BOMBAY HIGH COURT

Pukhraj Champalal Jain

Vs.

D.R. Kohli

Special Civil Application No. 322 of 1958

(Tambe and Badkas, JJ.)

20.03.1959

JUDGMENT

Tambe, J.

1. One of the questions raised in this application relates to the constitutionality of Section 178A of the Sea Customs Act (Act VIII of 1878) and, therefore, a notice was issued to the Attorney General. The contention is that it violates the constitutional guarantee to acquire, hold and dispose of property, and to practise any profession, or to carry on any occupation, trade or business enshrined in Sub-clauses (1) and (g) of Clause (1) of Article 19 of the Constitution of India.

2. Petitioner Pukhraj Jain, a national and citizen of India, owns a gold and silver shop at Rajnandgaon and carries on business of a goldsmith under the name and style of "Champalal Pukhraj". The petitioner claims that his business is of buying and selling gold and that he was doing business both at Rajnandgaon and Tatanagar.

3. On October 25, 1956, while he was travelling in a train he was intercepted at Raigarh railway station at about 4.30 p.m. by the Customs Inspector (P & I) and he was found in possession of five bars of gold bullion weighing1 290.6 tolas valued approximately at ₹ 29,835. The Inspector under a reasonable belief that the gold was smuggled, seized it from the petitioner. He also recorded statements of the petitioner on October 25, 26 and 30. On completion of necessary investigation, the Collector of Central Excise, M.P. and Vidarbha Area, Nagpur, respondent No. 1 hereto, served the petitioner with a show cause notice on May 20, 1957, which reads as follows;

To
Shri Pookhraj Jain,
s/o Champalal Jain,

Sadar Bazar, Rajnandgaon.
Whereas Shri Pookhraj Jain s/o Champalal Jain of Rajnandgaon while travelling by train on 25-10-56 from Calcutta on interception by the Inspector (P & I) Raipur at the Raigarh Railway Station at 16.30 hrs, on 25-10-56 was found to be in possession of 5 pieces of gold bullion weighing tolas 290.6 (valued at ₹ 29,835/- approximately) which the said officer seized while acting on a reasonable belief, strengthened by the suspicious circumstances of his journey without a railway ticket, that it was smuggled into the State of West Bengal of the Indian Union in contravention of the Government of India's Notification No. 12(11) F.I/48 of 25-8-48 (as amended) issued under the Foreign Exchange Regulation Act, 1947, read with Section 19 of the Sea Customs Act, VIII of 1878, and Section 23A of the first mentioned Act. And whereas it appears that the above action of the said Sri Pookhraj Jain prima facie amounts to the contravention of Government of India's Notification No. 12(11) F.I/48, dated 25-8-1948 (as amended) issued under the Foreign Exchange Regulation Act, 1947, read with Section 23A of the said Act, and Section 19 of the Sea Customs Act, 1878, and punishable under item (8) of Section 167 of the Sea Customs Act, 1878. Now, therefore, the said Shri Pookhraj Jain is hereby required to show cause to the undersigned why a penalty should not be imposed on him and why the said quantity of gold weighing tolas 290.6 in respect of which the offence appears to have been committed should not be confiscated tinder item 8 of the Schedule to Section 167 of the Sea Customs Act, 1878.

2. Sri Pookhraj is further directed to produce at the time of showing cause all the evidence upon which he intends to rely in support of his defence, as per Section 178A of the Sea Customs Act, 1878.

3. Shri Pookhraj should also indicate in his written explanation whether he wishes to be heard in person before the case is adjudicated.

4. If no cause is shown against the action proposed to be taken within ten days of the receipt of this notice or if he does not appear before the adjudicating officer when the case is posted for hearing, the case will be decided on the basis of evidence on record, assuming that Shri Pookhraj Jain has no defence to offer. In reply to the notice the petitioner showed cause. His defence in short was that out of 290.6 tolas of gold found in his possession, 162 tolas of gold was purchased by him from various persons and remaining 128 tolas of gold formed part of 150 tolas of gold which he had received as his share at the time of the partition of the joint family property. He wanted to sell that gold. He, therefore, got it melted and converted into five bars. He had taken gold from Rajnandgaon to Tatanagar for selling it. He however was not successful in selling the gold at Tatanagar and while he was returning from Tatanagar he was intercepted. In support of his contention the petitioner also examined certain witnesses before the Collector of Central Excise, respondent No. 1 hereto. His defense Avas not accepted by the Collector. The conclusions reached by the Collector in his words are:

"In view of the foregoing discussions and examination of the case in all its aspects, I am fully convinced in that the party has failed to discharge his burden under Section 178A of the Sea Customs Act, 1878, to prove that the seized gold is" not the smuggled one, Even though there are no foreign marks on the seized gold, the irresistible conclusion from the evidence led before me and the serious contradictions and material factual discrepancies in the defense story is that the gold in question is obviously contraband as per information received by the Department."

The Collector, therefore, by his order dated July 26, 1958, ordered confiscation of 290.6 tolas of gold and also imposed a penalty of ₹ 25,000 on the petitioner under Section 167(8) of the Sea Customs Act, 1878, read with Section 19 ibid and Section 23A of the Foreign Exchange Regulation Act, 1947. Against this order of the Collector the petitioner has preferred this application under Articles 226 and 227 of the Constitution of India and therein he prays for the issue of a writ of certiorari or a writ in the nature of certiorari or other appropriate writ and for quashing and setting aside the said order. The petitioner further prays for issue of a writ of prohibition or a writ in the nature of prohibition or other appropriate writ, direction or order under Article 226 of the Constitution of. India against respondent No. 1 prohibiting him, his officers, subordinates, servants and agents from taking any steps in enforcement and/or execution of the said order dated July 24/26, 1958.

4. At this stage it would be convenient to refer to some of the provisions of the relevant Acts.

5. Section 19, which appears in Chapter IV of the Sea Customs Act, provides that the Central Government may from time to time, by notification in the Official Gazette, prohibit or restrict the bringing or taking by sea or by land goods of any specified description into or out of India across any customs frontier as defined by the Central Government.

6. Item 8 of Section 167 of the Sea Customs Act runs as follows:

"167. The offences mentioned in the first column of the following schedule shall be punishable to the extent mentioned in the third column of the same with reference to such offences respectively:

Offences	**Section of this Act to which offence has reference**	**Penalties.**
8. If any goods, the importation or exportation of which is for the time being prohibited or restricted by or	18 & 19	Such good shall be liable to confiscation; any person concerned in any such offence

under Chapter IV of this Act, be important into or exported from India, country to such prohibition of restriction, or		shall be liable to a penalty not exceeding three time the value of the goods, or not exceeding one thousand rupees."

Section 178 of the Act provides that anything liable to confiscation under this Act may be seized in any place, either upon land or water, by any officer of Customs or other person duly employed for the prevention of smuggling.

7. Section 183 provides that 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.

8. Section 8(1) of the Foreign Exchange Regulation Act, 1947, provides that the Central Government may, by notification in the Official Gazette, order that, subject to such exemption, if any, as may be contained in the notification, no person shall, except with the general or special permission of the Reserve Bank and on payment of the fee, if any, prescribed, bring or send into India any gold or silver, etc. In exercise of the powers conferred by Sub-section (1) of Section 8, notification No. 12(11) PI/48, dated August 25, 1948, was issued. The notification runs as follows:

> (1) Restrictions on Import of Gold & Silver,
> In exercise of the powers conferred by Sub-section (1) of Section 8 of the Foreign Exchange Regulation Act, 1947 (VII of 1947), and in supersession of the notification of the Government of India in the late Finance Department No. 12(11) FI/47, dated the 25th March 1947, the Central Government is pleased to direct that except with the general or special permission of the Reserve Bank, no person shall bring or send into India from any place outside India
> (a) any gold coin, gold bullion, gold sheets or gold ingot, whether refined or not; or
> (b) any silver bullion, any silver sheets or plates which have undergone no process of manufacture subsequent to rolling, or any silver coin not current in the country of issue.

9. Section 23 of the Foreign Exchange Regulation Act, 1947, provides for penalties and procedure in respect of contravention of the provisions of this Act or of any rule, direction or order made thereunder.

10. Section 23A provides that

> "without prejudice to the provisions of Section 23 or to any other provision contained in

this Act, the restrictions imposed by Sub-sections (1) and (2) of Section 8.... shall be deemed to have been imposed under Section 19 of the Sea Customs Act, 1878 (VIII of 1878), and all the provisions of that Act shall have effect accordingly, except that Section 183 thereof shall have effect as if for the word 'shall' therein the word 'may' were substituted."

The combined effect of the aforesaid provisions of the Acts and the notification in short is that under notification dated August 25, 1948, restrictions are imposed on the import of gold in India and it can only be imported under genera] or special permission of the Reserve Bank. By virtue of Section 23A of the Foreign Exchange Regulation Act, the aforesaid notification has the force of a notification issued under Section 19 of the Sea Customs Act. Thus gold imported in contravention of the aforesaid notification is liable to be seized under Section 178 of the Act and renders the person in possession of such gold liable for being proceeded against by the authorities under the Sea Customs Act under Item 8 of Section 167 of the Act. The Customs authorities, however, are not under an obligation to give him an option to pay a fine in lieu of confiscation of the gold. It is within the discretion of the authority concerned to give him that option or not. The order of confiscation made under Section 167 of the Sea Customs Act after completing the inquiry has the effect of vesting the seized property in the Government (Section 184 of the Act).

11. The provisions of Section 178A of the Sea Customs Act come into play at the stage of inquiry. Relevant provisions of the section read as follows:

"178A. (1) Burden of proof: Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be on the person from whose possession the goods were seized.
(2) This section shall apply to gold, gold manufactures, diamonds and other precious stones, cigarettes and cosmetics and any other goods which the Central Government may, by notification in the Official Gazette, specify in this behalf.

We are here concerned with gold. Mr. Sorabji, learned Counsel for the petitioner, contends that the provisions of this section violate the rights guaranteed under Article 19(1)(f) and (g) of the Constitution of India. Under the aforesaid Clauses (f) and (g) a citizen of India is guaranteed the right to acquire, hold and dispose of property and to practice any profession, or to carry on any occupation, trade or business. Gold is a commodity which is capable of acquisition. Trading in gold is also not prohibited. The aforesaid section makes it well-nigh impossible for a citizen to exercise these rights on account of the heavy burden that is cast on him by Sub-section (1) of Section 178A to prove that the gold in his possession is not smuggled gold. The burden east is impossible to be discharged. By looking at gold it is not possible to tell whether it was imported in India or not and yet a citizen is called upon to prove the date of its being first brought in India. It affects a person's right to acquire, hold and dispose of gold and also to carry on trade and

business in gold. A person would be afraid of purchasing gold in market. This also affects trade and business. The burden imposed is excessive and arbitrary. It is also contended by Mr. Sorabji that there is no connection between reasonable belief of the customs officer seizing gold and the burden which a citizen is called upon to discharge, viz. that the gold is not smuggled gold. Reliance is placed on the decisions of Mr. Justice K.T. Desai in *Amichand Vallamji v. M.G. Abrol*[1] *decided by K.T. Desai J.,* and a Division Bench of the Madras High Court in *Nathlla Sampathy Chetty v. The Collector of Customs*[2]. These decisions, no doubt, support the contentions raised.

12. Mr. Abhyankar, Special Government Pleader, for respondent No. 1, on the other hand, contends that Article 19 of the Constitution has no application at all. Result of failure to discharge the burden on the part of a citizen is deprivation of gold under Item 8 of Section 167 of the Sea Customs Act. Apposite article that is attracted to this case is Article 31 of the Constitution. Section 17 8A is placed on the statute book for the purpose of imposing or levying penalty and the Legislature was, therefore, competent to make that legislation under Article 31(5)(b)(i). In the alternative, Mr. Abhyankar contends that even if the
provisions of Article 19(i)(f) and (g) are attracted, the case falls under the provisions of Clause (5) of Article 19. The restrictions imposed are in the interests of the general public

[1](1958) O.C.J. Miscellaneous Application No. 21 of 1957, on May 15, 1958 (Unrep)

[2](1958) Writ Petitions Nos. 384 of 1957 and 660 of 1958, decided by Rajgopalan and. Balakrishna JJ., on September 9, 1958

and are reasonable. There are also adequate safeguards provided in the Sea Customs Act itself against an arbitrary action of a Customs authority.

13. In our opinion, there is not much force in the contention of Mr. Abhyankar that the apposite article applicable would be Article 31 to the facts and circumstances of the case.

14. Article 31 relates to the deprivation of private property of a person. On the language of Section 178A of the Sea Customs Act, it has no relation to the question of deprivation of property. It is not enacted for the purpose of taking the property of a person but is only a rule of evidence enacted for the purpose of ascertaining whether gold seized from the possession of a person is smuggled gold or not. No doubt the combined effect of Sections 178A and 167(5) is deprivation of property but then the deprivation is on a footing1 that the person in possession had no legal right to hold that property it having been smuggled. It is well-settled that Article 31 deals with the field of eminent domain. In *Dwarkadas Shrinivas of Bombay v. The Sholapur Spinning and Weaving Co. Ltd*[3] their Lordships of the Supreme Court observed (p. 694) :

> "...In considering Article 31 it is significant to note that it deals with private property of persons residing in the Union of India, while Article 19 only deals with citizens defined in Article 5 of the Constitution. It is thus obvious that the scope of these two articles cannot be the same as they cover different fields. It cannot be seriously argued that so far as citizens are concerned, freedoms regarding enjoyment of property have been granted in

> two articles of the Constitution, while the protection to property qua all other persons has been dealt with in Article 31 alone. If both articles covered the same ground, it was unnecessary to have two articles on the same subject. The true approach to this question is that these two articles really deal with two different subjects and one has no direct relation with the other, namely, Article 31 deals with the field of eminent domain and the whole boundary of that field is demarcated by this article. In other words, the State's power to take the property of a person is comprehensively delimited by this article. The article has been split up in six clauses. Moreover, by the amendment of the Constitution certain kinds of laws have been exempted from the operation of the article or from the whole of Part III of the Constitution by the addition of Articles 31A and 31E. Article 31(1) declares the first requisite for the exercise of the power of eminent domain. It guarantees that a person cannot be deprived of property by an executive fiat and that it is only by the exercise of its legislative powers that the State can deprive a person of his property. In other words, all that Article 31(1) says is that private property can only be taken pursuant to law and not otherwise.

This contention of Mr. Abhyankar, therefore, fails.

15. It is next to be seen whether the provisions of Section 178A are violative of Article 19(1)(f) and (g) of the Constitution. Clauses (f) and (g) of Article 19 guarantee to a citizen the right to acquire., hold and dispose of property and to practice any profession, or to carry on any occupation, trade or business. There is no prohibition in any law for acquisition or holding or disposing of gold. There is also no law prohibiting a person from trading or doing business in gold. Gold is an article which could be possessed and over

[3][1954] S.C.R, 674, s.c. 56 Bom. L.R. 681, 689

which the aforesaid rights could be exercised. It has to be seen whether the provisions of Section 178A in any manner restrict the exercise of these rights. In a given circumstance, i.e. when gold is seized by a Customs authority under a reasonable belief that it is smuggled, the section requires a citizen to prove that gold in his possession is not smuggled, and. indeed it is difficult to discharge that burden. As observed by Mr. Justice K.T. Desai in *Amichand Vallamji v. M.G. Abrol,* ,

> "It (gold) is an article which is capable of being split and there can be a fusion of diverse quantities of gold. It is easily changeable in form, size and shape. The gold available in the market hardly bears any identification mark. It is available in the form of lagdis, ravas, patlas and bars. It is available in the shape of coins. It was at one time a medium of currency.

A person purchasing gold has no means for ascertaining the year in which it was imported in India. It is common knowledge that there is very little indigenous gold in India and a large percentage of gold found in India is imported gold. An innocent purchaser may bona fide acquire gold in the market and yet he will be required to prove that that gold is not smuggled gold. In

Babulal Amthalal Mehta v. The Collector of Customs, Calcutta[4] their Lordships observed (p. 1119):

> "...No doubt the content and import of the section are very wide. It applies not only to the actual smuggler from whose possession the goods are seized but also to those who came into possession of the goods after having purchased the same after the same has passed through many hands or agencies. For example, if the Customs authorities have a reasonable belief that certain goods in the possession of an innocent party are smuggled goods and the same is seized under the provisions of this Act, then the person from whose possession the goods were seized, however innocent he may be, has to prove that the goods are not smuggled articles. This is no doubt a very heavy and onerous duty cast on an innocent possessor who, for ought one knows, may have bona fide paid adequate consideration for the purchase of the articles without knowing that the same has been smuggled. The only pre-requisite for the application of the section is the subjectivity of the Customs-officer in having a reasonable belief that the goods are smuggled.

This heavy and onerous duty imposed by the section on a citizen of India would undoubtedly act as a restriction on free exercise of the right of acquiring, holding and disposing of gold or of carrying on trade or business in gold guaranteed by Article 19(1)(f) and (g) of the Constitution. It has, however, to be remembered that the right conferred by Article 19(1)(f) and (g) is not an absolute right. The Legislature has been authorized to curtail that right, and impose restrictions on its exercise to a certain extent as provided in Clause (5) of Article 19 of the Constitution, and when we turn to Clause (5) of Article 19 it is clear that the power conferred on the Legislature to impose restrictions on the exercise of the right under Article 19(1)(f) and (g) are circumscribed by three limitations, the first limitation is that the restrictions imposed must be by enacting a law, the second limitation is that the law must be in the interests of the general public and the third limitation is that those restrictions must be reasonable. It is not in dispute that the restrictions imposed are by law. It is also not in dispute and indeed it cannot be disputed,

[4][1957] S.C.R. 1110

that the restrictions imposed are in the interests of the general public. The question to be considered is whether the restrictions imposed are reasonable.

16. Now, the restriction imposed is in the shape of rule of evidence casting a burden of proof on the person from whose possession the gold is seized to prove that the gold was not smuggled. The expression 'smuggling' is not denned. The meaning given to that word in the words of their Lordships of the Supreme Court in Babulal's case is as follows (p. 1116) :

> "...Though the word 'smuggling' is not defined in the Act, it must be understood as having the ordinary dictionary meaning namely carrying of goods clandestinely into a country.

It would be convenient at this stage to consider various steps taken by the Government of India to

restrict importation of gold. Upto September 4, 1939, there was no restriction on the import of gold in India. On that day a notification No. 53, dated September 4, 1939, was issued by the Finance Department (Central Revenues) of the Central Government. This notification was issued in exercise of the powers conferred on the Central Government by Section 19 of the Sea Customs Act. It prohibited bringing or taking by sea or land into British India from any place other than Burma or out of British India to any place other than Burma, gold coin, gold bullion or gold ingots, whether refined or not, except on the authority of a license granted in that behalf by the Reserve Bank of India. On March 25, 1947, the Foreign Exchange Regulation Act came into force, and on the same day, in exercise of the powers conferred on the Central Government under Section 8(1), the Central Government issued a notification prohibiting import of any gold coin, gold bullion, gold sheets or gold ingots, whether refined or not except with the permission of the Reserve Bank of India. This notification superseded the aforesaid notification dated September 4, 1939, issued under Section 19 of the Sea Customs Act. The notification dated March 25, 1947, was also superseded by another notification issued on August 25, 1948. The contents of this notification are similar in effect to that issued on March 25, 1947. This notification of August 25, 1948, was in force at the material time. No duty was levied on the import of gold till April 1, 1946, but thereafter a duty has been imposed. The burden that falls on a person from whose possession gold is seized is that he must prove that the gold seized from him was not smuggled gold and not as contended for by Mr. Sorabji that he has to trace its history from the date on which it was for the first time brought on the Indian soil. In our opinion, the burden cast on him would be discharged by him either by proving that the gold seized from him was on the Indian soil prior to September 4, 1939, or that it was brought on the Indian soil subsequent to that date on the authority of a licence granted in that behalf by the Reserve Bank of India and duty thereon was paid if any was payable. It has to be considered whether this burden can be termed as reasonable. The approach to the question has to be in the light of the following observations of their Lordships of the Supreme Court in *State of Madras v. V.C. Row*[5]

> "... It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern, of reasonableness can be laid down as

[5][1952] S.C.R. 597 (p. 607)

> applicable to all eases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.

It has also to be assumed that the elected representatives of the people have in authorizing imposition of the restrictions considered them to be reasonable. It is, therefore, first to be considered what conditions were prevailing when Section 178A of the Sea Customs Act was brought on the statute book and the evil it sought to be remedied. In other words, what was the underlying object or purpose of the Legislature in enacting Section 178A.

17. As already stated, import of gold was restricted in India since September 4, 1.939. Section 178A, however, was brought on the statute book for the first time in the year 1955 by virtue of Section 14 of the Sea Customs (Amendment) Act, 1955 (21 of 1955). To understand the conditions that prevailed in 1955 and the evil which was sought to be remedied by the Legislature by enacting this section, reference to the Objects and Reasons of the Act and the Explanatory Note in the Bill would afford a useful guide and it is open to the Court to refer to them for this limited purpose.

18. In *State of West Bengal v. Subodh Gopal*[6], , Das J., as he then was, observed (P- 104) :

> "It is well settled by this Court that the statement of objects and reasons is not admissible as an aid to the construction of the statute... & I am not, therefore, referring to it for the purpose of construing any part of the Act or of ascertaining the meaning of any word used in the Act but I am referring to it only for the limited purpose of ascertaining the conditions prevailing at the time which actuated the sponsor of the Bill to introduce the same & the extent & urgency of the evil which he sought to remedy. Those are all matters which, as already stated, must enter into the judicial verdict as to the reasonableness of the restrictions which Article 19(5) permits to be imposed on the exercise of the right guaranteed by Article 19(1)(f).

These observations were affirmed by the Supreme Court in *M.K. Ranganathan v. Govt. of Madras*[7],. In our opinion, these observations would apply with equal force to use of the speech made in Parliament by the sponsor of the Bill, for the limited purpose.

19. The Bill introduced in Parliament is Bill No. 48 of 1954. By this Bill it was proposed to amend the Sea Customs Act. Clause 14 thereof provided that the following clause be inserted in the Act as Section 178A after Section 178:

> "Where any goods are seized under this Act on the ground that they are smuggled goods, the burden of proving that the goods are not smuggled
> goods shall be on the person from whose possession the goods are seized.

One of the objects for introducing this Bill was to take some additional power for controlling smuggling. Note to Clause 14 reads:

[6](1954) A.I.R. S.C. 92, S.C. (1954) S.C.R. 587

[7](1955) A.I.R. S.C. 604

> "At present when action is taken against persons who are in possession of smuggled goods, it is not always easy for customs authorities to prove that the goods are smuggled goods. This clause places the burden of proof in such cases on persons from whose possession suspected smuggled goods are seized. Such a provision is necessary in order to safeguard the revenues of the State.

This Bill was introduced in Parliament by the Minister of Revenue and Defence Expenditure (Shri A.C. Guha) on March 12, 1955. The following observations in his speech at the time of making a motion for taking the Bill into consideration are material:

> "The second point is to take some additional power for controlling smuggling. It may not be quite unknown to this House that smuggling has increased rather enormously. Previously there was not much economic incentive for smuggling, but due so many restrictions and controls, and licences and prohibitions due to the development to indigenous industries and also due to our having long land borders after the partition of India, smuggling has become more rampant and has also become a paying proposition. Certain articles are prohibited for import and even for export, and if a smuggler can get them into or send them out of India, he can reap rich profits. This economic incentive for smuggling was lacking so long; now it has become necessary for the Government to take stringent measures and to take additional powers to stop smuggling.

In considering the genesis of Section 178A their Lordships of the Supreme Court observed as follows in *Babulal Amthalal Mehta v. The Collector of Customs*[8],

> "The genesis of Section 178-A may now be considered. The Central Government had appointed a commission known as the Taxation Enquiry Commission which by its report recommended the adoption of the principles underlying Section 178-A in order to minimize smuggling. In Vol. II of their report, Chapter VII deals with administrative problems in regard to customs and excise duties. At pp. 320 and 321 the Committee recommends the amendment of the Sea Customs Act, firstly to make smuggling a criminal offence and secondly empowering Customs officers to search premises etc. and the third recommendation is the one with which we are concerned. It is in the following terms:
> "To transfer the onus of proof in respect of offences relating to smuggling to the person in whose possession any dutiable restricted or prohibited goods are found.

It is to implement this recommendation (hat Section 178A has been enacted. It would be seen that this clause of the Bill as originally framed has not been accepted by the Parliament and material changes have been effected by Parliament in enacting Section 178A. The burden is imposed on a person only when gold is seized from his possession in the reasonable belief that it is smuggled gold and not when it is seized on the ground that it is smuggled as originally proposed. In the second instance, the amendment proposed was of general application to all smuggled goods. By enacting Clause (2) Parliament limited it only to gold, gold manufactures, diamonds and other precious stones, cigarettes and cosmetics and any oilier goods which the Central Government may, by notification in the Official Gazette, specify in this behalf. Looking to the articles mentioned in Clause

(2) the common feature that appears to be is that it relates to articles which can easily be smuggled. Thus considering all this material, in our opinion, the conditions prevailing in 1955 were that smuggling of articles including gold, had increased in dangerous proportions and was affecting the economy of the country. There was an incentive for the residents of India and others to smuggle articles including gold. On account of inherent characteristics of the articles there was difficulty in the way of the Customs authorities to prove that the seized gold was smuggled gold. This resulted in the smuggled gold getting distributed in the country and in adversely affecting the economy of the country. The primary object with which Section 178A was brought on the statute book was, in our opinion, to prevent certain smuggled articles getting absorbed in the country.

20. Keeping these aforesaid conditions and circumstances prevailing at the time Section 17 8A of the Sea Customs Act was brought on the statute book and the underlying object or the purpose of the Legislature in enacting this section in view, it has to be considered whether the restrictions imposed have a rational relation to the object sought to be achieved by the Act; or in other words, the restrictions imposed are in any manner disproportionate, arbitrary and excessive. Mr. Sorabji contends that the presumption raised is not founded on the proof of any fact as such but is founded only on the subjectivity of the Customs officer in having a reasonable belief that the goods are smuggled. There is no provision in the statute which entitles a person from whose possession gold is seized to know the reasons or grounds of his reasonable belief nor the subjectivity of the Customs officer made a justiciable issue. Powers conferred on the Customs officer are, therefore, arbitrary and there is no rational relation between the subjectivity of the Customs officer and the presumption raised. Reliance is placed by Mr. Sorabji on certain observations made in *State of Madras v. V.G. Row* and decisions in *Thakur Raghubir Singh v. Court of Wards, Ajmer*[9] *Ebrahim Vazir Mavat v. The State of Bombay*[10] and *Tot v. United States*[11]

21. It must be conceded that there is no provision in the Sea Customs Act which entitles a person from whose possession gold is seized to know the facts on which the reasonable belief of the Customs officer that the gold is smuggled is founded. Section 181 no doubt provides that when anything is seized, or any person is arrested under this Act, the officer or other person making such seizure or arrest shall, on demand of the person in charge of the things so seized, or of the person so arrested, give him a statement in writing of the reason for such seizure or arrest. But when we turn to Section 178A it becomes clear that entertaining a reasonable belief that the gold is smuggled is a sufficient reason for the seizure of the gold, and if the Customs officer says so in the writing which he gives to the person concerned, it would amount to sufficient compliance with the provisions of Section 181 of the Sea Customs Act. It is also true that the grounds on which the reasonable belief is entertained by the Customs officer cannot be inquired into a Court of law.

22. It is, on the other hand, contended by Mr. Abhyankar that the information which a Customs officer receives regarding the smuggled gold has to be kept confidential, and if this information is disclosed either to the person from whose possession gold is seized or

[9][1953] S.C.R. 1049, 1054 [11](1943) 319 U.S. 463, 87 Law. ed. 1519

[10][1964] S.C.R. 933, 937

at the time of judicial inquiry, people will not come forward to give information to the Department and the very object of the Act would be defeated. There is considerable force in the argument of Mr. Abhyankar. In our opinion, there is good reason for not disclosing information giving rise to the reasonable belief of a Customs officer. This, however, does not mean that the facts on which the Customs officer seizing gold founds his reasonable belief are not subjected to any scrutiny at all. If we turn to the provisions of Section 182 of the Sea Customs Act, it becomes clear that the officer who holds an inquiry thereunder is usually not the same officer who has seized the gold. As already stated, Section 178A comes into play only at the stage of inquiry and it is for that officer to consider whether he should raise a presumption or not. It necessarily follows that it is open to that officer to consider whether on the material placed before him he could hold that the seizure made by the Customs officer was made in the reasonable belief that the gold was smuggled.

23. Mr. Abhyankar has placed on record instructions issued to the Customs officer by the Collector of Central Excise Collectorate, Nagpur, being Standing Order 4 of 1953. The procedure which has to be followed by the Customs officer according to this Standing Order in short is that the Customs officer making a seizure as a result of an information lodged with him, has to place on record substance of the information received. He has to disclose the names of the informers to his superior officers confidentially. Preliminary reports of searches and seizures are to be submitted to the immediate superior officer promptly. Seizure report which has to be made has to contain particulars of the date, time, place of seizure of the person from whom and the goods which are seized, of the rules for the violation of which the seizure has been effected and of the reasons why the seizing officer made the seizure. This report and its enclosures form the basis of the proceedings before the adjudication officer. Seizure report complete with essential documents is to be submitted within 7 days of the seizure. The officer receiving the seizure report has to scrutinise the papers and see whether a prima facie case has been made out and whether the case is within his competence to adjudicate and it is only when he is satisfied on both these points that he issues a formal show cause notice. If he is not satisfied and if he feels that a wrong seizure has been made and there was actually no prima facie case against the person from whom the goods are seized, the goods seized are ordered to be released. These instructions in the Standing Order further make it clear that the officer holding an inquiry has to apply his mind to the facts and circumstances which led to the seizure and has to satisfy himself that they in fact give rise to a reasonable belief that the gold seized was smuggled.

24. The next stage after the show cause notice is the inquiry by the adjudication officer. Here the person from whom gold is seized has an opportunity of showing that the gold was not smuggled gold. As already stated, no doubt, the onus is a heavy onus. After considering all this material on

record the decision is arrived at by the adjudication officer. Now, if the adjudication officer orders confiscation of gold or imposition of any penalty the person from whose possession the gold is seized has a right to prefer an appeal against that order to the appropriate appellate authority under Section 188 of the Sea Customs Act. At this stage, again, the whole case including the facts giving rise to the reasonable belief of the Customs officer seizing gold comes under the scrutiny of the appellate authority. Apart from this, revisional powers are also conferred on the Chief Customs authority and the Chief Customs officer under Section 190A, and on the Central Government under Section 191, of the Act. There is no reason to assume that the various Customs authorities on whom the aforesaid powers are conferred will not exercise them honestly and fairly. The validity of a statute must be judged rather on the assumption that those who are called upon to exercise these wide powers will exercise them honestly and bona fide: *Bapurao Dhondiba v. State of Bombay*[12], On this assumption and in view of the aforesaid safeguards contained in the Sea Customs Act itself, it is difficult to assume that a citizen of India would be called upon to bear the burden of rebutting the presumption on a mere arbitrary whim of a Customs officer, It must also be kept in view that the presumption raised is not that the person from whom the gold is seized under such reasonable belief is a smuggler or is in any manner concerned in smuggling of that gold, or that he is in possession of it knowing that it is smuggled. The presumption only is that that gold is smuggled. As already stated, the object of the Act is to prevent smuggling. The presumption raised is only limited to that extent and not for the purpose of holding the person from whose possession gold is seized criminally liable. Failure to rebut the presumption would only result in confiscation of gold and thereby prevent smuggled gold from getting absorbed in the country.

25. The presumption raised, in our opinion, has therefore, a rational relation to the object sought to be achieved by the Act.

26. Mr. Sorabji further contends that the restrictions imposed are manifestly excessive and are not necessary for the achievement of the object of the Act. They would affect a person who had bona fide acquired gold prior to the date this Act came into force. It is true that to discharge the burden raised under Section 178A it is not sufficient for the person from whose possession gold is seized to prove that he had acquired this gold bona fide prior to the date the Act came into force. He has further to establish that the gold is not smuggled gold. But to so limit the presumption would not achieve the object which the Legislature had in view, viz. confiscation of smuggled gold. We have already shown that the chances of gold being confiscated from innocent bona fide purchasers are very much minimised on account of the safeguards in the Act to which we have already referred. It is true that some instances may occur where bona fide purchasers may suffer on account of failure on their part to discharge the heavy onus cast on them. But hardship in few individual cases should not weigh in considering the constitutionality of an enactment.

27. The decisions to which reference was made by Mr. Sorabji also are not of much assistance to

him and are distinguishable on facts.

28. The passage in *State of Madras v. V.G. Row* on which reliance was placed by Mr. Sorabji reads as follows (p. 608):

> "...The formula of subjective satisfaction of the Government or of its officers, with an Advisory Board thrown in to review the materials on which the Government seeks to override a basic freedom guaranteed to the citizen, may be viewed as reasonable only in very exceptional circumstances and within the narrowest limits, and cannot receive judicial approval as a general pattern of reasonable restrictions on fundamental rights.

[12](1956) 58 Bom. L.R. 418

These observations are no authority for holding that the formula of subjective satisfaction cannot be viewed as a reasonable restriction in any case. Each case would depend on its own facts. On the facts of this case it was held that there was no adequate provision in the Act for the scrutiny of the subjective satisfaction on the basis of which the action was taken nor was there a real opportunity to the person to show cause against the action proposed to be taken against him. Such is not the ease here. Confiscation of gold does not follow as a result of the mere subjective satisfaction of officer seizing it. It is open to scrutiny at the hands of his superior officer. A citizen has an opportunity of being heard at the stage of inquiry.

29. In *Thakur Raghubir Singh v. Court of Wards,* , Ajmer a citizen was deprived of his right to enjoy his property on the mere subjective determination of the Court of Wards that he was a person who habitually infringed the rights of his tenants without any opportunity to show that he had not been doing so.

30. In *Ebrahim Vazir Mavat v. The State of Bombay* also subjective determination of the Central Government that the citizen has committed a particular offence resulted in his expulsion from the country without an opportunity to show that he had not committed that offence.

31. The American decision reported in Frank *Tot v. United States of America,* referred to by Mr. Sorabji, proceeds on the application of the American doctrine of due process clause of the American Federal Constitution. As observed by their Lordships of the Supreme Court in Babulal's case and in *Gopalan v. State of Madras*[13]*,* and *State of West Bengal v. Subodh Gopal*, the decisions of the American Courts relating to the application of the doctrine of due process clause are of little assistance in construing the provisions of the Constitution of India.

32. To summarize; At the time Section 178A was brought on the statute book importation of gold had become highly lucrative, it could easily be smuggled and was being smuggled in the country in large quantity for some years prior to the enactment of this section, this was largely affecting the economy of the country, detection' was getting difficult, even on detection of certain cases proving that the gold seized was smuggled gold" was difficult presumably because information

received in confidence could not be put in evidence which in its turn resulted in getting the smuggled gold absorbed in the country. This mischief had to be remedied and, therefore, Section 178A, amongst others, was brought on the statute book principally to prevent smuggling or, in other words, to prevent getting smuggled goods absorbed in the country. Restrictions imposed come into play only when the seizure of gold is under the reasonable belief of a Customs officer that it is smuggled gold. In view of the safeguards provided in the Act, the power conferred on the Customs officer to seize gold is not likely to be exercised in an arbitrary or capricious manner and afford sufficient safeguard to a citizen of India against any arbitrary action being taken against him. In these circumstances the restrictions imposed under Section 178A of the Sea Customs Act have a rational relation to the object of the Act and, therefore, are reasonable restrictions in the interests of the general public within the meaning of Clause (5) of Article 19 of the Constitution.

[13](1950) A.I.R.S.C. 27

33. For the reasons stated above and with, utmost respect to the learned Judges, deciding *Amichand Vallamji v. M.G. Abrol* and *Nathlla Sampathy Chetty v. The Collector of Customs*, in our judgment, we hold that the provisions of Section 178A of the Sea Customs Act do not infringe the constitutional guarantee afforded by Article 19(1)(f) and (g) of the Constitution so far as gold is concerned.

34. It is true that their Lordships of the Supreme Court in Babulal's case were considering the constitutionality of Section 1.78A in relation to Article 14 of the Constitution. But their following observations lend support to the conclusions to which we have reached (p. 1121) :

> "A cursory perusal of Section 178-A will at once disclose the well defined classification of goods based on an intelligible differentia. It applies only to certain goods described in Sub-section (2) which are or can be easily smuggled. The section applies only to those goods of the specified kind which have been seized under the Act and in the reasonable belief that they are smuggled goods. It is only those goods which answer the threefold description that come under the operation of the section. The object of the Act is to prevent smuggling. The differentia on the basis of which the goods have been classified and the presumption raised by the section obviously have a rational relation to the object sought to be achieved by the Act. The presumption only attaches to goods of the description mentioned in the section and it directly furthers the object of the Act, namely, the prevention of smuggling.

35. Now, when the presumption raised by the section has a rational relation to the object sought to be achieved by the Act and it directly furthers the object of the Act, namely, the prevention of smuggling, it is difficult to hold that the restriction imposed in the shape of this presumption is unreasonable.

36. Mr. Sorabji then contends that even if Section 178A of the Sea Customs Act is not ultra vires

of the Constitution, it has no application in deciding questions relating to contravention of the notification issued under Section 8(1) of the Foreign Exchange Regulation Act. He argues that by virtue of Section 23A of the Foreign Exchange Regulation Act the provisions of the Sea Customs Act were incorporated in the Foreign Exchange Regulation Act in the year 1952. Section 178A of the Sea Customs Act was brought on the statute book in the year 1955 but was not incorporated in the Foreign Exchange Regulation Act and, therefore, in deciding the question of contravention of the notification issued under Section 8(1) of the Foreign Exchange Regulation Act, the Collector was not entitled to call in aid the provisions of Section 178A, he ought to have decided the case only in accordance with the provisions of the Sea Customs Act as they stood when Section 23A of the Foreign Exchange Regulation Act was enacted. Reliance is placed on the following observations of the Judicial Committee of the Privy Council in *Secretary of State for India v. Hindusthan Co-operative Insurance Society*[14]

> "It seems to be no less logical to hold that where certain provisions from an existing Act have been incorporated into a subsequent Act, no addition to the former Act, which is not expressly made applicable to the subsequent Act, can be

[14](1931) L.R. 58 I.A. 259, s.c. 33 Bom. L.R. 1006 (p. 267)

> deemed to be incorporated in it, at all events if it is possible for the subsequent Act to function effectively without the addition.

Reliance is also placed on the decision of a Division Bench of the Madras High Court (*Nathlla Sampathy Chetty v. The Collector of Customs*). In our opinion, the aforesaid observations of their Lordships of the Privy Council have no application to the facts of the present case inasmuch as in our view the effect of Section 23A of the Foreign Exchange Regulation Act is not to incorporate the provisions of the Sea Customs Act into the Foreign Exchange Regulation Act but the effect is of incorporating the restrictions imposed by the Sub-sections (1) and (2) of Section 8, Sub-section (1) of Section 12 and Clause (a) of Sub-section (1) of Section 13 in the Sea Customs Act with certain modifications in Section 183 of the Sea Customs Act. With respect, it is, therefore, not possible for us to accept the view of the Division Bench of the Madras High Court in the aforesaid case. This contention of Mr. Sorabji, therefore, fails.

37. It is next contended by Mr. Sorabji that the inquiry held by respondent No, 1 in this case under Section 167(8) of the Sea Customs Act was a quasi judicial inquiry. Respondent No. 1 was, therefore, bound to follow the principles of natural justice in the conduct of that inquiry. He has failed to follow those principles inasmuch as he had examined three witnesses Anwar, Marotrao and his brother Rambhau behind the back of the petitioner and had considered their evidence in deciding the case against the petitioner. This contention also in our opinion has no force. The inquiry held under Section 167(5) is a quasi judicial inquiry: *Sewpujanrai I. Ltd. v. Collector of Customs*[15] and respondent No. 1 was bound to follow the principles of natural justice in holding the inquiry. These principles are in the words of their Lordships of the Supreme Court in *Union of India v. T.B. Varma*[16]

> "... Stating it broadly and without intending it to be exhaustive, it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them. If these rules are satisfied, the enquiry is not open to attack on the ground that the procedure laid down in the Evidence Act for taking evidence was not strictly followed.

38. In the first place, the arguments raised before us were not specifically stated in the petition filed before us. The plea is contained in para 7 of the petition and it is in vague terms. A copy of the letter dated October 21, 1957, referred to therein is not placed on the record. Mr. Abhyankar stated before us that in the letter dated October 21, 1957, the request made by the petitioner was that these witnesses should be submitted for cross-examination. The Department produced Anwar on February 6, 1958. The petitioner as well as his counsel were present at that time. Anwar was examined in the presence of the petitioner's counsel. His counsel however did not cross-examine him. When this statement was made by Mr. Abhyankar, Mr. Sorabji accepted the statement of Mr.

[15][1958] A.I.R. S.C. 843, 849

[16][1958] S.C.R. 499 (p. 507)

Abhyankar. Mr. Abhyankar further stated that the question of producing Rambhau and Marotrao for cross-examination did not arise because on February 6, 1958, the petitioner went back on his previous statement and stated that he had not melted gold through Rambhau and Marotrao. The statement of Marotrao and Rambhau was also to the same effect. That being the position, it was not necessary to produce Rambhau and Marotrao at the time of the inquiry, the inquiry officer having accepted the statement of the petitioner that the gold was not melted by him through Rambhau and Marotrao. In view of these facts, in our opinion, this contention of Mr. Sorabji must fail.

39. Last contention of Mr. Sorabji is that, at any rate, on the facts found by respondent No. 1, no penalty could be imposed on the petitioner and, therefore, the order of respondent No. 1 to the extent it imposes personal penalty of ₹ 25,000 on the petitioner is bad in law. At any rate, respondent No. 1 was acting beyond his jurisdiction in imposing penalty in excess of ₹ 1,000, In our opinion, the contention is well-founded. We have already reproduced the relevant provision of Item (8) of Section 167 of the Sea Customs Act and it would be seen that the liability to pay penalty arises only when it is proved that the person proceeded against is concerned in the importation in India or exportation from India of goods contrary to the provisions of the law. The mere finding that the goods found in a person's possession were smuggled goods is not sufficient to impose a penalty. In the instant case, respondent No. 1 has not found that the petitioner was in any manner so concerned in the importation of gold. The finding recorded is only that the gold

found in the petitioner's possession is smuggled gold. Respondent No. 1, therefore, in our opinion, has erred in law in imposing the penalty of ₹ 25,000 on the petitioner. This error of law is apparent on the face of the record and, therefore, the order of respondent No. 1 to this extent is liable to be quashed.

40. Mr. Abhyankar, however, contends that though respondent No. 1 has not recorded a finding that the petitioner was concerned in the importation of this smuggled gold found in his possession, this is the necessary inference on the facts found by him. It is not possible for us to accept this contention. It is not for this Court to record any finding on a question of fact. The question was entirely within the jurisdiction of respondent No. 1. Respondent No. 1 having failed to record the necessary finding of fact his order is liable to be set aside to the extent stated above. On this finding of ours it is not necessary to consider the question as to the quantum of fine which could be imposed under Item (8) of Section 167 of the Sea Customs Act. We would, however, record our finding in view of the arguments advanced before us by Mr. Abhyankar. He contends that there is no limitation in the matter of imposing a penalty on the Customs authority under Item (8) of Section 167. In support of his contention he placed reliance on the decisions in *Mohandas v. Sattanathan*[17], and *Palriwala Bros. Ltd. v. Collector of Customs*[18], . The question, however, is no more open to debate and is concluded by the decision of their Lordships of the Supreme Court in *F.N. Roy v. Collector of Customs, Calcutta'[1957] S.C.R. 1151, 1158.* where they observed:

> "...The Section (167, Item 8 of the Sea Customs Act) makes it clear that the maximum penalty that might be imposed under it is ₹ 1000. The discretion that the section gives must be exercised within the limit so fixed. This is not an uncontrolled or unreasonable discretion.

[17](1954) 56 Bom. L.R. 1156., 1163
[18](1958) A.I.R. Cal. 232

In view of these observations, it will have to be taken that the aforesaid two decisions stand overruled by necessary implication.

41. In the result, the petition partly succeeds. The order of respondent No. 1 so far as it relates to the imposition of penalty of ₹ 25,000 is quashed. Rest of the order including the order of confiscation of gold shall stand. In view of partial success of the parties, costs of this petition shall be borne as incurred.
Order accordingly.