a person who does not possess such a right could call into question the legislation as being void, since it can only be avoided if it affects the fundamental rights of a citizen and not that of a person who is not a citizen. With great respect to the learned Chief Justice, I am unable to accept the proposition that he has so broadly propounded. In any event, it is impossible to accept it in the present case, even assuming that the provisions of Jaw which are impugned are unreasonable restrictions. I do not know how the question of unreasonable restriction arises at all in this case. To put it in another way, a non-citizen, not having any fundamental rights guaranteed under Article 19 cannot say that the particular legislation deals with him unreasonably, or is bad because it violates a provision in the constitution which does not apply to him. In my opinion, the petitioner is not entitled to invoke Article

[2] AIR 1954 SC 321

19 of the Constitution. So far as Article 14 is concerned, no such point has been taken in the petition and I do not see where the discrimination comes in. Discrimination can only take place between equals. There can be no discrimination between citizens and non-citizens who belong to

two different classes altogether.

14. Lastly, even if Article 19 applies, I would be willing to hold that the restriction is reasonable. There is wide-spread smuggling in this country and ships, particularly those coming from the Eastern waters, are continuously being apprehended with contraband goods on board, specially smuggled gold. In order to stop this wide-spread evil, it was necessary to introduce firm and comprehensive measures. If the matter is looked at from the point of view which I shall presently adumbrate, the impugned provisions will not appear at all to be unreasonable.

15. This brings me to the second and the real point taken in this application. I have already mentioned that the main defense of the petitioner company, which is the owner of the vessel concerned, is that the owners had no knowledge or complicity in the offence which was committed in finite of all reasonable precautions taken by the owners. As I have also mentioned, above, it is necessary to bear in mind two distinct aspects of the matter, namely, the commission of the offence and the penalty to be imposed. So far as the offence is concerned, the intention or complicity of any person is immaterial. When a vessel is constructed, adapted, altered, or fitted for the purpose of concealing goods and as soon as it enters, or is within the limits of any port in India or Indian Customs water, it becomes a tainted vessel. This provision of law is analogous to Section 168 of the Act, which provides that every vessel, cart, or other means of conveyance and every horse or other animal, used for the removal of any goods, liable to confiscation under the Act, shall in like manner be liable to confiscation.

16. Section 168 of the Act was explained by me in *Annada Prasanna Majumdar v. T.C. Seth*[3] There, certain bags of betel nuts, which were alleged to be smuggled, were being carried in a motor car. The owner of the motor car, who let out the car on hire, denied any knowledge of this smuggling. It was argued that when the Collector came to the conclusion that the petitioner had no knowledge of and did not participate in this smuggling, he was bound to hold in favour of the petitioner and not to impose any fine at all. It appears, however, that the Collector did not come to any definite finding as to whether the owner had actual knowledge of the smuggling. On the other hand, he did not hold that the petitioner had no knowledge. On the facts, however, he passed an order confiscating the motor car under Section 168 of the Sea Customs Act, 1878 and under Section 183 he gave the petitioner an option to pay a fine of Rs. 2,000/- in lieu of confiscation. I relied on the English case of *De Keyser v. British Railway Traffic and Electric Co. Ltd*[4]*.,* and held as follows :

> "In the present case, it may well be that the petitioner had no knowledge of this smuggling, but that is no reason why the offending vehicle or in other words, the vehicle transporting the offending goods, should not be the subject-matter of confiscation under Section 168 . . .. . . Mr. Chatterji has argued that the Court cannot allow an unreasonable exercise of juris diction. Whether it can do so or not

[3] AIR 1956 Cal 553

[4](1936) 1 K.B. 224

> it is clear to the that on the facts of this case, the vehicle is priced at about Rs. 13,000/- and the fine imposed is only Rs. 2,000/-. It appears to be perfectly reasonable. It is not necessary to come to any conclusion as to whether the petitioner took part in this smuggling, but the facts are certainly very curious and require a great deal of

consideration. Taking all the facts and circumstances of this case, I do not think that the fine imposed is either unreasonable or in excess."

17. Mr. Kar appearing on behalf of the respondents has argued that he relies on my observation to the effect that in such cases it is the vessel which becomes tainted and it is irrelevant to consider the intention or complicity of the owner. He says that it is also the effect of the English decision mentioned above.

18. In my decision the distinction between the commission of the offence and the imposition of the penalty has not been developed, because upon the argument advanced and on the facts and circumstances of that case, it was unnecessary to do so. What was argued in that case, was that the offence itself had not been committed because the owner knew nothing about it. This plea was negatived. I, however, did not intend to decide that for the purposes of imposing the penalty, the knowledge or complicity of the owner was irrelevant and should never be considered. That would be giving a wrong interpretation of the English case cited above.

19. The facts of that case were as follows : The respondents therein were at all material times owners of a certain motor tank wagon, which at the material time, was in the possession of one Joseph Harris under the terms of a hire-purchase agreement entered into between Harris and the respondents. An employee of Harris took the tank wagon to a petrol depot where he loaded into the wagon 750 gallons of petrol. He then removed 75 gallons of petrol and replaced it by kerosene and thereby infringed the provisions of Section 4 (1) of the Finance (No. 2) Act, 1931. The respondents were wholly unaware of and free from complicity in, the transaction. The tank wagons were seized by the Officers of the Customs and Excise in accordance with the provisions of the Customs Consolidation Act, 1876 and it was claimed that the tank wagon should be, condemned as forfeited. This was resisted by the owners. Lord Hewart, C.J. said as follows :

> "It seems to me that on a true construction of this statute where certain events have happened - and in the present case there is no dispute that those events have happened - the property in question is labelled "forfeited" under Section 202 ..... What is it that is open to the claimant on such proceedings ? In my opinion, nothing more is open to him than to contend and if need be, to offer evidence to prove, that, on a true view of the facts, the conveyance in question does not come within the class of things which, by Section 202, are forfeited. He may contend with success, for instance, that through error or otherwise a conveyance not liable to be forfeited has been seized. He may say in whatever form is suitable to the relevant facts that the conveyance does not come within the class of things forfeited. But once it is established that the conveyance does come within that class, this undoubtedly rigorous statute gives the claimant no opportunity of asking the Court to take into consideration mitigating circumstances with the effect of removing the conveyance from that class. There is no opportunity for mercy with regard to a conveyance which has been forfeited, although there may be grounds for contending that the conveyance does not come within the class of forfeited property.

In the present case no such contention was advanced. All that was argued on behalf of the

respondents was that they did not know of the wrongful use for which the lorry was employed. That circumstance was wholly irrelevant to the proceedings before the Justices. It did not effect the purpose for which the lorry had been used. If that sort of argument was open to the owner of a conveyance! in such a case as the present, the result might be, in the case of two partners, where one was aware of the wrongful use to which the vehicle was being put and that other was not, that the vehicle might be excused from condemnation because of the innocent mind of one of the partners, that result enuring for the benefit of the guilty partner. In the present case, the argument adduced before the Justices, which was really an argument in mercy, that the owner of the vehicle was not aware of the illegal use to which it was being put, was wholly irrelevant to the only question which the Justices had to consider. That question was : On the facts is it true to say that this conveyance falls within the category of things which are forfeited by reason of the operation of Section 202 ? On the facts of this case the Justices had no option. The only course open to them was to condemn a conveyance that was forfeited under Section 202."

20. Pausing here for a moment, it will appear that this extract from the judgment of Lord Hewart, C.J. goes to support fully the argument put forward by Mr. Kar. It is, however, necessary to look at the provisions of the English Act, a little more closely in order to understand the real meaning of the observations made by Lord Hewart.

21. The relevant provisions are Sections 202, 207, 209 and 226 of the English Customs Consolidation Act, 1876 (39 and 40 Vict. c. 36). Under Section 202, - "All .... conveyances, ... made use of in the importation. landing, removal or conveyance of any uncustomed, prohibited, restricted or other goods liable to forfeiture under the Customs Acts shall be forfeited ... ..

22. Section 207 speaks about the procedure of giving notice to the owner and lays down how claims are to be preferred. Section 226 lays down the duty of the Justices dealing with such forfeiture. Section 209 is, however, important and must be set out :

> "209. Power to restore seizures and mitigate penalties : When any seizure shall have been made or any fine or penalty incurred or inflicted, or any person committed to prison for any offence under the Customs Acts, the Commissioners of the Treasury or Customs may direct the restoration of such seizure, whether condemnation shall have taken place or not, or waive proceedings, or mitigate or remit such fine or penalty, or release from confinement either before or after confiscation such person on any terms and conditions as they shall see fit."

23. The position under the English Law was, therefore, as follows : If a conveyance was made use of in the importation, removal etc., of prohibited or restricted goods, then the conveyance "shall" be forfeited. In this respect, the law was obligatory and there is no option given. This, however, is not the last word on the subject because under Section 209, the owner, or a person concerned, may urge mitigating circumstances before the Commissioners of the Treasury or Customs who have power to give relief. This aspect of the matter has been brought out by Humphrey, J. in the same case. The learned Judge observed as follows :

> "A good deal has been said in this case about the hardship which might result in the case

> of some valuable vehicle being forfeited because some person happened to be in it who had in his possession goods liable to forfeiture. The answer to that contention is to refer to Section 209, by which most ample provision was made for the remission by the Commissioners themselves of the forfeiture which has already been decreed ..... One must assume that the Commissioners will act reasonably and without undue hardship if an application is made to them to remit the forfeiture which the law has imposed on some vehicle."

24. The learned Judge explained what the duties of the Justices were under the Act. So far as the Justices were concerned, the only object in asking for an order from them was to give effect to the forfeiture which had already taken place. The only question with which the Justices were concerned was a question of fact whether the goods were liable to forfeiture under the Customs Act. There was nothing to be found in any pan of the Act of 1876 which entitled the Justices to enter on a roving enquiry into the circumstances of the case and the rights of the parties inter se and to decide whether or not they should override the perfectly clear terms of Section 202. When once it was found that the vehicle had been used for the conveyance of goods liable to forfeiture, that vehicle had to be forfeited.

25. It is clear, therefore, that the principle whereby a vessel becomes a tainted vessel has to be considered in the background of the Act of 1876. So far as the offence is concerned, once a conveyance is used for the purpose of transporting a prohibited or restricted article, the offence is committed and the conveyance must be forfeited. There is, however, under the English Law, an appeal to the Commissioners of the Treasury or Customs, who can consider the mitigating circumstances and do justice between the parties. It would thus be an incorrect view of the English Law to say that the owner could not at any stage put forward mitigating circumstances, for example, his own lack of knowledge, want of complicity and/or impossibility of checking unauthorized commission of an offence.

26. Coming now to the Indian law, we find that the prohibition is contained in Section 52-A of the Sea Customs Act and the penalty in Section 167 (12-A). Coming to the latter section, we find that the imposition of penalty is not in obligatory terms as under the English law. All that is said is that the vessel "shall be liable to confiscation." There is also no provision equivalent to Section 209 of the English Act, What, then, is the meaning of the words "shall be liable to confiscation ?" Mr. Kar argues that it can only mean that if the offence is committed, then the vessel must be confiscated. I do not think that this is a reasonable interpretation.

27. In this connection, two English cases might be cited. One is *Grivell v. Malpas*[5], In this case, Sub-Section 3 of Section 47 of the Public Health (London) Act, 1891 was being considered. It was held that the words "any article liable to be seized" meant any article "prima facie" liable to be seized. The next case is *Wickhambrook Parochial Church*

[5](1906) 2 KB 32

Council v. Croxford,[6] In that case, the word "liable" as appearing in Sub-Section 3 of the Chancel Repairs Act, 1932, was interpreted. Lord Haa worth M.R. held that the word "liable" meant that a person was imperiled of having something done to him and to which he was exposed and subjected to, or from which he was likely to suffer.

28. It appears to me that the position under the Indian Law is that if a vessel conies within the mischief of Sen. 52-A, that is to say, if it is constructed, adapted, altered or fitted for the purpose of concealing goods and if it enters or is within the limits of any port in India or the Indian Customs water, then it becomes a vessel which has satisfied the conditions laid down in Section 52-A and, therefore, becomes a tainted vessel. The offence is committed as soon as such a vessel enters the prohibited area and for that purpose, the knowledge, intention or complicity of the owners is immaterial. But such questions or any ether mitigating circumstances are not irrelevant when considering the imposition of the penalty.

29. Section 167(12-A) of the Act declares such vessels to be "liable" to confiscation, that is to say, open to the peril of confiscation. It may, however, be that the Custom authorities, having considered all the facts of a given case, would not consider, the matter deserving of the extreme penalty of confiscation. I will explain this a little farther. Section 52-A speaks about construction, adaptation, alteration etc., for the purpose of concealing goods. Such construction, adaptation etc., must necessarily be of an infinite variety. A ship may be big or small. Even a medium size ship would now a days cost a gigantic sum. A large size ship may cost crores. Supposing that a sailor makes a little hole underneath his bunk in order to conceal a muggled watch he has picked up in the last port. That would certainly make the vessel an offending vessel, upon a strict interpretation of Section 52-A. But does it mean that the whole ship worth crores should by that reason alone be automatically confiscated ? In my opinion, that is neither the provision of law as I find it, nor could it have been the intention of the legislature to impose such a law. There is no obligatory word used for imposing the penalty of confiscation in each and every case. Therefore, while under the English Law of 1876 there was bound to be confiscation at the first instance with a right to the Commissioners to do justice between the parties and mitigate the rigours of confiscation, in India there is no obligation to confiscate in the first instance and it is open to the Customs authorities to consider all mitigating circumstances at the earliest possible moment and to do justice between the parties. From that point of view, there is no prohibition upon the Customs authorities to consider every kind of mitigating circumstance, which will includes a pica on behalf of the owners as to their absence of knowledge and complicity in the commission of the offence and the impossibility, or an enormous difficulty in ensuring a vessel from being tainted altogether and at all times. That being so, let me come to the facts of the present case and consider as to whether the decision of the Additional Collector of Customs in this case is in accordance with this view of the law.

30. The order of the Additional Collector of Customs with which we are concerned in this case, dated 5-9-1957, is Ex. 'E' to the petition. The Additional Collector of Customs, first of all, gives the facts of the case and delineates the defense taken by the owner. He has rightly held that so far as the off once committed is concerned, the intention of the owners is irrelevant. Upon this point what has been held is as follows :

[6](1935) 2 KB 417

> "The plain meaning of the text suggests that as soon as a vessel constructed, adapted, altered or fitted for the purpose of concealing goods enters or is within the limits of any port in India, it, according to Section 167 (12-A) of the Sea Customs Act, becomes an offending vessel, rendering itself liable to confiscation without any regard to the fact as to who the owners of the vessel are or to the extent to which they might be implicated. It is the vessel which had committed the offence as it were and on which the section imposes

the penalty of confiscation."

31. To this there is very little to say. The next question, however, is as to the imposition of the penalty. Upon this point, as I have already pointed out, the mitigating circumstance, such as, the want of knowledge or complicity on the part of the owners is a relevant circumstance and may be considered or taken into account. It is on this point that the Additional Collector of Customs has fallen into an error. He holds as follows :

> "I accordingly informed the representationists that if they had any mitigating circumstances to place before me in respect of this charge, these must be in defense of the vessel such as, for instance, that the cavity found was not for concealing goods etc. On the facts of the case it had been shown that this particular cavity on board M/V. "Rebeverett" having been constructed in the manner described earlier, ...it cannot but be held that the said construction had no other purpose except to conceal goods. The representationists appreciated the legal position and had nothing to add but repeated that the fact that the owners would in fact suffer the loss should be considered as a mitigating circumstance."

32. The ship was confiscated and a fine of Rs. 4,00,000/- was imposed in lieu of confiscation. In fact, the fine has been paid and the ship has left the harbour. Although the matter has not been clearly expressed, it is quite clear and Mr. Kar appearing on behalf of the respondents argues that it is clear, that the Additional Collector of Customs was following what has been laid down in the judgment of Lord Hewart, C.J. mentioned above. In so far as it has been held that an offence had been committed, the finding is quite correct, but in holding that the only mitigating circumstance that can be considered is the tact as to whether the construction, adaptation, alteration etc., conies within Section 52-A or not, is taking too narrow a view of the matter and, therefore, the Additional Collector of Customs obviously fell into the error of overlooking the fact that the other mitigating circumstances like the ones that were put forward on behalf of the owners, could be taken into consideration for the purposes of the imposition of the penalty. I do not say that upon a consideration of such facts the Additional Collector of Customs must necessarily come to a different conclusion in this case. But what has to be ensured is that he has a dear conception of the law on the subject and has exercised his mind and the discretion given to him by law, in a proper manner. This he has failed to do in the facts and circumstances of this case and to the limited extent mentioned above.

33. The last point that was taken is that the imposition of a fine of four lakhs of rupees under Section 183 is not in accordance with law. The argument of Mr. Meyer is that under Section 183 an option to pay a tine in lieu of confiscation can only be given in the case of confiscation of 'goods.' He argues that a vessel cannot be called "goods" and, therefore, there is no application of Section 183. This is a strange argument to make at this stage. If this argument was taken at the proper stage before the authorities below, they might have confiscated the ship without giving an option to pay a fine. Having availed itself of the advantages conferred by Section 183 and having removed the ship, which is worth many times the fine paid, the plea comes with ill grace from the petitioner that no such option should have been given. However, apart from this aspect of the matter, I do not think that there is any substance in the point. Mr. Meyer has pointed out that the word "goods" has been used in various parts of the Act and sometimes, as in Section 167 (10), it

has been used in contradistinction to the word "vessel." He argues that it was not possible, therefore, to enlarge the meaning of the word "goods" to include a "vessel." In my opinion, this is too narrow a reading of Section 183. In my opinion, the word "goods" in Section 183 would include a vessel when it is the question of the vessel being confiscated.

34. That being so, the question is what should be the form of order that should be made in this case. As I have stated above, the Additional Collector of Customs in considering the matter has fallen into the error of overlooking one aspect of the case, namely the factors to be taken into consideration before imposing a penalty. This, however, is a fundamental point and while I am unable to hold that in the facts and circumstances if they were rightly considered, there would have been no order of confiscation; equally it might well have been, if the proper factors were taken into consideration, that the penalty imposed might have been less severe. The petitioner company is, therefore, entitled to have the matter re-considered from the proper point of view and the error, in my opinion, appears on the face of the impugned order. On the other hand, it must be considered that the fine has been paid and the ship has been removed outside jurisdiction. It would be inequitable to order the fine paid to be at once refunded without the petitioners bringing their ship back to the port. As a matter of fact, I am not sure that I can at all order refund in this application because moneys must have merged in the general revenue. What I shall, therefore, do is to issue a writ in the nature of Certiorari quashing the order of the Additional Collector of Customs dated 5-9-1957, only in respect of the confiscation of the ship and payment of a line in lieu thereof and direct that the matter may now be re-considered in accordance with law. But, meanwhile I shall restrain the petitioned by an injunction from taking any steps for the refund of the fine which has been paid, pending the disposal of the matter by the Customs authorities which must be done within a reasonable time not exceeding six months from date of service of the order. There will be no order as to costs. I make it clear that the other parts of the order of the Additional Collector of Customs particularly the confiscation of the gold is not touched by this order.
Order accordingly.