KERALA HIGH COURT

Arthur Import and Export Co

Vs.

Collector of Customs

O.P. No. 278 of 1956

(Kumara Pillai and Vaidialingam, JJ.)

13.01.1958

JUDGMENT

Vaidialingam, J.

1. This is an application under Articles 226 and 227 of the Constitution by Arthur Import and Export Company. Bombay, for the issue of a writ of certiorari or other appropriate writ, direction or order to quash the levy imposed on the applicants by the 1st respondent, the Collector of Customs, Cochin and the orders passed by the 2nd and 3rd respondents, the Collector of Customs, Madras and the Union of India represented by the Joint Secretary, Ministry of Finance (Revenue Division) New Delhi. There is also a further prayer to direct the Collector of Customs, Cochin, the 1st respondent, by issuing a writ of mandamus, to refund the amount of Rs. 81,993-8-0 stated to have been illegally collected from the applicants.

2. It will be seen from what is stated above that the Collector of Customs. Cochin, the Collector of Customs, Madras and the Union of India represented by the Joint Secretary, Ministry of Finance (Revenue Division) New Delhi, are respondents 1 to 3 respectively in the application. The events leading up to this application, as can be gathered from the affidavit and the application are as follows :

3. The petitioners, under license issued to them imported 344 bales of Viscoss bright bleached Rayon staple fiber from Japan. The consumers are stated to be certain Mills in Coimbatore. According to the petitioners the quantity in terms of pounds will be lbs. 103368 and their value at Rs. 1-3-3 per lb. will be somewhere about Rs. 1,27,973-15-0. The goods were shipped from Japan by s.s. 'ASAHISAN-MERU' and the port of destination was Cochin. The ship, when it arrived at the port of Karachi on its way to Cochin, caught fire on 6-8-1954 and in spite of all efforts, the fire could not be extinguished and so the vessel was sunk and subsequently, the petitioners' goods were salvaged.

4. According to the petitioners, the staple fiber bales were damaged by fire, sea water and fresh water and in view of the extensive damage, the value of the goods had deteriorated considerably. In that wet, dirty, and smoky condition, the salvaged goods were transported to Cochin by

another ship s.s. 'Ordia' and the said consignment reached Cochin on 1-11-1954. According to the applicants, the insurance Company has assessed the salvaged value of goods at Rs. 6,000 and the Lloyd's surveyor report fixes the value of those goods at an amount not exceeding Rs. 12,890. The price of the goods had also considerably depreciated to 2 annas per lb. The salvaged goods, in view of the severe damage sustained by fire and the sinking of the ship, have become goods of a different description from those which had been exported from Japan. The bales were so soaked in sea-water; extraneous substances entered the contents of the bales and affected the fibers. The fibers were jammed, changed colour, and have also lost their brightness and strength. The petitioners applied for rebate of duty to the 1st respondent, under Section 33 of the Sea Customs Act.

5. But in spite of all these circumstances, the 1st respondent assessed the goods at a duty of Rs. 31 993-8-0 based on the value given in the invoice. The amount was paid under protest. According to the petitioners, the Collector of Customs, Cochin has not taken the actual condition of the goods and the decomposition of the entire lot of fiber. He has acted on the advice of the Textile Commissioner. Bombay which is ex parte, and based on no material.

6. The petitioners filed an appeal to the Collector of Customs, Madras on 8-3-1955 against the order of the Collector of Cochin levying and collecting the full duty of Rs. 31,993-8-0. The Collector of Customs. Madras dismissed the appeal by his order dated 14-6-1955 without assigning any proper reasons and without hearing the parties and the said appellate order is of no legal force and is devoid of merit.

7. The petitioners again applied to the Collector of Customs, Cochin on 8-3-1955 for refund of the duty collected from them. But the Cochin Officer the 1st Respondent, by his order dated 18-7-1955 rejected the same on the ground that the duty has been correctly levied and the Collector of Customs, Madras has rejected the appeal against the order levying the duty.

8. The applicants further filed a revision to the Government of India (Revenue Division) New Delhi, against the order of the Collector of Customs, Madras rejecting their appeal. The Government of India, by its order dated 8-3-1956 also rejected the revision on the ground that there is no reason to interfere with the order passed by the Collector of Customs, Madras, in appeal.

9. The order of the Collector of Customs, Cochin declining the order of refund, the appellate order of the Collector of Customs, Madras confirming the duty levied by the Cochin Officer, and the order of the Government of India rejecting the revision against the order of the Collector of Customs, Madras, are all marked as Exts. A, B and C respectively in these proceedings.

10 The petitioners further state that the order of the Collector of Customs, Cochin Ext. A, declining to grant a refund is the operative order affecting the rights of the petitioners and the same is ultra vires, illegal and beyond jurisdiction. It is also stated that the effective order, namely, Ext. A has to be quashed inasmuch as it is passed by an authority resident within the jurisdiction of this court.

11 Finally it is prayed that this court should call up the records and quash the levy by the Collector of Customs, Cochin dated 7-3-1955 as also his later order of 18-7-1955. The later order is that evidenced by Ext. A. There is also a prayer to declare the orders evidenced by Exts. B and

C as void and inoperative and also to issue a writ of mandamus directing the 1st respondent to refund the amount of Rs. 31,993-8-0 illegally collected with interest and for costs.

12 The 1st respondent has filed four counter affidavits. In the counter-affidavit dated 20-3-1957, the contentions set forth below have been raised.

13 The applicants do not constitute a company and Arthur Import and Export Company is not a legal entity entitled to file this application. This court has no jurisdiction to entertain this application in view of the fact that the petitioners are seeking interference with the orders passed by respondents 2and 3 who are not within the jurisdiction of this court, and those respondents have also passed the orders at places outside this court's jurisdiction. The order of assessment passed by the 1st respondent has merged in the subsequent appellate order of the 2nd respondent and the final revisional order of the 3rd respondent and it is the final order evidenced by Ext. C that is the outstanding order at present. Without interference with the orders passed by respondents 2 and 3, the original order of assessment passed by the 1st respondent cannot be interfered with. No declaration can be granted in these proceedings against the orders evidenced by Exts. B and C. Further, having exhausted their remedies available under the Sea Customs Act it is not open to the petitioners to come again and seek relief under Articles 226 and 227 of the Constitution.

14 The position taken up by the applicants that the order Ext. A has to be quashed and that it is capable of compliance by an authority resident within the jurisdiction of this court is disputed. No writ of mandamus can he against the 1st respondent directing the refund of the amount collected as duty.

15. Without prejudice to these preliminary objections, the 1st respondent also raised his defense on the merits of the application. The department does not admit that the commodity was damaged by fire or that the damage was so extensive as to make the goods deteriorate considerably in value. The Ship Master's report does not disclose the condition of the goods. The Lloyd's Survey Reports and the entries thereon have no probative value until it is tested by cross-examination of the party who actually surveyed the goods.

16 It is also stated that when the goods arrived at Cochin, the petitioner's clearing agents namely, Pierce Leslie and Co. Ltd., applied to the Customs authorities for an abatement of duty under Section 33 of the Sea Customs Act. A further request was made by the said clearing agents that the value of the goods may be assessed by the Customs Appraiser for purpose of ascertaining the duty. An examination of the goods for purpose of assessment of the value, revealed that though they were slightly wet on account of contact with sea-water, they were not damaged either by smoke or fire. Even the discoloration was very negligible being confined to those parts of the bale where the fiber was in contact with iron hoops.
Even outer covering of the bales were found not affected by fire. Nevertheless, representative samples were drawn from the consignment in the presence and to the satisfaction of the clearing agents and forwarded to the Textile Commissioner, Bombay for analysis and expert report as to the spinnable value. The Textile Commissioner sent a report after examining the samples and gave his opinion that contact with sea-water does not affect staple fiber and that rebate can be given only on the discolored portion of the goods. But as the discolored portion was very negligible, after physical examination of the goods, the Customs Appraiser assessed the value of

the goods at Rs. 1.27,973-15-0, and that was fixed as the 'real value' of the goods.

17 The Department also stated that the 'real value' was ascertained after proper inquiry and that duty was levied and collected only on such 'real value'. It is also stated that the customs authorities have no information regarding the value arrived at by the Insurance Company, and in any event, it is not binding on the Department. The Department does not further accept the contention about the depreciation of the goods to 2 annas per lb. or of the fact that the damage was so extensive as to render the goods different from those exported from Japan. The Department maintained that the goods were really worth the amount on which duty was levied and collected by the Department. They again relied upon the expert opinion of the Textile Commissioner, Bombay that contact with sea-water cannot affect the quality or utility of the staple fiber and that even after contact with sea-water, the fiber can be utilised for spinning purposes after the drying and that only the discoloured portion can be considered to have been damaged. But according to the 1st respondent, the discoloured portion was so negligible that there was no appreciable deterioration in the quality or value of the goods.

18. The Department admits the levy and collection of duty amounting to Rs. 31,993-8-0 and it is stated that this amount was paid by the clearing agents of the consignees on behalf of the latter, as the clearing agents were convinced that the claim for abatement was not tenable. The 1st respondent further denied the giving of any assurance to the petitioners that the duty paid will be refunded after reference to the Collector of Customs, Madras.

19 After the order levying the duty has been upheld by the Collector of Customs, Madras, it is stated that the order refusing a refund, as evidenced by Ext. A. was perfectly correct and within the jurisdiction" of the 1st respondent. The 2nd respondent has taken all relevant circumstances in disposing of the appeal against the petitioners. Similarly, it is also stated that the order Ext. C was passed by the Government of India after taking all circumstances into consideration. In view of the orders covered by Exts. B and C, it is not open to the petitioners to claim any refund from the 1st respondent and the order refusing a refund covered by Ext. A is not the real operative order affecting the rights of parties. The real operative order is the one levying a duty by the 1st respondent by its order dated 16-2-1955 which has been confirmed by the appellate and revisional orders evidenced by Exts. B and C respectively. It is also stated that the order dated 16-2-1955 has been passed after due enquiry and after taking into consideration the representation made by the petitioners and that the real value of the goods was estimated after due enquiry and the duty thereon was levied accordingly. The whole proceedings relating to the levy and collection of duty are within the jurisdiction of the 1st respondent and the order passed is perfectly legal and competent in law.

20 The petitioners filed a supplementary affidavit on 22-3-1957 in which they stated that the petitioner-company is a registered partnership firm and that they are entitled to maintain the application. But they disputed the statement in the counter affidavit of the 1st respondent that representative samples were drawn from the consignment in the presence of and to the satisfaction of the consignee's representative and forwarded to the Textile Commissioner, Bombay. They even alleged that such a statement is false to the knowledge of the deponent of the counter-affidavit.

21 They also alleged that the Textile Commissioner is not an expert and that the alleged

examination by him was not done with the concurrence of the petitioner. They again reiterated their original allegations that the real value of the goods was never ascertained by the Department after proper enquiry and the value arrived at by them is also not the real value. It is further stated that the 1st respondent has not complied with the provisions of law in the matter of the ascertainment of either the quality of the goods or their real value.

22 The 1st respondent filed a supplementary counter-affidavit dated 25-3-1957 disputing the fact that the petitioner firm is a registered partnership. It is also stated that Messrs. Pierce Leslie and Co., Ltd.. were the clearing agents of the petitioner and those agents have been acting for and on behalf of the petitioners in the various stages connected with the clearing of the goods and even thereafter. It is again reiterated that representative samples were drawn from the consignment in question in the presence of the representative of M/s. Pierce Leslie and Co. Ltd.. and the endorsement to the effect.

> "We are satisfied that the samples have been drawn in our presence and are representative of the consignment covered by this B/E

Sd/
For PIERCE LESLIE and CO. Ltd.."
is also given. It is further stated that M/s. Pierce Leslie and Co. Ltd., knew that the samples were drawn for the purpose of being sent to the Textile Commissioner for his expert opinion and that he is an expert competent to express his opinion on the matter in dispute. It is again stated :

> "The petitioners' representative Sri S. N. Puri had been duly appraised of the opinion of the Textile Commissioner before it was relied upon by the Department."

23 There was again a memorandum dated 1st April 1957 filed by the petitioners' Advocate enclosing copies of the deed of partnership and also an extract of the Registrar of Firms, to prove that the petitioner is a Registered firm and as such, entitled to maintain this application. There was again another supplementary counter-affidavit dated 5-4-1957 filed by the 1st respondent. Therein the 1st respondent raised a point not covered so far by bis previous counter-affidavit. That related to the delay on the part of the petitioners in filing a writ application in this court on the ground that the order Ext. C was made as early as 8-3-1956 and the application was filed in this court only as late as September 1956. On this ground the 1st respondent contended that the application has to be dismissed in limine.

24 The 1st respondent filed a final supplementary counter-affidavit dated 8-1-1958, on 9-1-1958. In that it is again reiterated that representative samples from the consignment in question were taken on several occasions in connection with the assessment of the goods. It is stated that besides the samples, taken on 3-3-1955 and other days, representative samples had been drawn in the presence of Sri S. Bayros, representative of M/s. Pierce Leslie and Co. Ltd., on 13-1-1955. Mr. Bayros has endorsed on the Bill of Entry in his own handwriting on 13-1-1955 to the following effect:

> "Samples are drawn in our presence and all representative of the consignment." It is further stated that this entry was made in the presence of the Customs Examiner and the

shed appraiser and that one of the representative samples taken on that day was sent to the Textile Commissioner, Bombay for his opinion.

25 The above narration concludes the various points taken by the petitioner as also the several contentions raised on behalf of the Department.

26 It may be mentioned that the ship in which the cargo was under transhipment, appears to have caught fire on 6-8-1954 and the ship was sunk on' the same date. It also appears to have been refloated on 8-8-1954. This is borne out by the report of the Master of the ship dated 9-8-1954 Ext. D. There appears to have been a surveyor's report on 16-11-1954 as to the condition of the cargo and that report is marked as Ext. E. It is seen from that report that the bales were opened and examined on the request of the consignee and that the bale bands are rusty and intact. Outer packing is fully damaged and contents completely discoloured. It is also stated that all bales are wet and water remains in the middle of each bale. It is also seen that after arrival at Karachi, the goods were under inspection by the Customs authorities between 12-11-1954 and 10-1-1955 and this is evidenced by Ext. F, wherein it is stated that the contents are damaged by sea-water and unfit for use for which it is imported.

27 There is also a further report Ext. G dated 17-12-1954, estimating the value of the damaged staple fiber at 2 annas per lb., being its salvage value. There is also a certificate by the South British Insurance Co.. Ltd.. dated 19-12-1955, Ext. H to the effect that the Insurance Company has paid to the petitioner firm full claim in respect of 172 bales damaged by fire. It is also stated that the damaged goods were subsequently delivered to the petitioner-company against payment of Rs. 6,000/-as salvaged value of the goods. Exts. A to H conclude the documents filed on behalf of the applicants.

28 The 1st respondent has filed on his behalf-certain documents and they will be referred to presently and they are marked as Ext. 'R' series.
29 The first document Ext. R1 contains extracts dated 13-1-1955 of the notes made by the Examiner and the shed-Appraiser. It is stated that the bales had been opened and examined. Damage to the staple fiber is due to sea-water spread on the bales. Sea-water penetrated inside and made the staple fiber wet. Besides this the contents of the bales appear as any ordinary staple fiber. There is no discoloration and it is not even soiled except by the rest of the hoops.

30 The 2nd document, Ext. R2, is a letter dated 25-1-1955 by Pierce Leslie and Co., Ltd.. to the respondent regarding the 344 bales staple fiber. The latter states that all the bales had been opened for the inspection of the 1st respondent and that the Bill of Entry has been forwarded to the 1st respondent by the shed Appraiser. Information is asked for as to whether the percentage of damage sustained to the goods has been decided and the letter further requests an expeditious disposal of the matter.

31 The 3rd document filed on behalf of the 1st respondent is Ext. R-3. the report dated 8-2-1955 by the Textile Commissioner, Bombay on the samples sent to him. It is stated therein that the samples of staple fiber have been examined and that no sign of damage is observed except that a small portion of the sample is found discolored. A further portion of the sample is stated to have been found to be damaged due to wetting of the bales by sea-water. It is again stated that as sea-

water does not contain substances likely to damage, the staple fiber can be utilized for spinning purposes after drying. The report further says that it is not possible to give any opinion from the samples submitted regarding damage due to discoloration, as the extent of such damage can be judged only by complete physical examination of the bales in question. The report winds up by saying that the discolored portion may be treated as damaged and rebate to duty allowed on the same accordingly.

32. After the receipt of the Textile Commissioner's report, the 1st respondent passed the order dated 16-2-1955, Ext. R4 assessing the duty on the goods on the full invoice value. Though it is stated in the petition that the order levying the duty by the 1st respondent is one dated 7-3-1955. it is now agreed by all parties that the real order by the 1st respondent levying the duty is this Ext. R4 dated 16-2-1955. Ext. R4 runs as follows :

> "In view of the Textile Commissioner's advice at 3 per cent that sea water does not contain substances likely to damage staple fiber, no abatement due to wetting is admissible. As discoloration is negligible, no abatement on this ground is also admissible. The goods may be assessed on the full invoice value and released. A delay certificate for the full period from 12-11-1954 to date may issue.

Sd- Principal Appraiser,
16-2-1955.
Sd. Collector".

33. On 3-3-1955 the clearing agents wrote a letter Ext. R5 to the 1st respondent stating that they intend to deposit the import duty on the goods under protest and appeal to higher authorities. The letter further contains a request to the 1st respondent to draw fresh samples in triplicate in their presence to enable them to submit to the collector of customs, Madras on appeal against the ruling of the 1st respondent. It is also stated that the clearing agents will request the Collector of Customs, Madras to send one sample to a surveyor of his own choice and one sample to the surveyor nominated by them.

34 There is no dispute that the duty levied under Ext. R4 was actually paid by the petitioners or on their behalf by their clearing agents on 7-3-1955 under protest. There is only one more document filed on behalf of the 1st respondent and that is Ext. R6 being the memorandum of appeal dated 8-3-1955 filed by the petitioners to the Collector of Customs. Madras against the order levying duty, that is, Ext. R4. It is not necessary at this stage to detail the several grounds mentioned in Ext. R6.

35 It will be seen from the facts mentioned above that the main grievance of the petitioner is against the levy and collection of duty based on the order dated 16-2-1955 of the 1st respondent, Ext. R4. It is by virtue of that order that the duty was collected and paid by the petitioners on 7-3-1955. That order was taken up in appeal by the petitioners to the collector of customs, Madras as is evidenced by Ext. R6. The order under Ext. R4 was confirmed by the collector of customs, Madras by his order dated 14-6-1955, Ext. B. In the said order, the collector of customs, Madras has considered the several contentions raised by the petitioners in their memorandum of appeal Ext. R6, and has finally rejected their appeal.

36 On the same date as they filed the appeal, which resulted in the order Ext. B, the petitioners also filed an application before the 1st respondent for refund of the duty collected on the goods as per order Ext. R4. The 1st respondent passed an order on 18-7-1955 evidenced by Ext. A. As by this time the appellate order of the collector of customs, Madras. Ext. B had been passed, the 1st respondent stated in Ext. A that the grounds on which refund is claimed were also the grounds on the appeal to the collector of customs, Madras against the levy of full duty. The appeal has been rejected by the collector of customs, Madras and therefore the 1st respondent held that the duty has been correctly levied and that no refund is due. In this view, he rejected the claim for refund.

37 As stated earlier, the order under Ext. B was taken up by the petitioners in revision to the Government of India (Revenue Division) in Customs Revision Application No. 422/56. The Government of India on 8-3-1956 passed orders. Ext. C confirming the order of the collector of customs, Madras covered by Ext. B and dismissed the revision filed by the 1st respondent. After all these proceedings, it is stated in the application before us that the order of the 1st respondent covered by Ext. A is the operative order affecting the rights of the petitioner and that Ext. A is ultra vires, illegal and beyond jurisdiction. It is also stated in paragraph 21 of the application that the effective order sought to be quashed is capable of compliance by an authority resident within the jurisdiction of this court and as such, the writ of mandamus is prayed for against the 1st respondent to compel him to repay the duty collected.

38 We may at the outset state that we are not satisfied that the order Ext. A is the operative order affecting the rights of the petitioner. In our opinion, Ext. R-4 dated 16-2-1955 is the order by the 1st respondent directing the assessment of duty on the full invoice value. It may be a right or wrong order. But that is not the point for consideration now. That will be considered later in the judgment. This order Ext. R-4 has been confirmed by the orders of the appellate and revisional authorities as is evidenced by Exts. B and C. Therefore so long as the order of assessment is in force and against the petitioner, it is not open to him to treat those orders as non-existing and rely upon the order Ext. A, refusing to refund, as the only operative order. When the assessment order has been confirmed by the higher authorities and is in force, it follows that the petitioner is not as of right entitled to claim a refund. Therefore, prima facie, the order covered by Ext. A refusing to refund is one passed with jurisdiction and correct in law so long as the orders Exts. R-4 B and C. are in force. In fact, in Ext. A itself it is stated that the application before him is only based on the same grounds on which the order of assessment was challenged in the appeal to the collector of customs, Madras and that the Collector of customs, Madras has rejected the contentions of the petitioner. Therefore the sole ground on which the application for refund is rejected is substantially the order covered by Ext. B confirming the order of the 1st respondent Ext. R-4. We do not see anything illegal or the exercise of an excess of jurisdiction, when the order Ext. A was passed. Therefore, in our view, the petitioner will not be entitled to claim any relief whatsoever on the basis of the order covered by Ext. A alone, unless he is able to satisfy us that the orders covered by Exts. R4 B and C are open to review by this court.

39 Mr. T. N. Subramonia Iyer, learned counsel for the applicants referred us to a decision of the Rajasthan High Court and to certain decisions of the Travencore-Cochin High Court that an order for refund by issuing a writ of Mandamus as prayed for by him, can be issued in proceedings under Articles 226 and 227 of the Constitution. But it is unnecessary for us to consider either the scope of those decisions or the powers of the High Court to so direct refunds under Articles 226

and 227 in the view we take in this matter that it is not open to the petitioner to claim any relief by way of refund attacking the order Ext. A alone without having the proceedings covered by Exts. R4. B and C set aside on some ground known to law.

40 Therefore, the most important question will be as to whether the order covered by Ext. R4, confirmed by the appellate and revisional authorities under Exts. B and C, is open to attack by the petitioner in these proceedings under Articles 226 and 227 of the Constitution.

41 Before considering the substantial points raised in this application, we may dispose of some of the minor contentions raised on behalf of the 1st respondent, and they relate to the right of the petitioners to file this application and the delay in the matter of filing this application. Though the 1st respondent disputed that the applicants are a registered firm, the petitioners have placed before us sufficient material to show that the applicants are a firm registered under the Indian Partnership Act In fact, though the 1st respondent challenged the right of the petitioners to file this application, the learned Government Pleader has not really seriously disputed the right of the petitioner to file this application. In fact, he could not in view of the deed of partnership and the certificate of the Registrar of Firms filed in this case. Therefore, we see no substance in this objection of the 1st respondent.

42. The 1st respondent has also raised the contention that this application for a writ of certiorari should be dismissed in limine on the ground that there has been delay in the matter of filing of this application. The order of the Government of India in revision evidenced by Ext. C was passed on 8-3-1956 and this application was filed on 7-9-1956. Though ordinarily, a party invoking the jurisdiction of this court under Article 226 should come at the earliest possible moment, still in this case, we are not satisfied that the application should be dismissed on the sole ground of delay. In fact, this objection regarding delay is clearly an after-thought of the 1st respondent because we find he has not raised this objection in the 1st counter affidavit filed dated 20-3-1957 nor even in the supplementary counter-affidavit dated 25-3-1957. We cannot allow the 1st respondent to raise any contention he pleases at any stage of these proceedings. Even otherwise, we are not satisfied that there has been such inordinate delay in seeking relief from this Court. Therefore, we overrule the objections regarding delay raised on behalf of the 1st respondent. We may also refer to the decisions of the Full Bench of the Travencore-Cochin High Court reported in *Swaraj Motors v. Municipal Council, Alwaye*[1], where the learned Judges state that no hard and fast rule can be laid down and it would be within the discretion of the court trying the application, to interfere in appropriate cases even if the applications are presented beyond the conventional period permitted for filing a Civil Revision Petition. His contention regarding the delay is also rejected.

43 Coming to the substantial contentions of the parties, as stated earlier, objection has been taken on behalf of the 1st respondent that the order of assessment Ext. R4 has been confirmed by the appellate order of the Collector of Customs, Madras under Ext. B, which in turn has been confirmed by the Government of India (Revenue Division) New Delhi under Ext. C. Therefore, the order of the 1st respondent under Ext. R4 has merged in the appellate order of the Madras Officer under Ext. B which in turn has again merged in the revisional order of the Government of India functioning at New Delhi as evidenced by Ext. C. The two authorities who passed the orders under Exts. B and C respectively are outside the territorial jurisdiction of this court and as such, this court has no power to review the orders covered by Exts. B and C under Article 226 or

227 of the Constitution. Without having those orders set aside in appropriate proceedings, it is not open to the petitioners to invite this court to sit in judgment over the order, Ext. R4, on the basis that it is passed by an officer resident within the jurisdiction of this court. A review of the order under Ext. R4 will serve no purpose so long as the orders under Exts. B and C stand. In other words, inviting this court to review the order under Ext. R4 is to ask the court indirectly to review the orders under Exts. B and C also which it cannot do directly, so ran the argument of the learned Government Pleader.

44. This is met by Mr. T. N. Subramonia Iyer, learned counsel for the applicant by contending that this court has got ample territorial jurisdiction over the actions of the 1st respondent who is bound to obey the directions given by this court and this court has got ample jurisdiction to see that an officer functioning within its jurisdiction is not permitted to do any illegal act and thus cause legal injury to the parties like the petitioners. The 1st respondent cannot take shelter on the ground that an order passed

[1]1954 Ker LT 443: (AIR 1954 Tra Coc 468)

by him, though illegally and without jurisdiction, has been confirmed by other authorities functioning outside this court's jurisdiction. Mr. T. N. Subramonia Iyer further contended that even if this court has no jurisdiction over respondents 2 and 3. still the order of the 1st respondent can be quashed, as it has been passed illegally and without jurisdiction and as such, it is a void order. There cannot be a confirmation by the appellate authorities of a void order. In this view, learned counsel contended that the order under Ext. R4 can be reviewed by this court independently of the orders covered by Exts. B and C.

45 Before considering as to whether the order under Ext. R4 is one passed without jurisdiction and as such, void in our opinion, it is desirable to deal with the earlier contention regarding the powers of this court to review the order under Ext. R4 when it has merged in the orders passed by authorities functioning outside the jurisdiction of this court.

46 There is no dispute that the respondents 2 and 3 are authorities functioning outside the jurisdiction of this court.

47 Mr. T. N. Subramonia Iyer contended that this court can issue a writ of certiorari against the orders of the 1st respondent covered by Ext. R4, as he is an officer functioning within the jurisdiction of this court. He relied upon the decision of the Travencore-Cochin High Court in *Thangalkunju Musaliar v. Venkatachalam*[2] which has been sub-sequendy confirmed by the Supreme Court in *Thangalkunju Musaliar v. Venkatachalam Potti*[3]*,*

48 There can certainly be no quarrel with the proposition stated in a simple way that this court will have jurisdiction over orders passed by Tribunals functioning within the jurisdiction of this court. But the question is whether this court can interfere with the order passed by an officer within its jurisdiction when admittedly that order has become merged in appellate and revisional orders passed by authorities functioning outside its jurisdiction. The learned Government Pleader very vehemently contended that the decision relied upon by Mr. T. N. Subramonia Iyer of the Travencore-Cochin High Court or of the appellate judgment of the Supreme Court does not in any way recognize the powers of this court to interfere under such circumstances. In fact, according to the learned Government Pleader, the reasoning of their Lordships of the Supreme Court in 1956 SCJ 323: AIR 1956 SC 246. is that when an order has merged in the orders passed

by outside authority even the first order cannot be interfered with by this court. He also relied upon the decision of the Supreme Court in *Election Commission v. Saka Venkata Rao*[4]*,*

49 There is no dispute that in the decision of the Travencore-Cochin High Court in 1954 Ker LT 23 (FB), there was no question of the merger of the order passed by the Officer within its jurisdiction. Therefore, that decision will not help the petitioners in this case. The judgment of the Travencore-Cochin High Court directing the issue of a writ of prohibition against the Income tax Officer on special Duty residing within its jurisdiction was confirmed by their Lordships of the Supreme Court in 1956 SCJ 323:

[2]1954 Ker LT 23 (FB) [4]1953 SCJ 293: (AIR 1953 SC 210)
[3]1956 SCJ 323: (AIR 1956 SC 246)

AIR 1956 SC 246. It is seen from their Lordships' judgment at page 327 (of SCJ), that the learned Attorney-General pressed this preliminary objection again before their Lordships. It was contended that the 2nd respondent in that case had its office in New Delhi and was permanently located there and the fact of its having appointed respondent 1 to function and carry on the investigation within the State under its direction, did not make the 1st respondent amenable to the jurisdiction of the High Court. The learned Attorney-General also contended that the High Court had no jurisdiction to entertain a writ petition against the 2nd respondent therein who had his office in New Delhi. It was further contended that the High Court could not do indirectly what it was not able to do directly and that it could not issue any writ of prohibition against the Incometax Officer even though he resided at Trivandrum within the jurisdiction of the High Court inasmuch as he was merely an arm of 2nd respondent and any writ issued against him, would have indirect effect of prohibiting the 2nd respondent from exercising its legitimate functions under the Travencore Act 14/1124 read with Act 30 of 1950 and Act 44 of 1951. The learned Attorney-General also relied upon the decision of the Supreme Court in 1953 SCJ 293: AIR 1953 SC 210.

50 In the Travencore-Cochin case, their Lordships after considering the relevant statutory provisions under which the 1st respondent the Income-tax Officer was functioning, came to the conclusion that the 1st respondent the authorized official before them had considerable powers conferred upon him in the conduct of investigation and that he has important functions to discharge and is not merely a mouth-piece of the commission or a conduit pipe transmitting the orders or the directions of the commission. On this basis their Lordships observe at page 330 (of SCJ).

> "If, therefore, he does anything in the discharge of his functions as authorized agent which is not authorized by law or is violative of the fundamental rights of the petitioner, he would be amenable to the jurisdiction of the High Court under Article 226."

Dealing with the contention that issuing a writ against the 1st respondent would amount to indirectly issuing a writ against the 2nd respondent therein who was outside the jurisdiction of the High Court, their Lordships observe on the same page :

> "The principal could, in no event, urge that his agent should be allowed to function for him within the territories in a manner which was not warranted by law or had no

> justification in law. It is expected that once this Court has declared the law the investigation Commission would comply with it and not place its agent in the wrong by directing him to act contrary to the law so declared".

We do not at all see how the reasoning of their Lordships in any way assists the contentions of Mr. T. N. Subramonia Iyer that a writ can issue against the orders of the 1st respondent before us though it has been confirmed by the authorities functioning outside its jurisdiction. This will become very clear from the observations of their Lordships at page 331 of the reports (of SCJ) . Those observations which will be referred to later, were made by their Lordships in dealing with the three decisions of the High Courts of Allahabad, Nagpur and Pepsu relied upon by the learned Attorney-General in support of his preliminary objection. Those three decisions are *Azmat Ulah v. Custodian Evacuee Property, U. P. Lucknow*[5], *Burhanpur National Textile Workers Union, Burhanpur v. Labour Appellate Tribunal of India at Bombay*[6] and *Joginder Singh Waryam Singh v. Director, Rural Rehabilitation, Pepsu*[7].

51 A perusal of these three decisions will show that the order passed by the authorities within the territories of the particular High Courts merged in the order of the superior authority which was located outside the territories and was therefore beyond the jurisdiction of that High Court. Under such circumstances, writ against the authority functioning within the jurisdiction can be of no avail and could give the applicants therein no relief as notwithstanding the quashing of the order of the subordinate authority, the orders of the superior authority functioning outside the territories, would nevertheless remain outstanding and operative against the petitioners. Therefore, the High Courts, in each of these cases, came to the conclusion that no writ could issue against the outside authority; and as the orders of the subordinate authorities within jurisdiction have become intructuous in view of the orders of the appellate authorities, the applications for issue of writ were dismissed. In particular, the decision in AIR 1955 Allahabad 435 (F. B. of 5 Judges) (E) shows that the real question in such cases is as to whether the Court could issue a writ of Mandamus to the Custodian of Evacuee Property, U. P., who was the only respondent within the jurisdiction commanding him to treat as a nullity an order made by the Custodian General in New Delhi in the exercise of his revisional powers. The Full Bench held that both on principle and authority the answer to the question must be in the negative and the Court observes:

> "In our opinion, it is no less clear that we cannot do indirectly what we have no power to do directly. We have no power to set aside the Custodian-General's order; it is so far as this Court is concerned, a final order. If we examine the grounds of that order for the purpose, should we find the order to be invalid by declaring it to be. a nullity, we are in effect doing indirectly what we cannot do directly. Until the Custodian-General's order be quashed or set aside by a Court competent to do so, this Court must deem the order to be valid order and there is consequently no material upon the basis of which we can issue 'Mandamus' which the petitioners seek".

52 In the decision of the Nagpur High Court in AIR 1955 Nagpur 148, the learned Judges held that the Nagpur High Court did not possess jurisdiction to interfere with the decision of the Labour Appellate Tribunal situated at Bombay as no writ could run to the Bombay Tribunal; and

as its decision could not be interfered with, it would be improper to interfere with the order of the industrial Court because that would be doing indirectly what the Court cannot do directly. The learned Judges further observe that by quashing the order of the Industrial Court, only, they would be placing that Court on the horns of a dilemma.

[5] AIR 1955 All 435 (FB) [7] AIR 1955 Pepsu 91

[6] AIR 1955 Nag 148

53 In the third case namely, AIR 1955 Pepsu 91 an order passed by an officer in Patiala was confirmed by the Custodian-General at New Delhi in the writ proceedings. Objection was taken before the learned Judges that no writ could issue against the Custodian-General who was at New Delhi though the subordinate officers were within the jurisdiction of the High Court as their orders had been merged in the order of the Custodian-General. It was also contended that in view of the merger of these orders, no writ could issue even against the orders of the subordinate authorities functioning within the jurisdiction of the Court. The learned Judges accepted this preliminary objection and declined to issue the writ prayed for on the ground that if a writ is issued, the subordinate authority will be faced with two contradictory orders, one made by the Custodian-General and the other by the High Court. It may also be stated that the learned Judges did not find any difference between an order passed on appeal and an order passed on a revision though the appellate and the revisional orders merely confirm the orders of the lower Tribunals. These are the three decisions that were relied upon very strongly by the learned Attorney-General before their Lordships of the Supreme Court in 1956 SCJ 323: AIR 1956 SC 246. Dealing with these decisions their Lordships observe at page 331 (of SCJ) as follows :

> "These decisions, however are clearly not in point for, in each of them the order passed by the authority within the territories and accordingly within the jurisdiction of the High Court concerned had merged in the order of the superior authority which was located outside the territories and was, therefore, beyond the, jurisdiction of that High Court. In that situation, a writ against the inferior party within the territories could be of no avail to the petitioner concerned and could give him no relief for the order of the superior authority outside the territories would remain outstanding and operative against him.

As, therefore, no writ could be issued against that outside authority and as the orders against the authority within the territories would, in view of the orders of the superior authority have been infructuous, the High Court concerned had, of necessity to dismiss the petition. Such, however, was not the position in the present petition before the High Court of Travencore-Cochin. There was here no question of merger of any judicial order of respondent 1 into the judicial order of respondent 2".

54 After making these observations, their Lordships again consider the position of the 1st respondent there under the various enactments and held that the High Court had jurisdiction to issue a writ against that officer and thereby prevent him from further infringing the petitioner's fundamental rights.

55 In AIR 1953 SCJ 293: AIR 1953 SC 210, the Supreme Court had no occasion to really consider this position. The learned Chief Justice in that decision observes :

> "Our attention has been called to certain decisions of the High Court dealing with the

situation where the authority claiming to exercise jurisdiction over a matter at first instance is located in one State and the appellate authority is located in another State. It is not necessary for the purpose of this appeal to decide which High Court would have jurisdiction in such circumstances to issue prerogative writs under Article 226".

56. But the observations extracted above front the decisions of their Lordships in 1956 SCJ 323 at p. 331: (AIR 1956 SC 246 at p. 255), in our opinion, makes the position very clear that when an order of an inferior tribunal is carried up in appeal or revision to a superior tribunal outside the Court's jurisdiction, and the superior tribunal passes an order confirming, modifying or reversing the order of the inferior tribunal, a writ cannot issue from this Court to the superior tribunal because it is not situated within the territorial jurisdiction of this Court; in such a case no writ can equally issue against an inferior tribunal that is situated within the jurisdiction of this Court. In our opinion, the doctrine of merger enunciated by their Lordships of the Supreme Court, clearly applies, and the order, Ext. R4, in this case having become merged in the orders of the appellate and revisional authorities functioning outside this State, cannot be quashed as such under Article 226 or 227 of the Constitution.

57 We may also refer to two unreported decisions of the Madras High Court. In the *Collector of Customs, Madras v. A. H. A. Rahiman*[8], (since reported in AIR 1957 Madras 496), the learned Chief Justice and Mr. Justice Panchapakesa Ayyar of the Madras High Court have considered a position similar to the one before us. The learned Chief Justice, with whom Mr. Justice Panchapakesa Ayyar has agreed, has if I may say so with respect, very exhaustively considered the position with special reference to the decisions of their Lordships of the Supreme Court in 1956 SCJ 323: AIR 1956 SC 246 referred to above. Though the facts in the individual appeals differed in certain circumstances, the learned Judges finally understand the Supreme Court as laying down the principle that a writ cannot issue against an order of a subordinate tribunal within the jurisdiction of a Court when that order has become merged in the orders of outside authorities who are not amenable to the Court's jurisdiction. In *Hindumul Dhalichand v. The Collector of Customs, Madras*[9], Rajagopalan and Rajagopala Ayyengar, JJ., of the Madras High Court, following the judgment of the learned Chief Justice and Mr. Justice Panchapakesa Ayyar referred to above, declined to quash the orders of the subordinate authorities within its jurisdiction when they had become merged in the orders of the appellate authorities functioning outside its jurisdiction. The learned Judges observe that it was not open to the petitioners before them to attack the order of the Assistant Collector, Madras or the collector of customs, Madras without attacking the validity of the order of the Government of India which had confirmed those orders and over the Government of India, the learned Judges stated they had no territorial jurisdiction. The learned Judges also applied the principle of merger and held that the only Court which could enquire into the validity of those orders was the Court which had territorial jurisdiction over the revisional authority namely, the Government of India and in this view, the learned Judges declined to grant the applications for quashing the order of the Assistant Collector, Madras and collector of customs, Madras though they were officers functioning within their jurisdiction.

58. With respect, we adopt the reasoning of the learned Judges of the Madras High Court in the two decisions referred to above. Applying the principles laid down by the Supreme Court and also those laid down by the decisions referred to above, we hold that the principle of merger applies to the case before us and the order under Ext R-4

[8] Writ Appeals 120/55 etc., D/d. 16-11-1956
[9] W.P. 884 to 886/55, D/d. 28-11-1956 (Mad)
cannot be quashed, as it has become merged in the orders of the appellate and revisional authorities over whom this Court has no territorial jurisdiction.

59 Mr. T. N. Subramonia Iyer next contended that the order evidenced by Ext. R-4 is a nullity and as such a void order. Being a void order there cannot be a confirmation either under Ext. B or Ext. C. No doubt such a contention finds support from the decision of the Madras High Court in W. A. 120/55 etc. : AIR 1957 Madras 496, referred to above. The learned Judges observe that if an order of a subordinate authority is void ab initio and as such a nullity, the order on appeal therefrom cannot be of greater validity. In this connection, it will be useful to refer to the decision in *Barnard v. The National Dock Labour Board*[10], (Court of Affid). Renning, L. J. in that decision observes as follows :

> "So far as the decision of the Appeal Tribunal is concerned, it seems to me that, once the Court Manager's order is found to be a nullity, it follows that the order of the Appeal Tribunal is also a nullity. The appeal Tribunal has no original jurisdiction of its own; it cannot itself make a suspension order; it can only affirm or disaffirm a suspension order which has already been made. If none has been made because it is a nullity, the Tribunal can do nothing. It cannot make something out of nothing any more than anybody else can". (See page 42 of the Report).

With great respect, we agree with the observations in the English decision referred to above and also to the reasoning of the learned Judges in W. A. 120/55 etc.: AIR 1957 Madras 496, High Court, Madras, that when the order of the subordinate Tribunal is" ab initio void and as' such a nullity, the order on appeal therefrom cannot be of greater validity.

60 Therefore, the question arises whether the order, Ext. R-4, is one passed without jurisdiction or an order void ab initio and as such a nullity.

61 Mr. T. N. Subramonia Iyer contended that the order evidenced by Ext. R-4 is an absolute nullity as one passed without jurisdiction. He also took up the position that there is an error of law apparent on the face of the record which vitiates the whole proceedings and as such, it has to be set aside. According to Mr. T. N. Subramonia Iyer, the 1st respondent has not followed the procedure prescribed under Section 33 of the Sea Customs Act 1878-Central Act 8/1878. According to him, the 1st respondent is bound to grant abatement of duty, once the petitioner is able to place the necessary materials before the 1st respondent that the goods have sustained damage and their value has depreciated. It is further contended that the reduced duty is to be levied on the real value of such goods to be ascertained, at the option of the owner in the manner provided in Clause (a) or Clause (b) of Section 33. Mr. T. N. Subramonia Iyer further contended that his client was not a willing party to the matter being referred to the Textile Commissioner of Bombay and that in any event, the opinion of the latter is not the last word on the subject. He also contended that the 1st respondent should have accepted the evidence furnished by the petitioner namely, by Exts. D. E.F. G. and H. The 1st respondent has merely adopted the opinion of the Bombay Officer
[10] 1953-2 QB 18

without indifferently applying his mind as he is bound do under Section 33. So ran the argument of Mr. T. N. Subramonia Iyer.

62 On the other hand, the learned Government Pleader contended that the order Ext. R-4 was passed by the 1st respondent by virtue of the powers and duties given to him under the Sea Customs Act and that it was passed in the exercise of an appropriate jurisdiction vested in him under law. It was open to the 1st respondent either to accept the evidence placed by the petitioner regarding the value of the goods or for him to come to a conclusion of his own. He also contended that the materials placed before this Court will show that the clearing agent of the petitioners who was representing the latter in all these proceedings at the relevant time was aware of the fact that the matter was being referred to Bombay and that the report so obtained will be put against the petitioners. The samples themselves were drawn in the presence of the representative of the clearing agent and they have subscribed to the same.

63 There is no dispute before us that the petitioners have opted to adopt the procedure prescribed under Section 33 (a) of the Sea Customs Act. There is also no dispute that the clearing agents were acting on behalf of the petitioners before the collector of customs, Cochin in these matters. We are satisfied that the samples were drawn in the presence of the representative of the clearing agents representing the petitioners with the knowledge that they are going to be sent to Bombay for obtaining a report about their utility. It is also stated in the counter-affidavits filed by the 1st respondent that the petitioners' representative Sri S. N. Puri had been duly appraised of the opinion of the Textile Commissioner before it was relied upon by the Department and this statement has not been challenged by petitioners. In fact, in the several proceedings that the petitioners took against the order Ext. R-4, there is not a single complaint that the samples were sent to Bombay without their knowledge or that they were not aware of the Bombay Report. So far as this application is concerned, we are satisfied that the samples were drawn in the presence of the representatives of the petitioner and the clearing agents are certainly aware of the fact that the report is to be obtained from Bombay. They did not object to that procedure. We are also satisfied that the petitioners' representative Mr. Puri must have been informed about the report of the Bombay Officer. The only objection of the petitioners in these proceedings appears to have been that the Bombay Officer's report should not be treated as final and the reports of their own surveyors and insurance agents must have been given equal weight. So far as we could see, they have not challenged the act of the 1st respondent as such in sending the samples to Bombay for the purpose of getting an expert opinion. It may be that they have not given their consent in writing, but all the circumstances and materials placed in this case clearly show that they never protested regarding this course and as such, we have to proceed on the basis, for the purpose of this application, that they were fully aware of what was happening. It cannot also be said chat the report has been obtained and used behind their back, because there is the definite statement in the supplementary affidavit dated 25-3-1957 of the 1st respondent that Sri S. N. Puri, petitioners' representative was duly appraised of the opinion of the Textile Commissioner before it was relied upon by the department. This statement of the 1st respondent has not been challenged nor has it been shown to us that this statement is in any way, contrary to fact.

64 Under Section 33(a) the real value" of such goods may be fixed on appraisement by an officer of customs and the duty may be assessed on the value so fixed. As mentioned earlier, there is no dispute that the petitioners agreed to adopt the procedure under Clause (a) of Section 33. If so, we are not able to see how there is any want of jurisdiction in the 1st respondent when he passed Ext. R-4. It is seen from Ext. R-4 that the principal Appraiser, an officer of customs, has fixed the

real value of the goods and this has been accepted by the 1st respondent and he has levied duty accordingly. It will be seen from Ext. R-4 that even the Textile Commissioner's report has not been fully accepted by the 1st respondent. Though the Textile Commissioner, as seen from Ext. R-3, was prepared to treat the discolored portions, as damaged, Ext. R-4 clearly shows that the 1st respondent has independently considered this matter and has found as a fact that the discoloration is negligible. The 1st respondent has arrived at the real value of the goods as the amount mentioned in the invoice. In his opinion, there was no circumstance warranting a rebate in duty. This may be a right decision or a wrong decision on facts. But we are not here sitting as an appellate authority reviewing the factual considerations that may have weighed with that officer in coming to the particular factual conclusion. We have only to see whether Ext. R-4 evidences any error apparent on the face of the record or is one passed without jurisdiction. We are not able to accept the contention of Mr. T. N Subramonia Iyer that Ext. R-4 is an order void ab initio and as such a nullity coming within the principles laid down by the Madras High Court in W. A. No. 120/55, etc., : AIR 1957 Madras 496, and it is not open to attack on this ground. In our view, the 1st respondent had materials before him to arrive at the conclusion that he did and as such he acted with jurisdiction when passing Ext. R-4.

65. Mr. T. N. Subramonia Iyer next contended that there is an error in law apparent on the face of the record inasmuch as that officer, the 1st respondent has not really fixed the real value of the goods in Ext. R-4 itself. We are not satisfied that this contention has any substance. The 1st respondent has clearly stated that the goods are to be assessed on the full invoice value and then released. There is no dispute in this case that the duty collected was not based on the full invoice value . We may also refer in this connection to the latest decision of the Supreme Court in *Prem Singh v. Dy. Custodian General*[11], where their Lordships refer with approval to the prior decision of their Lordships in *T.C. Basappa v. T. Nagappa*[12], as follows :

> "The error in the decision or determination itself may also be amenable to a writ of certiorari but it must be a manifest error apparent on the face of the proceedings, for example, when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by a certiorari but not a mere wrong decision".

Again at page 36 (of SCJ): (at pp. 809-810 of AIR) of the report their Lordships further observed :-

> "The errors pointed out if they are errors at all are mostly errors of fact and even if the errors may by any stretch of argument be said to constitute errors of

[11]1958 SCJ 29: (AIR 1957 SC 804)

[12]1954 SCJ 695: AIR 1954 SC 440

> law, they are nothing more than mere errors of law which may be corrected by a Court of appeal but which do not render the order a "speaking order" showing a clear ignorance or disregard to the provisions of the law so as to be amenable to correction by a writ of certiorari".

66 In this case, we see no such error of law justifying our interference with that order on this

ground either.

67 We cannot refrain from remarking that the 1st respondent, the collector of customs, Cochin might well have taken a more lenient view of the petitioners' case having regard to the surveyor's and Insurance reports and also to the report of the Textile Commissioner himself where he has suggested that the discolored portions may be treated as damaged and rebate of duty allowed on the same accordingly,

68 In the result, this application fails and is dismissed, but in the circumstances without any order as to costs. The Rule-Nisi issued by this Court, will stand discharged.

Application dismissed.