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E-BOOK

IMPORTANT CASE LAWS

ON

SEARCH, SEIZURE & ARREST

[CENTRAL EXCISE, CUSTOMS & SERVICE TAX]

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Sd/-

(C. P. Goyal)
Additional Director General
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Important case laws

1. *Search held invalid in certain circumstances – Delhi High Court*

Customs Vs Dina Aruna Gupta

IN THE HIGH COURT OF DELHI
Suresh Kait, J.

CUSTOMS
Versus
DINA ARUNA GUPTA

Crl. L.P. No. 344 of 2011 and CRL. M.A. No. 8398 of 2011 (condonation), decided on 22-7-2011

REPRESENTED BY: S/Shri P.C. Aggarwal and Sunder Lal, Advocates, for the Petitioner.

[Judgment (Oral)]. - ***CRL. M.A. 8398/2011 (Condonation)***

For the reasons explained in the application, the same is allowed and the delay in filing the appeal is condoned.

Criminal M.A. stands disposed of.

CRL. L.P. No. 344/2011

1. Petitioner, the Customs Department, has assailed the impugned order dated 4-6-2010 passed by learned Additional Sessions judge, Dwarka Courts, New Delhi whereby the respondent Ms. Dina Aruna Gupta was acquitted.

2. The facts of the case are that :-

On 14-3-2001, accused Dina Aruna Gupta, respondent herein who is holder of Indian Passport bearing No. ZI366659, working as On-board courier, went to Singapore on duty and on her return on 15-3-2001 at IGI Airport, New Delhi from Singapore by Air Indian flight No. A1477, she reported at customs courier counter to finish her official duty. Her hand baggage was consisting of one black colour stroller bag and one black colour ladies hand bag. Having completed the other formalities, at the customs courier counter, when she walked through the green channel, was intercepted on suspicion by the customs officer at the exit gate of the

arrival hall.

3. At this stage, two independent panch witnesses were called, in the presence of witnesses, customs officer asked the respondent, whether her baggage or person contained any contraband goods, like gold or electronic, to which she replied in the negative.

4. The customs authority served a notice under Section 102 of the Customs Act, 1962 (hereinafter referred as to the 'said Act'). The baggage of the respondent was examined and 10 pieces of gold biscuits of 10 Tolas, each from inside her black colour ladies purse were recovered. The recovered gold biscuits bearing foreign markings, collectively weighing 1166.4 Grams of 999 purity, valued collectively at ` 5,01,552/-.

5. Personal search of the respondent was conducted, but nothing incriminating was recovered. The respondent could not produce any other documentary or otherwise in support of legal import of the recovered gold and the same was seized under the provisions of the said Act under the reasonable belief that the same were smuggled into India, hence, liable to be confiscated.

6. As alleged, during the course of the inquiry, the respondent tendered her voluntary statement under Section 108 of the said Act, which is admissible in evidence, wherein she admitted the recovery and seizure of the aforesaid gold and other incriminating facts.

7. After investigation, a complaint under Section 132 and 135(1)(a) of the said Act was filed. The prosecution had examined PW1 Smt. Suchi Goyal, Air Customs Officer (ACO), the seizing officer; PW-2 Shri S.K. Mohanty, Superintendent of Customs, who recorded the statement of the respondent under Section 108 of the said Act.

8. After recording pre-charge evidence, vide order dated 13-9-2001 charges under Section 132 & 135(1)(a) of the said Act against the respondent was framed, to which she pleaded not guilty and claimed trial. The aforesaid PWs were tendered for their cross examination after charge. Their cross examination was conducted after charge. The statement of the respondent under Section 313 Criminal Procedure Code was recorded and the entire evidence against the respondent was put to her.

9. The respondent herself appeared in the witness box and was examined as DW1. The Trial Court after hearing the arguments convicted the respondent and sentenced her for a period of six months under Section 132 of the said Act and three years under Section 135 coupled with a fine of ` 80,000/- vide order dated 28-8-2002.

10. Respondent preferred an appeal against the aforesaid conviction order dated 28-8-2002 before the Sessions Court and learned Additional Sessions Judge, had remanded back the case for further trial.

11. After remanding back of the case, on 5-7-2003, PW3 Shri Ramesh Chander Aggarwal, who has tested the recovered gold was examined. On 17-

9-2003, statement of the accused under Section 313 Cr. P. C. was recorded.

12. After hearing the arguments, respondent was again convicted, vide order dated 31-5-2006 by the Court of learned ACMM; New Delhi and sentenced for a period of six months under Section 132 of the said Act and three years under Section 135 coupled with a fine of ` 80,000/-.

13. Being aggrieved against the aforesaid conviction order dated 31-5-2006, respondent has preferred an appeal before the Court of Additional Sessions Judge, New Delhi and the said appeal was decided vide order dated 4-6-2010, whereby the respondent was acquitted.

14. The custom department, being aggrieved by the aforesaid order dated 4-6-2010 passed by the learned Additional Sessions Judge, has assailed by filing the instant revision petition.

15. Learned counsel for the petitioner submits that learned Additional Sessions Judge has gone wrong while not appreciating the deposition of PW1 Mrs. Suchi Goyal, ACO, PW2 Shri S. K. Mohanty, Superintendent, who recorded the statement of the respondent under Section 108 of the aid Act and PW3 Shri Ramesh Chander Aggarwal, goldsmith and the valuer.

16. On perusal of the impugned judgment dated 4-6-2010, it is seen that learned Additional Sessions Judge has come to the conclusion, on the basis of that statement of the accused recorded under Section 108 of the said Act is admissible in evidence, against the accused unless it is proved that it was forcibly extracted from the accused. No doubt, as per the provision, the statement under Section 108 of the said Act cannot be doubted as it is admissible, however, at the same time, cannot be made sole basis of the conviction particularly if the same is retracted immediately thereafter. Besides, it is also to be seen the circumstances in which the said statement was made and at what time.

17. Learned Additional Sessions Judge noted in the present case, as pointed out by the learned defence counsel that the prosecution did not prove on record the arrest memo of the accused. Further, pointed out that the photocopies of the arrest memo which is on the judicial record and as per the time of arrest is shown as .05 hours which in her opinion, amounts to 12.05 hours. This fact has not been properly appreciated by the learned Trial Judge and had held that .05 hours amounts to 5:00 AM. The reasons given by the learned Trial Court was that in the *panchnama* it was stated that the proceedings started at 23:00 hours on 15-3-2001 and concluded at 03:00 AM on 16-3-2011, shows that *panchanama* proceedings was over at 12:30 AM, hence the claim that the accused was arrested at 12:05 AM, is discarded as it was not based on the arrest memo. In the arrest memo, the time is mentioned as .05 hours, which by no stretch of imagination can be termed as 05:00 AM, thus if the time of the *panchnama* proceedings is mentioned 23:00 hours to 00:03 hour, the time mentioned on the arrest memo as 05:00 AM, cannot be ignored.

18. Learned Additional Sessions Judge has observed that arrest memo

is to be read independently as a separate document, prepared during the investigation and according to it, time of arrest is clearly mentioned as .05 hours. Had it been that the time of arrest was 05:00 AM it would have been mentioned as 05:00 hours instead of .05 hours.

19. Indisputably, as per the photocopies of the arrest memo, the accused was arrested on 12:05 AM whereas statement under Section 108 of the said Act admittedly recorded at 01:00 AM. At that time, the accused/respondent was already arrested and under the influence of the customs officers for which reasons she could not have made any voluntary statement in her own handwriting.

20. Besides, she retracted from the aforesaid statement at the earliest opportunity available to her. Admittedly, when she was produced in the Court for the first time, after her arrest, she moved an application retracting from the statement on the ground that she was forced to make the statement.

21. Thus, in the circumstances, learned Additional Sessions Judge observed that the statement of the respondent under Section 108 of the said Act was not recorded voluntarily, and has come to the conclusion that the prosecution has failed to prove the statement of the respondent under Section 108 of the said Act, cannot be used against the accused to corroborate the case of the prosecution.

22. As is observed by learned Additional Sessions Judge, prosecution has failed to prove on record that the baggage and person of the respondent was searched on 15-3-2001 as there is interpolation of the dates on the said notice at two places i.e. below the signature of PW1 Smt. Suchi Goyal and below the signature of the accused. The date appears to have been mentioned originally as '16-3-2001' at both the places and thereafter it was interpolated as '15-3-2001'. No explanation has been given by the prosecution for the aforesaid interpolation. This leads to the inference that no notice under Section 102 of the said Act was served upon the respondent/accused, before baggage and person was searched. Rather the inference can also be drawn to the effect that no such search was conducted as claimed by the prosecution.

23. The prosecution, as is observed by the learned Additional Sessions Judge, has not produced the *Panch* witnesses to prove the alleged recovery of the gold biscuits from the possession of the accused.

24. It was further observed from the learned Trial Court's order that since accused had admitted in her statement under Section 108 of the said Act, the recovery of the gold from her possession, as such non-production of the *panch* witness not fatal to the case of prosecution.

25. Further, learned Additional Sessions Judge did not agree with the aforesaid view of the learned Trial Court and was of the view that onus is always on the prosecution to prove its case. As it is already observed above that the statement of the accused under Section 108 of the said Act, in the present case is of no help to the prosecution, since it was recorded after the arrest of the accused, therefore, it was necessary on the part of the prosecution to examine the *panch* witness to prove the alleged recovery of the

gold bars from the possession of the accused.

26. It was also seen by the learned Additional Sessions Judge from the record that the intercepting officer has also not been examined by the prosecution nor even has cited as a prosecution witness. The prosecution has not even brought on record as to who was the officer who had intercepted the accused on the basis of the suspicion. The only witness examined by the prosecution on record regarding the alleged recovery of gold bars from the possession of the accused is PW-1 Smt. Surchi Goyal, Air Custom Officer, who in her examination in chief claimed that she had intercepted the accused on suspicion, whereas, in her cross examination she testified that the accused was intercepted for the first time by the gate officer and not by her, she could not tell the name of the gate officer. Further, in her examination in chief, she stated that she had searched the hand purse of the accused, which was found to contain ten gold biscuits of 10 Tolas each, which were wrapped in white colour handkerchief and the biscuits were bearing foreign markings as "THE PERTH MINT AUSTRALIA - TEN TOLAS 999". Whereas, in her cross examination dated 11-10-2001, she testified that when she was called for further proceedings in the matter the gold was lying in the bag wrapped in the handkerchief of white colour. The witness has not explained as to when she had left the proceedings and when she had again joined the proceedings. Neither she could give the description of bag nor it has been mentioned in *panchnama*.

27. It was further noticed that PW-1 in her entire testimony even did not disclose the name of the *panch* witness and from where they were called and who had called them. She categorically testified that she has not told as to whether the name of the officer, who had called the *panch* witness, nor they were cited in the list of witnesses, as she had not called the witnesses.

28. Regarding the sanction, PW-1 Smt. Surchi Goyal, testified in her cross examination, that she had not obtained the sanction for prosecution in this matter and she had simply put to the file. Thus, the prosecution has even failed to file on record that the sanction Ex.PW-1/N granted by the Commissioner of Custom was applied by PW-1 or any other officers and that the same was granted by the Commissioner of Custom after applying its mind on the facts of the present case. As per the testimony of PW-1 it appears that, as was observed by learned Additional Sessions Judge, had simply put to the complaint before the Commissioner of Customs and had gathered sanction for the prosecution of the accused in mechanical manner without due application of mind. The provision envisaged in Section 137 of the said Act are mandatory. As per the same, no Court shall taken cognizance of any offence under Section 132, 133, 134 and 135 of the said Act, except with the previous sanction of the Commissioner of Custom.

29. Thus, the sanction was granted by the Commissioner of Customs in mechanical manner without applying the mind to the material placed before him by the investigating officer and then to decide whether the prosecution of the accused was required or not. Though, PW-1 Mrs. Surchi Goyal has

claimed that she was not the IO of the case, but in her cross examination, testified that she had put up the complaint for sanction for prosecution. She has nowhere testified that she has produced all the documents such like panchnama, summons under Section 102, 108 of the said Act and the statement of the accused besides the other documents for his perusal to facilitate him to take a decision on sanction.

30. Recovery of the gold bars of 24^ from the possession of the accused was also to be proved by the prosecution. At the time the prosecution was to prove the time of the recovery of gold from the possession of the accused and it was of foreign origin.

31. The prosecution has examined PW-3 Shri Ramesh Chand Aggarwal, the goldsmith and the valuer who had tested the gold bars allegedly recovered from the possession of the accused. Whether PW-3 Shri Ramesh Chand Aggarwal was possessed of any qualification in the matter of testing gold was liable to be proved by the prosecution. The certificate issued by the PW-3 Shri Ramesh Chand Aggarwal i.e. Ex.PW-1/F does not disclose the method on the basis of which he had tested the gold and had reached to the conclusion that it was gold of 24^ purity.

32. Normally, the test applied for testing gold is furnace test but the same was not applied or resorted to in the present case. There is no evidence on record that PW-3 Sh. Ramesh Chand Aggarwal was possessing any proficiency in the matter of testing gold. The certificate/report Ex.PW-1/F does not contain any data. Whereas the certificate must contain actual data and not mere opinion. Further, the gold of foreign origin has to be proved by the authentic manner. Law is well settled that mere marking cannot be taken as a proof of the gold for origin of the gold as markings and labels. In such a situation, the statement of the accused under Section 108 of the said Act has no consequences.

33. As per prosecution, the value of the gold as on 15-3-2001 was not taken into consideration, while giving the value of the alleged recovered goods. Learned Additional Sessions Judge found no evidence on record to show that as to what was the market rate of gold or international rate of gold as on 15-3-2001 or even on 16-3-2001 so as to say that the recovered gold was correctly valued. As per the testimony of PW-3 Sh. Ramesh Chand Aggarwal, he did depose correctly the value of the gold as mentioned in the certificate Ex.PW-1/F. As per his examination in chief, the value of the gold was ` 5,01,500/- whereas as per the certificate Ex.PW1/F, the value of the gold is mentioned as ` 5,01,552/-.

34. The visits at the airport of the PW3 Sh. Ramesh Chand Aggarwal has also not been proved. There is no documentary evidence on record about the arrival of the PW3 Sh. Ramesh Chand Aggarwal at IGI Airport. PW3 Sh. Ramesh Chand Aggarwal has admitted in his cross examination that no entry pass was made for him. It is only during the testimony of PW3 Sh. Ramesh Chand Aggarwal, it has come on the record that that PW3 Sh. Ramesh Chand

Aggarwal, did not come alone to the airport but was accompanied by his assistant Shri Hitender Gupta and he also testified that the certificate Ex.PW1/F was not in his own handwriting but was prepared by his assistant, referred above. The prosecution has neither cited nor examined him as a prosecution witness. Since the certificate Ex.PW1/F was in the handwriting of Shri Hitender Gupta, it was more necessary that he was to be cited as witness, and should have been examined as a witness to prove that gold bars were tested by the PW3 Sh. Ramesh Chand Aggarwal in his presence and certificate Ex.PW1/F was prepared by him under the direction of PW3 Sh. Ramesh Chand Aggarwal.

35. In his cross examination, he has deposed that he was paid ` 500/- for the professional charges and the said amount was given to him in cash by Shri O.N. Sharma, Superintendent of Customs and the aforesaid Superintendent, Custom did not issue any receipt for the said amount. At the same time, he claimed that he used to pay ` 1,250/- per One lac and he has not given any explanation as to why he accepted ` 500/- in place of the rates mentioned above.

36. In view of the above discussion, I am of the opinion that the prosecution has failed on account of arrest of the accused, testing of the gold, the value of the gold and the visit of PW3 Sh. Ramesh Chand Aggarwal and the sanction issued by the Commissioner of Customs. On these issues, the prosecution could not prove, I note, all the issues raised have been dealt with by learned Additional Sessions Judge.

37. I find no infirmity in the order passed by the learned Additional Sessions Judge; therefore, I am not inclined to interfere with the order passed by learned Additional Sessions Judge.

38. In view of above, Criminal L.P. No. 344/2011 is hereby dismissed.

39. No order as to costs.

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2. *Reason to believe for conducting search – clarified by Allahabad High Court*

N. K. Laminates Pvt. Ltd. Vs Superintendent(CP) Central Excise

IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD
Yatindra Singh and Rajes Kumar, JJ.
N.K. LAMINATES PVT. LTD.
Versus
SUPERINTENDENT (CP), CENTRAL EXCISE

Writ Petition (Tax) Nos. 1289-1290 & 1334 of 2003, decided on 27-10-2010
CASES CITED

Commissioner v. Ram Kishan Shrikishan Jhaver — AIR 1968 SC 59 —

Distinguished……[Para 25]

Durga Prasad, Etc. v. H.R. Gomes Supdt. — 1983 (13) E.L.T. 1501 (S.C.) — *Relied on……...*[Para 36]

R.S. Seth Gopikishan Agarwal v. R.N. Sen — AIR 1967 SC 1298 — *Relied on……*[Paras 33, 34]

REPRESENTED BY : S/Shri Bharat Ji Agrawal, S.D. Singh and Dinesh Prakash, Counsels, for the Petitioner.
S/Shri S.P. Kesarwani and B.K.S. Raghuvanshi, for the Respondent.

[Order]. - The petitioners are manufacturers. However, classification of their product is disputed. It is for this reason a search was conducted at their units under Central Excise Act, 1944 (the Excise Act). These writ petitions revolve around legality of the same.

The facts

2. The Central Government has framed Central Excise Rules, 1944 (the Rules) under the Excise Act. In pursuance of the powers confirmed under Rule 8(1) of the Rules, the government issued a notification on 10-2-1986 (the exemption notification) listing the goods that were exempt from the excise duty. Entry no. 6 of this notification is '*Kattha* (Catechu)': it is exempted from duty.

3. The exemption notification was amended on 1-3-2003. Entry no. 6 now stands as '*Kattha* (Catechu) excluding Gambier'.

4. Traditionally, *Kattha* is manufactured from *Khair* wood. It is exempted from excise duty. The petitioners case is that:

It can be manufactured from Gambier, which is imported from outside; They purchase Gambier from the market and manufacture *Kattha* from it. They are not liable pay excise duty.

5. The Central Excise Department at Kanpur (the Department) disputed the claim of the petitioners. They started investigating it.

6. A search was conducted on 4th September, 2003 in six units in Kanpur. Out of these six, we are concerned with the three that are petitioners in WP (Tax) 1289 of 2003 (the first WP), WP (Tax) 1290 of 2003 (the second WP), and WP (Tax) 1334 of 2003 (the third WP).

7. The goods as well as the records of the searched units were seized and three samples of the goods were made. One sample was given to the petitioner, one was sent to Central Revenue Control Laboratory, Pusa Road, New Delhi (the CRCL), and one was kept by the Department.

8. The notices were issued to them on 10-10-2003 requiring them to register their product as classifiable under chapter sub-heading 1301.10 (Lac; gum, resin and other vegetable saps and extracts in or in relation to which any process is carried on with the aid of power).

9. The petitioners filed these WPs against search and seizure as well as the notices dated 10-10-2003.

10. During pendency of the WPs, the following developments have taken place :

The CRCL has sent its report on 9-12-2003. Thereafter, the Department sent a sample each to U.P. State Public Analyst, Lucknow (the State Analyst) for examination. He has also sent his report on 14-10-2004 to the Department.

The Department has sent notices to the petitioner in the first and third WPs on 31-8-2004 and a notice dated 29-7-2004 to petitioner in the second WP requiring them to pay excise duty and penalty.

The copies of the reports as well as notices were produced before the court after giving copies to the counsel for the petitioners.

Points for determination

11. We have heard Sri Bharat Ji Agrawal, Sri SD Singh, and Sri Dinesh Prakash, counsel for the petitioners and Sri S.P. Kesarwani and Sri B.K.S. Raghuvanshi for the respondents. The following points arise for determination :

(i) Whether the goods manufactured by the petitioners are exempt from excise duty?

(ii) Whether there is any reason to believe for conducting the search?

(iii) Whether the reasons should be personally recorded by the empowered officer?

(iv) Whether the approval for search was to be obtained from the Director General, Central Excise Intelligence (the DGCEI)?

(v) Whether there was no application of mind for ordering search?

Ist point : Exciseable or non — not decided

12. The counsel for the petitioner submits that:

- *The petitions are manufacturing Kattha;*
- *It is exempt from excise duty; and*
- *No search could be conducted in the premises.*

13. The case of the petitioners is that the goods manufactured by them is *Kattha*. In this regard they submit that :

- *The other wings of the Government treat it as Kattha;*
- *The raw material of their product is Gambier. Except Kanpur, it is treated as Kattha in rest of the country by the Department;*
- *The petitioners cannot be discriminated.*

14. The question whether the goods manufactured by the petitioners are liable to excise duty or not, is disputed by the Department. This require investigation into question of fact. It cannot be gone into in the writ jurisdiction.

15. The petitioners have been served with the notices dated 10-10-2003 to get themselves registered. Subsequently, notices have also been issued by the Department on 31-8-2004 to the petitioners in first and third WPs and on 29-7-2004 to the petitioner in the second WP to deposit excise duty and penalty. The question whether the product is liable to excise duty or not will be decided in these proceeding and not here in the writ jurisdiction.

16. As we are not expressing our opinion on the merit of the case, we do not wish to say anything except that the Department cannot adopt discriminatory approach: the manufactured goods from Gambier cannot be treated as *Kattha* (and exempt it from excise duty) at some places and at others as an excisable item. The Department has to adopt one standard; either it is treated as *Kattha* and a non-excisable item by the excise department or is not treated as *Kattha* consequently an excisable item: there cannot be discrimination areawise. We leave the matter here.

17. The petitioner may appear before the authority of the Department, that has issued notices to them in the week commencing 21st November, 2010 along with their objections and evidence in support of the same. Thereafter, the objection of the petitioners may be decided by a reasoned order. Different Authorities have issued notices to the petitioners. It would be convenient to consolidate the proceedings and decide them together. Needless to add the question of payment of excise duty or penalty, if any, will only arise if the petitioners are manufacturing excisable goods.

2nd point : Reasons are there

18. The counsel for the petitioners cited *Lakhmani Mewal* v. *ITO*, 103 ITR 437 and submitted that the reasons to believe must be relevant and should exist before the search is ordered.

19. There is no dispute so far as the aforesaid proposition is concerned. The reasons have to be relevant and must exist before a search is ordered. It is on their basis that the search is conducted. Let's consider, if reasons are there or not and whether they are relevant.

20. The Department has produced the original record of the case where the reasons were recorded. A photostat copy of the documents were also given to the counsel for the petitioners.

21. The record indicates that even prior to the amendment of the exemption notification, there was doubt, whether the goods manufactured by the petitioner from Gambier was exempt from excise duty or not. In this connection, investigations were going on.

22. The Superintendent of the Department submitted a note (see *Appendix-1*) on 22-3-2003. It indicated the following reasons for conducting the *search* :

(i) The Units are engaged in manufacture of product by processing Gambier and Khair wood and under the guise of Kattha, no excise duty is being paid;

(ii) The Food and Adulteration Department has clarified that neither Kattha can be manufactured from Gambier, nor the product manufactured from Gambier can be marketed as Kattha;

(iii) The goods manufactured from Gambier is not Kattha as per clarification from the Food and Adulteration Department and ISI specifications for Kattha;

(iv) The goods manufactured from Gambier classified in the CSH 3201 as Tanning Extract, on the basis of classification of Gambier in the Customs Tariff and as mentioned in corresponding Bill of Entry filed by the importers. It is liable for payment of 16% ad valorem excise duty.

23. The Assistant Commissioner is the empowered officer to order the search. On the note of the Superintendent, he made the following noting/order on 25-3-2003 :

> 'Please conduct the necessary search and get the relevant records from all the unit involved in the manufacturing of Gambier extract and also put up a letter to DGCEI mentioning the details of intelligence.'

24. The reasons are there in the note of the Superintendent. They are relevant and were in existence prior to the order for the search. It is on their basis, the search was ordered by the empowered officer on 25-3-2003. Thereafter, some officials were authorised and search was conducted on 4-9-2003. However, the question is, should they be personally recorded by the empowered office?

3rd point : Not necessary to personally record reasons

25. The counsel for the petitioner cited *Commissioner of Commercial Taxes, Board of Revenue* v. *Ram Kishan Shrikishan Jhaver*, AIR 1968 SC 59 (paragraph 17 to 19) (the *Ramkishan* case) and submitted that :

(i) In view of Section 18 of the Excise Act, the search is made in accordance with the provisions of Code of Criminal Procedure, 1973 (the CrPC).

(ii) The conditions for conducting the search are mentioned in Section 165 of CrPC.

(iii) In Ramkishan case, section 165 CrPC has been interpreted and it has been held that,

- The empowered officer must have reasonable grounds for

believing that anything necessary for the purpose of recovery of tax may be found in any place within his jurisdiction;

- He must be of the opinion that such thing cannot be otherwise got without undue delay;
- He must record in writing the grounds of his belief; and
- He must specify in such writing so far as possible the thing for which the search is to be made. After he has done these things, he can make the search.'

(iv) In this case reasons have not been recorded personally by the empowered officers;

(v) The search is illegal.

26. Section 18 of the Excise Act provides that all search and arrest shall be carried in accordance with the provisions of Code of Criminal Procedure. Section 165 of the CrPC is titled 'Search by police officer'. It provides how a search is to be conducted.

27. The Supreme Court in the *Ramkishan* case was concerned with the constitutionality of Section 41 of Madras General Sales Tax Act, 1959 (the Madras Act). The proviso to sub-section (2) of Section 41 [Section 41(2)] of the Madras Act provided that so far as may be, all searches be made in accordance with provisions of CrPC. The Madras High Court had held that :

(i) Sub-sections (2) to (4) of Section 41 of Madras Act were ultra vires the Constitution;

(ii) The warrant issued by the Magistrate for search of the residential accommodation was bad as Magistrate had not applied his mind before issuing the same.

The Supreme Court reversed the Madras High Court judgment on the first point but agreed with its second conclusion and dismissed the appeal.

28. In the *Ramkishan* case, the Court was not concerned with the question involved in the present writ petitions; there the court was concerned with the constitutionality of the Madras Act and was considering whether sufficient safeguards were provided under Section 41 of the Madras Act or not. It is in this light that the Supreme Court made some observations.

29. The Supreme Court in the *Ramkishan* case was neither concerned with the question whether empowered officer should record the reasons personally, nor in that case the order of the empowered officer was challenged on this ground. The Supreme Court has also neither held, nor made any observations that in case reasons are not recorded personally by the empowered officer then the order would be vitiated.

30. Section 12 of the Excise Act provides that the Central Government may apply the provisions of the Customs Act, 1962 (the Customs Act) with such modifications and alterations as it may consider necessary.

31. By the Notification No. 68/63-C.E., dated 4-5-1963 as amended from time to time, sub-section (1) of Section 105 [Section 105(1)] of the Customs Act with suitable modifications has been applied in the Excise Act.

32. Sub-section (2) of Section 105 [Section 105(2)] of the Customs Act applies CrPC so far as search under the Customs Act is concerned. It is

similar to Section 18 of the Excise Act.

33. Sections 105(1) and 105(2) apply Section 165 CrPC to a search under the Customs Act. They came to be interpreted in *R.S. Seth Gopikishan Agarwal* v. *R.N. Sen, Assistant Collector of Customs and Central Excise*, AIR 1967 SC 1298 (the *Gopikishan* case). In the *Gopikishan* case also, a similar argument was raised but was negated.

34. In the *Gopikishan* case, the Supreme Court held that the searches under Sections 105 of the Customs Act and 165(1) CrPC are intended to meet different situations : Section 165 CrPC applies only to the case where search is urgently required and search warrant cannot be obtained in the ordinary course. The conditions mentioned in Section 165(1) CrPC do not apply to Section 105 of the Customs Act. The Supreme Court observed,

> '[I]n our view, S. 105 of the Act and S. 165(1) of the Code of Criminal Procedure are intended to meet totally different situations. ...[U]nder S. 105 of the Act the Assistant Collector of Customs either makes the search personally or authorises any officer of Customs to do so, if he has reason to believe the facts mentioned therein. Under S. 165(1) of the Code of Criminal Procedure the recording of the reasons for believing the facts is only to enable him to make a search urgently in a case where search warrants in the ordinary course cannot be obtained. It is, therefore, not possible to invoke that condition and apply it to a situation arising under S. 105 of the Act'.

35. The same reason applies here. The order for conducting the search cannot be voided on the ground that the empowered officer has not personally recorded the reasons.

36. The object of search is to find out goods or documents that may be useful and necessary in the proceeding pending or contemplated under the Excise Act. The only requirement for the search is that there should be reasons to believe to conduct the search and they should be relevant. This is also so held in *Durga Prasad* v. *H.R. Gomes*, 1983 (13) E.L.T. 1501 :

> 'The object of grant of power under S. 105 is not search for a particular document but of documents or things which may be useful or necessary for proceedings either pending or contemplated under the Customs Act ... [T]he power of search granted under S. 105 of the Customs Act is a power of general search. But it is essential that before this power is exercised, the preliminary conditions required by the section must be strictly satisfied, that is, the officer concerned must have reason to believe that any documents or things, which in his opinion are relevant for any proceeding under the Act, are secreted in the place searched.'

37. The note submitted by the Superintendent is typed and thereafter the noting is by the empowered officer in his hand writing. The noting of the empowered officer indicates that he agreed with the reasons and has applied his mind; thereafter he has passed the order for necessary search to get the relevant records.

38. In our opinion,

- *The reasons to believe is mandated by Section 12 read with Section 105(1) of the Customs Act.*
- *It is not necessary for the empowered officer to record them personally.*
- *In the present case, the reasons were there. They were approved by the empowered officer. Thereafter, the order for search and seizure was made.*
- *This is sufficient compliance for conducting search under the Excise Act.*

39. The counsel for the petitioner submits that :

- *The empowered officer has neither used the word 'approved' nor 'agreed' while making his noting; and*
- *This shows that there was no approval under the Act.*

40. In *Gopikishan* case, a similar question was raised that the authorisation given by the empowered officer did not say that he had reasons to believe. The court (in paragraph 6) held that :

> 'Though the words "reason to believe" are not in terms embodied in the authorisation, the phraseology used in effect and substance meant the same thing.'

41. Here also, the words 'approved' or 'agreed' are not specifically used but there are ways of expression: language is used in different ways by different people but what is to be seen is the substance of it.

42. The empowered officer made his noting immediately after the note of the Superintendent. He has indicated that the search should be conducted and relevant records should be obtained. This indicates that he has approved the reasons given by the Superintendent.

4th point : Approval — not necessary from the DGCEI :

43. The counsel for the petitioner submits that :

- *In this case approval was to be given by the DGCEI as mentioned in the noting of the empowered officer;*
- *This was not done;*
- *The entire search was illegal.*

44. This case was not unique to Kanpur but the same reasons applied to all such units in the country. It is for this reason that the note of the Superintendent indicated the name of some of the units and it was mentioned that a letter be written to the DGCEI to cover all such units. The later part of the note of the empowered officer talks about getting approval of the letter that was to be sent and not about the approval for conducting search by the Department.

45. In our opinion, there was neither any requirement, nor was it indicated by the empowered officer to get approval of the DGCEI for the search.

5th point : There cannot be general order :

46. The counsel for the petitioners submitted that:

- *The names of the units are not indicated in the note of the empowered officer;*

- *There cannot be general order to search all the units in Kanpur;*
- *It cannot be said that there has been any application of mind.*

47. The note of the Superintendent indicates three units namely, M/s. N.K. Laminates, M/s. Brij Kattha, and M/s. Balram Wood Products. There is also recommendation for writing a letter to the DGCEI informing him details of the intelligence report to cover the similar units within jurisdiction of other commissionerates. The report is confined to three units though the recommendations is there for the other similar units in the Kanpur Commissionerate.

48. The empowered officer agreed with the report. Out of these three, two are at the petitioners in the first and third WPs. There is nothing on record to show that there was specific approval to conduct search in Kanchan Udyog.

49. The search is a serious matter. There cannot be general order for search: either the report should have indicated the names of such units and then agreed upon by the empowered officer, or the empowered officer should have indicated the same.

50. In our opinion,

- *There is no application of mind for conducting the search of Kanchan Udyog;*
- *The search conducted on M/s. N.K. Laminates and Brij Kattha Industries is valid; whereas the search of Kanchan Udyog is illegal.*

51. In view of our finding on this point, the Department has to return the seized goods and documents of Kanchan Udyog. However, it will be open to the Department to (for citations see below) :

- *Take photocopies of the documents;*
- *Use the documents in the proceeding to be decided by the Department.*

Conclusions :

52. Our conclusions are as follows :

(a) The reasons to conduct the search are there;

(b) The reasons to conduct the search need not be personally recorded by the empowered officer, but he should apply his mind and approve the same;

(c) The search conducted on M/s. N.K. Laminates and Brij Kattha Industries is valid; whereas the search conducted on Kanchan Udyog is illegal;

(d) The Department may return the goods and documents seized from Kanchan Udyog though it is entitled to keep photostat copies of the documents and use the same in the assessment proceeding;

(e) The party may appear before the relevant officers in the Excise Department at Kanpur in the week commencing 22nd November, 2010 and file their objection and evidence. Thereafter, the question whether their product is excisable or not may be decided by a reasoned order in accordance with law. It will be open to the Department to consolidate the cases so far as common question relating to the excisability of the goods are concerned.

53. With the aforesaid observations, the WPs are disposed of.

Appendix-1

The notice submitted by the Superintendent on 22-3-2003 indicating the reasons is as follows :

On the basis of intelligences and clarifications received from the Food and Adulteration Department, search operations were conducted in the manufacturing premises of the units engaged in the manufacture and clearance of products obtained from the processing of Gambier and Khair Wood together, in the guise of Kattha & availing the benefit of Notification No. 76/86, as amended. No Central Excise formalities like Registration, payment of Central Excise duty etc. were made by these units. The Food & Adulteration Department has very categorically clairified that Kattha cannot be manufactured from Gambier and resultant product obtained from the processing the Gambier cannot be marketed as Kattha. The aforementioned notification is only relevant as far as Kattha is concerned and exemption was granted to Kattha only. However, the product so obtained from the processing of Gambier along with some other raw materials does not fall within the ambit of Kattha as per clarification received from the Food & Adulteration Department and as well as on the basis of ISI specifications from Kattha.

Thus, the product so obtained from the processing of Gambier may rightly be classified in the CSH 3201 as Tanning Extract [on the basis of classification of Gambier in the Customs Tariff and as mentioned in corresponding Bill of Entry, so filed by the importers], and liable for payment of Central Excise Duty @ 16% adv.

On the basis of various records/information submitted/resumed from M/s. N.K. Laminates, M/s. Bij Kattha & M/s. Balram Wood Products, ***approximate duty involvement appears to be between Rs. 8-12 Cr.*** Exact quantum of duty cannot be ascertained at this stage as on account of Holi holidays, most of the manufacturers have not submitted the relevant records, which were not available on the date of search.

If approved, we may write a letter to DGCEI, submitting the details of intelligence to cover of the units of the same nature falling within the jurisdiction of other Commissionerates. Further, the remaining units falling within Kanpur Commissionerate, as verbally informed, may also be ordered to be searched in this regard.

Put up for perusal and further orders please.

(Pradeep Kumar)
Suptd. (CP).

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3. *Issuance of SCN is necessary within six months in terms of Section 110(2) of Customs Act not the service of SCN-- Madhya Pradesh High Court*

CCE, Indore Vs Ram Kumar Aggrawal

IN THE HIGH COURT OF JUDICATURE OF MADHYA PRADESH AT INDORE

Shantanu Kemkar and Abhay M. Naik, JJ.
C.C.E., INDORE
Versus
RAM KUMAR AGGRAWAL
Writ Appeal No. 782 of 2006, decided on 28-1-2011

CASES CITED

Commissioner v. Mohan Bottling Co. Pvt. Ltd. — 2010 (255) E.L.T. 321 (P & H) — *Relied on…….*[Para 14]
K. Narasimhiah v. H.C. Singri Gowda — AIR 1966 SC 330 — *Relied on……..*[Paras 6, 10, 11]
Union of India v. Kanti Tarafdar — 1997 (91) E.L.T. 51 (Cal.) — *Relied on……..*[Para 13]

REPRESENTED BY : Shri Abhisheikh Tugnawat, Advocate, for the Appellant. S/Shri G.M. Chaphekar, Sr. Advocate with Subodh Abhyankar, Counsel, for the Respondent.

[Order per : Abhay M. Naik, J.]. - This writ appeal is directed against the order dated 15th November, 2000 passed by the learned Single Judge of this Court in Miscellaneous Petition No. 44/1990, quashing thereby show cause notice dated 29-9-1989 (Annexure 10) issued by the Collector, Customs & Central Excise, Indore.

2. Short facts, leading to the present writ appeal, are that the petitioner-respondent was engaged in the business of Silver Refinery, being proprietor of Shri Ganesh Bullion Refinery. On 3-4-1989, a search was conducted at the shop of the petitioner-respondent and a seizure was made of 129.720 kilograms of silver and currency notes etc. A panchnama was prepared in the absence of the petitioner, copy whereof was annexed to the writ petition as Annexure-1. He was served with a show cause notice on 7-10-1989 in registered AD manner, copy whereof is placed on record as Annexure-10. Miscellaneous Petition No. 44/1990 was submitted with allegations that the said show cause notice was given to the petitioner beyond the statutory period of six months, as prescribed in Section 110 of the Customs Act, 1962.

Accordingly, a prayer was made for issuance of writ of *certiorari* for quashing of the said show cause notice. Additionally, a direction was sought against the respondents for return of the seized articles/goods.

In the return, it was stated that the seizure was duly made and the show cause notice was duly given to the petitioner. It was served on 28-9-1989, by way of affixture at the residential premises of the petitioner and a panchnama was duly prepared to this effect, as revealed in Annexure R/1. Additionally, show cause notice was also issued by the Office of the Collector, Customs & Central Excise, Indore on 29-9-1989 by registered post. A show cause notice was also affixed on the Notice Board of respondent's Office on 29-9-1989 vide Annexure R/2. Accordingly, the seizure having been duly made and the show cause notice having been duly given, the writ petition is liable to be dismissed.

3. Learned Single Judge vide impugned order dated 15th November, 2000 held that the respondents-appellants have failed to establish that the show cause notice was sent in conformity with the statutory requirement contained in Section 153(a) read with Section 110(2) of the Customs Act, 1962. Accordingly, the impugned show cause notice was found to have been vitiated and the writ petition was resultantly allowed.

4. Aggrieved by the aforesaid order, the present writ appeal has been preferred. Shri Abhisheikh Tugnawat, learned counsel for the appellants and Shri G.M. Chaphekar, learned senior counsel for the respondent made their respective submissions, which have been considered in the light of the material on record as well as provisions of law governing the situation.

5. It is contended on behalf of the appellants that the notice under Clause (a) of Section 124 of the Customs Act, 1962 was duly given within six months of the seizure of the goods. The same was equally good within the ambit of Section 110(2) of the Customs Act. According to the learned counsel, learned Single Judge has committed an error in holding contrary by mis-construing the provisions.

6. Aforesaid contention has been countered by Shri Chaphekar, learned senior counsel appearing for the respondent, relying on the Supreme Court decision in the case of *K. Narasimhiah* v*. H.C. Singri Gowda and Others* (AIR 1966 Supreme Court 330). Strong reliance has been placed on para 11 of it, which reads as follows :

> "11. "Giving" of anything as ordinarily understood in the English language is not complete unless it has reached the hands of the person to whom it has to be given. In the eye of law however "giving" is complete in many matters where it has been offered to a person but not accepted by him. Tendering of a notice is in law therefore giving of a notice even though the person to whom it is tendered refuses to accept it. We can find however no authority or principle for the proposition that as soon as the person with a legal duty to give the notice despatches the notice to the address of the person to whom it has to be given, the giving is complete. We are therefore of opinion that the High Court was wrong in thinking that the notices were given to all the Councillors on the 10th October. In our opinion,

the notice given to five of the Councillors was of less than three clear days."

According to him, notice under Clause (a) of Section 124 of the Customs Act, 1962 referred to in sub-section (2) of Section 110 thereof, can be said to be given only on service on the addressee.

7. In order to appreciate the rival contentions, we feel it necessary to reproduce the relevant portions of the following provision of law :-

"Section 110. Seizure of goods, documents and things.-

(2) Where any goods are seized under sub-section (1) and no notice in respect of the goods, the goods shall be returned to the person from whose possession they were seized :

Provided that the aforesaid period of six months may, on sufficient cause being shown, be extended by the Commissioner of Customs for a period not exceeding six months.

Section 124. Issue of show cause notice before confiscation of goods, etc. - No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person -

(a) is given a notice in writing informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty"

8. Perusal of the aforesaid provisions makes it clear that sub-section (2) of Section 110 conferred a right on the respondent to seek the return of the goods in question, if no notice to him, in respect thereof, is given under Clause (a) of Section 124 within six months of the seizure of the goods. Section 124 empowers the department to confiscate any goods or impose any penalty on any person if he is given notice in writing informing him of the grounds on which it is proposed to confiscate the goods or to impose a penalty. Section 110 deals with the seizure of goods, documents and things, whereas Section 124 requires issuance of a show cause notice before confiscation of goods etc. It is important to note that the central legislature has made it obligatory on the part of the department to give a notice by employing the words "notice in respect thereof is given" in Section 110(2) which is required to be given in writing by virtue of Clause (a) of Section 124. The words "notice is given" cannot be construed as "notice is served" else the legislature itself could have used the word 'served' in place of 'given'. The word 'given' cannot be treated as a synonym to word 'served', unless it is so indicated by the legislature in express manner or by necessary implication.

9. Sub-section (1) of Section 110 of the Customs Act empowers the proper officer to seize the goods, if he has reason to believe that the goods are liable to be confiscated under the said Act. After such seizure, he is further obliged to give a notice within six months of the seizure of the goods, failing which, the goods shall be liable to be returned to the person from whose possession they were seized. The object of this provision is to apprise such person of the grounds on which confiscation of the goods or imposition of penalty is proposed. In view of the object and purpose of this provision, the legislature in its wisdom has used the words "notice is given", which would

obviously mean that notice must be issued within six months of the date of seizure. The purpose of this provision is to relieve such person, if the department sleeps over the matter for a period exceeding six months from the date of seizure, without issuing notice of intended confiscation of the goods or imposition of penalty. Its purpose will not be frustrated, if the notice, though is given within six months of the seizure of the goods, is not served on such person within six months. On the contrary, if the same is construed so as to mean service within six months from the date of seizure, such person may avoid the service of notice for a period up to six months and may further take undue advantage by invoking sub-section (2) of Section 110. Needless to say that notice may be given by invoking the mode of registered post, which seems to have been prescribed by virtue of Section 153 of the said Act.

10. In the case of *Narsimhiah* (supra), it has been further observed :-

> "15. A consideration of the object of these provisions and the manner in which the object is sought to be achieved indicates that while the legislature did intend that ordinarily notice as mentioned should be given it could not have intended that the fact that the notice is of less than the period mentioned in the section and thus the Councillors had less time than is ordinarily considered reasonable to arrange his other business to be free to attend the meeting, should have the serious result of making the proceedings of the meeting invalid.
>
> 20. We are, therefore, of opinion that the fact that some of the Councillors received less than three clear days' notice of the meeting did not by itself make the proceedings of the meeting or the resolution passed there invalid. These would be invalid only if the proceedings were prejudicially affected by such irregularity. As already stated, nineteen of the twenty Councillors attended the meeting. Of these 19, 15 voted in favour of the resolution of no-confidence against the appellant. There is thus absolutely no reason for thinking that the proceedings of the meeting were prejudicially affected by the "irregularity in the service of notice."

11. Reliance on the decision in the case of *K. Narasimhiah* (supra) does not render assistance to the respondent, in view of the object sought to be achieved by Section 110(2) of the Customs Act.

12. Thus, we are now required to consider the word 'given' in the context of notice for the purpose of achieving the object of sub-section (2) of Section 110 of the Customs Act, 1962. The object of the said provision read with Clause (a) of Section 124 of the Act, is to apprise of the proposed ground of confiscation or imposition of penalty. If the notice is issued by registered post within six months of the seizure of the goods and it reaches the person concerned after six months, the proceedings undertaken by the department are not prejudicially affected. On the contrary, if the notice is dispatched well before the expiry of six months and its service is avoided by the person concerned until such expiry in collusion with postman or otherwise, undue advantage/shelter of sub-section (2) of Section 110 may be obtained. This

perhaps may be the reason that the legislature did not use the words "notice in respect thereof is served" in place of "no notice is respect thereof is given". It may further be seen that the petitioner himself in paragraph 13 of the writ petition has clearly mentioned that he is in receipt of the said notice. Thus, the object of the notice for the purpose of Section 110(2) of the Act stands achieved.

13. We may successfully refer to the Division Bench decision of the High Court of Calcutta in the case of *Union of India* v. *Kanti Tarafdar* [1997 (91) E.L.T. 51 (Cal.)]. While dealing with Section 110(2), 124 and 153 of Customs Act, 1962, it has been observed :-

> "28. Therefore, the real object of the notice under Section 110(2), which is required to be issued in writing as provided in Section 124 and which is required to be given within six months, is to give the authority concerned a time-limit of six months to make out a case for confiscation of the goods seized.
>
> 29. Once the authority concerned makes out a case for confiscation within the time-limit, it cannot be sit idle. It has to make the concerned person aware of such case by giving the written notice. The question therefore is how to give such notice.
>
> 30. The only mode or manner of serving of notices issued under the Act has been provided in Section 153. The legislature in Section 153 of the Act gave a clear mandate that any notice issued under the Act should be served in the manner provided in the section.
>
> 31. The legislature, while providing that a notice under Section 110(2) must be given within the time as specified in the said section did not provide in the section itself as to how such notice should be given, but as the same time provided that a notice under Section 110(2) should be a notice "issued" under Section 124 of the Act and "any notice", issued under the Act," which obviously includes a notice under Section 124 of the Act, should be "served" in the manner provided in Section 153 of the Act. If the legislature intended that the manner and method of giving notice under Section 110(2) should be different, then it would not have provided in the said section the words "notice in respect thereof if given under Clause (a) of Section 124" and the words "Issue of show cause notice" in Section 124 of the Act and the words "Any……notice issued" in Section 153 of the Act.
>
> 32. It is also our duty to harmonise the provisions of the Act to find out the real legislative intent. If we fail in doing so and do not harmonise these three sections then we have to read in Section 153 "any notice", "except notice contemplated under Section 110(2), issued under the Act" shall be served in the manner provided for in Section 153, which unfortunately, we cannot do as that will mean supplying of words in Section 153 even though there is no ambiguity in the section itself.
>
> 33. If that be so the notice as contemplated in Section 110(2) of the Act must be a notice to be issued under Section 124 of the Act

and must be given in the manner as provided for in Section 153 of the Act and not in a manner or method not thought of by the legislature at the time of enacting the Act concerned.

34. Further, Section 110(2), though a mandatory provision, contemplates giving of a notice under Section 124, which is a general provision, while Section 153 provides the mode of giving of such notice, which is a special provision. Applying the maxim *"Generalia specialiabus non-derogent"*, which means special provision will prevail upon general provision, we are of the view that special procedure for service of notice as provided for in the Act should prevail over the general enactment of giving of notice.

35. We, therefore, conclude that Section 153 of the Act controls Section 110(2) of the Act and a notice which is required to be given under Section 110(2) should be given in a manner provided in Section 153 and by no other means.

36. The word "serve" in legal connotation means to make legal delivery (a process or writ) on or upon (a person) or to present (a person) with a writ. (See the Shorter Oxford English Dictionary, re-print of 1988 at Page 1949). Therefore, is legal parlance serving is giving.

37. Under Section 153 of the Act, service is either by personal delivery (tender) or by putting it into transmission by registered post in case both are possible.

38. Thus, the logical conclusion would be that service of a notice will be complete either by tendering or by sending the same by registered post, since the legislature has equated both the situations by using the word "or".

39. In the event of the notice is tendered, the date on which the same was tendered should be taken as the date of giving of notice, but if the other option is exercised and the notice is sent by registered post the date of sending the notice should be the date of giving of notice as contemplated by Section 110(2) of the Act. Any other construction will render the legislative intent of equating tender with sending by registered *post otiose.*"

14. We may also successfully refer to the Division Bench decision of the Court of Punjab & Haryana High Court in the case of *Commissioner of Central Excise, Ludhiana* v. *Mohan Bottling Co. (P) Limited* reported as 2010 (255) E.L.T. 321 (P & H), which is to the effect that sending of notice through registered post at the correct address of the assessee is sufficient compliance. In the case in hand, we are not concerned with the presumption of service, because the petitioner himself has already admitted receipt of notice in paragraph 13 of the writ petition.

15. Now, coming to the material on record, it is an admitted position that the seizure of the goods was made on 3-4-1989. Show cause notice under Clause (a) of Section 124 of the Act was served on 29-9-1989 by way of affixture at the residential premises of the petitioner, as revealed in the

panchnama marked as Annexure R/1. It has been pointed out that it bears the signatures dated 27-9-1989, which makes the panchnama a forged and concocted document. Without entering into this controversy, we hereby observe that the show cause notice within the meaning of Clause (a) of Section 124 of the Act was issued by registered post on 29-9-1989, as revealed in the postal receipt. It is admitted to have been received by the petitioner in paragraph 13 of the writ petition. No prejudice is shown to have been caused to the petitioner on account of the receipt of the notice after expiry of six months, which according to Section 110(2) ought to have been given within six months of the date of seizure. Thus, we do not find non-compliance or contravention of the aforesaid provisions. In our considered opinion, learned Single Judge has committed an error firstly in ignoring the significance of the word 'given' employed in Section 110(2) as well as Clause (a) of Section 124 of the Customs Act, 1962. Learned Single Judge has further committed a mistake in straightway invoking Section 153 of the Customs Act, 1962, without taking into consideration that the word 'served' occurring in it is missing in Section 110(2) as well as Section 124 of the Act. Instead, the word 'given' is there in these two provisions which goes to show that the show cause notice must be given before expiry of six months and issuance of notice by registered post within six months is a sufficient compliance in the eye of law, moreso, when the same has been received by the respondent as has been admitted in paragraph 13 of the writ petition. Neither Section 110(2) nor Clause (a) of Section 124 of the Act contemplates service of notice in strict sense within a period of six months from the date of giving/issuing the same by registered post which mode has been prescribed under the Act. It merely speaks about giving of the notice. Keeping in view the object and purpose of the two provisions, it cannot be said that the legislature intended to achieve service of notice within six months from the date of seizure. Thus, the impugned order is also found to have been passed, without considering the object and purpose of the said provisions. Consequently, the impugned order is not found sustainable in law.

16. Resultantly, the appeal succeeds and is hereby allowed. The impugned order is hereby set aside with no order as to costs.

17. C. c. as per rules.

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4. *Investing of power of Central Excise Officer in 'any person' by CBEC - clarified by Allahabad High Court*

Raghunath International Ltd. Vs U.O.I.

IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD
Ashok Bhushan and Prakash Krishna, JJ.
RAGHUNATH INTERNATIONAL LTD.
Versus
UNION OF INDIA
Writ Tax No. 251 of 2012, decided on 21-5-2012

CASES CITED

Competition Commission of India v. Steel Authority of India Ltd. — (2010) 10 SCC 744 — *Relied on …..*[Para 26]

Duncan Agro Industries Ltd. v. Union of India — 1989 (39) E.L.T. 211 (Del.) — *Relied on…..*[Para 28]

I.T.C. Limited v. Union of India — 1988 (34) E.L.T. 473 (Cal.) — *Relied on…..*[Para 29]

I.T.C. Ltd. v. Union of India — 1991 (53) E.L.T. 234 (Cal.) — *Relied on…..*[Para 29]

Pahwa Chemicals Pvt. Ltd. v. Commissioner — 2005 (181) E.L.T. 339 (S.C.) — *Relied on…..*[Paras 33, 40]

Union of India v. Ind-Swift Laboratories Ltd. — 2011 (265) E.L.T. 3 (S.C.) = 2012 (25) S.T.R. 184 (S.C.) — *Relied on…..*[Para 27]

Union of India v. Khusi Aromatics — Special Leave to Appeal (Civil) Nos. 7681-7683 of 2011, decided on 23-1-2012 by Gauhati H.C. — *Referred…..*[Para 5]

Union of India v. Khusi Aromatics — Central Excise Appeal No. 7 of 2009, decided on 4-6-2010 by Gauhati High Court — **Distinguished ……**[Paras 5, 34, 35, 36]

DEPARTMENTAL CLARIFICATION CITED

C.B.E. & C. Circular, dated 27-2-1997…..[Para 33]

REPRESENTED BY : S/Shri A.K. Jain assisted by Rajeev Chaddha and Rajesh Jain, for the Petitioner.
S/Shri Bishwajit Bhattacharya, ASG and S.P. Kesarwani, Sr. SC, for the Respondent.

[Judgment per : Ashok Bhushan, J.]. - We have heard Shri A.K. Jain assisted by Shri Rajeev Chaddha and Shri Rajesh Jain for the petitioner, Shri

Bishwajeet Bhattacharya, Additional Solicitor General of India and Shri S.P. Kesarwani for the respondents.

2. This writ petition questions the jurisdiction of Additional Director General, Directorate General of Central Excise, Intelligence in issuing show cause notice dated 1-10-2009 to the petitioner initiating proceedings for determining the liability under Section 11A and other provisions of the Central Excise Act, 1944 (hereinafter called the "Act, 1944") and the Central Excise Rules, 2002 (hereinafter called the "2002, Rules"). The writ petition raises the issue pertaining to interpretation of Section 2(b) of the Act, 1944 and Rule 3 of 2002, Rules.

3. The facts of the case which need to be briefly noted for deciding the issues of the writ petition are : The petitioner was engaged in the manufacture and clearance of Gutkha and Pan Masala bearing "SIR" brand name. During the year 2007-08, search and seizure were carried out at the premises of the petitioner as well as at places of transporters, distributors etc. by the officers of the Directorate General of Central Excise, New Delhi which was followed by recording of statements of various persons. A show-cause notice dated 1-10-2009, under Section 11A of the Act, 1944 was issued by one Dr. Devender Singh, Additional Director General, Directorate General of Central Excise Intelligence asking the petitioner to show cause to the Commissioner, Central Excise, Kanpur within 30 days as to why the duty, penalty and interest be not imposed. Petitioner's case in the writ petition is that the Board i.e. Central Board of Excise and Customs by letter dated 3-12-2009, replying an application under the Right to Information Act, 2005 informed that Dr. Devender Singh was posted as Additional Director General, DGCEI, New Delhi vide Office Order dated 14-5-2009. The petitioner claims to have filed interim reply as well as further interim preliminary objections before the Commissioner of Central Excise, Kanpur. One of the objection taken by the petitioner before the Commissioner of Central Excise was that the appointment of Dr. Devender Singh has not yet been notified in the Official Gazettee, hence he had no authority and jurisdiction to issue show cause notice dated 1-10-2009 to the petitioner. The Commissioner also noted the objection of the petitioner in the proceedings dated 25-2-2011. Objections of the petitioner as noted in the proceedings were that the show cause notice issued to the petitioner has not been signed by the competent authority. No approval was sought by the Additional Director General, Directorate General of Central Excise Intelligence from the Adjudicating Authority for issuing the show cause notice. The petitioner has come up in the writ petition praying for quashing the show cause notice dated 1-10-2009, alleging it to be without jurisdiction. A writ of prohibition has been sought restraining the respondents from taking any coercive steps against the petitioner.

4. Learned counsel for the petitioner contends that Dr. Devender Singh, Additional Director General, Directorate General of Central Excise Intelligence had no jurisdiction to issue the show cause notice dated 1-10-2009 under Section 11A of the Act, 1944. It is submitted that Dr. Devender Singh, is not a

"Central Excise Officer" within the meaning of Section 2(b) of the Act, 1944. It is further submitted that no notification regarding appointment of Dr. Devender Singh, Central Excise Officer has been published in the Official Gazettee as required by the Rule 3(1) of the 2002, Rules. It is submitted that as per 2002 Rules, the appointment of Central Excise Officer by Central Board of Excise and Customs can be made only by a notification which is required to be published in the Official Gazettee as per Rule 2(f) of the 2002, Rules and no notification of appointment of Dr. Devender Singh as a Central Excise Officer having been published in the Official Gazettee he had no jurisdiction to issue the show cause notice and it is liable to quashed on this ground alone. It is further submitted that Dr. Devender Singh, Additional Director General, who had issued the show cause notice has asked the petitioner to show cause to the Commissioner Central Excise, Kanpur which clearly indicates that he had no jurisdiction to issue show cause notice he being not the adjudicatory authority. It is submitted that if the notice was to be issued by the authority other than the adjudicatory authority, prior approval of the adjudicatory authority was required to be taken before issuance of the show cause notice. It is further submitted that the notice was unsigned.

5. Learned counsel for the petitioner in support of his submission has placed reliance on the judgment of the Gauhati High Court in Central Excise Appeal No. 7/2009, *The Union of India & Anr* v. *M/s. Khusi Aromatics & Ors*., dated 4-6-2010, wherein the Division Bench of the Gauhati High Court while considering Section 2(b) of the Act, 1944 and Rule 3 of the 2002 Rules, held that the notification appointing a person as a Central Excise Officer is required to be published in the Official Gazettee and when there was no publication of the appointment of Shri Amar Singh, Chief Commissioner, Central Excise, Ranchi Zone as Commissioner Central Excise, Shillong he had no authority to participate in the proceeding and such decision was vitiated as *non est*. Learned counsel for the petitioner further submits that against the order of the Gauhati High Court, Union of India had filed a Special Leave to Appeal (Civil) Nos. 7681-7683/2011 in which although the leave was granted on 23-1-2012, but no stay has been granted. He submits that the judgment of the Gauhati High Court in the case of *The Union of India & Anr* v. *M/s. Khusi Aromatics & Ors* (supra) is fully attracted in the facts of the present case and the appointment of Shri Devender Singh having not been notified as Central Excise Officer under Rule 3(1) of the 2002, Rules, he had no authority to issue the impugned show cause notice.

6. Shri Bishwajeet Bhattacharya, Additional Solicitor General of India appearing for the respondents refuting the submission of the learned counsel for the petitioner contended that the Additional Director General, Directorate General of Central Excise Intelligence was a Central Excise Officer and fully entitled to issue show cause notice under Section 11-A of the Act, 1944. It is submitted that the Board had already issued notification dated 26-6-2001, in exercise of power under Section 2(b) of the Act, 1944 read with sub-rule (1) of Rule 3 of the Central Excise Rules, 2001, appointing the officers specified in Column 2 as Central Excise Officer and investing them with all the powers, to

be exercised by them throughout the territory of India, in which Additional Director General, Directorate General of Central Excise Intelligence was specified as Commissioner, Central Excise hence he was fully competent to issue the impugned show cause notice. It is further submitted that there was no necessity for publication of notification dated 26-6-2001 in the Gazettee. He submits that the 2002, Rules saves the things done under the 2001 Rules, hence investing them with all the powers by notification dated 26-6-2001 continues to operate and the submission that Devender Singh had no jurisdiction to issue the show cause notice is in correct. He submits that the Additional Director General, Directorate General of Central Excise Intelligence/Commissioner, Central Excise had every jurisdiction to issue the show cause notice and no prior approval of the adjudicatory authority was required. He further submits that there is no challenge to the notification dated 26-6-2001, in this writ petition, thus, the competence of Additional Director General, Directorate General of Central Excise Intelligence to issue notice as Commissioner of Central Excise cannot be challenged or entertained in this writ petition.

7. We have considered the submissions of the learned counsel for the parties and have perused the record.

8. Before we proceed to consider the submission of the learned counsel for the parties, it is necessary to refer to relevant provisions of the Act, 1944 and the rules framed thereunder and the relevant statutory changes brought from time to time.

9. The definition of Central Excise Officer is contained in Section 2(b) of the Act, 1944.

10. Section 2(b) of the Act, 1944 earlier to its substitution by the Finance Act, 1995 was to the following effect :

> **"2. Definitions. -** In this Act, unless there is anything repugnant in
>
> the subject or context,-
>
> (a) ……
>
> (b) "Central Excise Officer" means any officer of the Central Excise Department, or any person (including an officer of the State Government) invested by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 with any of the powers of a Central Excise Officer under this Act;"

The above definition of the "Central Excise Officer" was amended and the definition as it exists today as well as at the relevant time is as follows :

> **"2. Definitions. -** In this Act, unless there is anything repugnant in the subject or context,-
>
> (a) ……
>
> (b) "Central Excise Officer" means the Chief Commissioner of Central Excise, Commissioner of Central Excise, Commissioner of Central Excise (Appeals), Additional Commissioner of Central Excise, Joint Commissioner of Central Excise, Deputy Commissioner of Central Excise, Assistant Commissioner of Central Excise or any

other officer of the Central Excise Department, or any person (including an officer of the State Government) invested by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) with any of the powers of a Central Excise Officer under this Act;"

From the above definition of Section 2(b) of the Act, 1944 as was enacted, the "Central Excise Officer" was defined to mean following two categories of officers :

(i) Any officer of the Central Excise Department, or

(ii) Any person (including an officer of the State Government) invested by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 with any of the powers of a Central Excise Officer under this Act.

11. The definition of "Central Excise Officer" as amended and as now exists under Section 2(b) of the Act, 1944 now consists of three categories which are as follows :

"(i) Chief Commissioner of Central Excise, Commissioner of Central Excise, Commissioner of Central Excise (Appeals), Additional Commissioner of Central Excise, Joint Commissioner of Central Excise, Deputy Commissioner of Central Excise, Assistant Commissioner of Central Excise, or

(ii) any other officer of the Central Excise Department, or

(iii) any person (including an officer of the State Government) invested by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 with any of the powers of a Central Excise Officer under this Act."

12. Under the Central Excises and Salt Act, 1944, rules were framed namely; Central Excise Rules, 1944. Rule 4 of the 1944 Rules, deals with Appointment of Officers. Rule 5 of the 1944 Rules, deals with delegation of powers by the Commissioner. Rule 4 of the 1944 Rules was to the following effect :

"Rule 4. Appointment of Officers. - The Central Board of Excise and Customs may appoint such persons as it thinks fit to be Central Excise Officers, or to exercise all or any of the powers conferred by these Rules, on such officers."

13. Another set of Rules were framed namely; Central Excise Rules, 2001. Rule 3 sub-rule (1) of the Rules, 2001 were as follows :

"Rule 3. Appointment and jurisdiction of Central Excise Officer :- (1) The Board may, by notification, *appoint* such person as it thinks fit to be Central Excise Officer or to exercise all or any of the powers conferred by these rules, on such officer."

14. Rules, 2001 were superseded by 2002, Rules, 2002, Rules while superseding the 2001, Rules mentioned as follows :

"In exercise of the powers conferred by section 37 of the Central Excise Act, 1944 (1 of 1944) and in supersession of the Central Excise (No. 2) Rules, 2001, except as respect things done or omitted

to be done before such supersession, the Central Government hereby makes the following rules, namely:- Central Excise Rules, 2002."

15. Rule 2(f) and Rule 3 of the 2002 Rules, which are relevant in the present case are quoted below :

"Rule 2. Definitions. - In these rules, unless the context otherwise requires,-

(a) ……..

(f) "notification" means the notification published in the Official Gazette;

Rule 3. Appointment and jurisdiction of Central Excise Officers. - (1) The Board may, by notification, appoint such person as it thinks fit to be Central Excise Officer to exercise all or any of the powers conferred by or under the Act and these rules.

(2) The Board may, by notification, specify the jurisdiction of a Chief Commissioner of Central Excise, Commissioner of Central Excise or Commissioner of Central Excise (Appeals) for the purposes of the Act and the rules made there under.

(3) Any Central Excise Officer may exercise the powers and discharge the duties conferred or imposed by or under the Act or these rules on any other Central Excise Officer who is subordinate to him."

16. Now we revert to Section 2(b) of the Act, 1944. The submission of the learned counsel for the petitioner as noted above is that unless an appointment of Central Excise Officer is notified and published in the Gazettee as required under Rule 3 of the 2002, Rules, no officer can exercise jurisdiction under the Act, 1944. He submits that since the appointment of Dr. Devender Singh, Additional Director General, Directorate General of Central Excise, Intelligence has never been published in the Gazette, he had no jurisdiction to issue the show cause notice dated 1-10-2009 under Section 11-A of the Act, 1944.

17. Section 2(b) of the Act, 1944 as was initially enacted and subsequently amended both have been noted above. In Section 2(b) of the Act, 1944 as was enacted, there were only two categories of persons who could be treated as Central Excise Officer namely : (i) any officer of the Central Excise Department, or (ii) any person (including an officer of the State Government) invested by the Board, the powers of Central Excise Officer. Both the aforesaid categories were joined by word "or". Similarly, in Section 2(b) of the Act, 1944 as it exists today, there are three categories which are joined by word "or". Although in the last category which was the second category, "investment" of powers by the Board is contemplated. The word "or" is a disjunctive word. It is well established principle of statutory interpretation that the word "or" is normally disjunctive and the word "and" is normally conjunctive. Both of them can be read as vice-versa, but that interpretation is adopted only where the intention of the legislature is manifest.

18. Justice G.P. Singh in the Principles of Statutory Interpretation

(Thirteenth Edition) Chapter 7 page 485 has stated as follows :

> "The word 'or' is normally disjunctive and 'and' is normally conjunctive but at time they are read as vice versa to give effect to the manifest intention of the Legislature as disclosed from the context. As stated by SCRUTTON,L.J.: "You do sometimes read 'or' as 'and' and in a statute. But you do not do it unless you are obliged because 'or' does not generally mean 'and' and 'and' does not generally mean 'or'. And as pointed out by LORD HALSBURY the reading of 'or' as 'and' is not to be resorted to, "unless some other part of the same statute or the clear intention of it requires that to be done". Where provision is clear and unambiguous the work 'or' cannot be read as 'and' by applying the principle of reading down. But if the literal reading of the words produces an unintelligible or absurd result 'and' may be read for 'or' and 'or' for 'and' even though the result of so modifying the words is less favourable to the subject provided that the intention of the Legislature is otherwise quite clear. Conversely if reading of 'and' and 'or' produces grammatical distortion and makes no sense of the portion following 'and', 'or' cannot be read in place of 'and'. The alternatives joined by 'or' need not always be mutually exclusive."

19. The use of the word "or" in Section 2(b) of the Act, 1944 is clearly disjunctive and cannot be read as conjunctive. The (unamended) definition clause reads the Central Excise Officer, *means* any officer of the Central Excise Department. Similarly, in the amended definition clause Section 2(b) of the Act, 1944 Central Excise Officer, means Chief Commissioner of Central Excise….. The first category which is contemplated both in the amended and unamended definition of Central Excise Officer clearly indicates any officer of the Central Excise Department to mean a Central Excise Officer. Under (unamended definition) officers of the Central Excise Department as now exemplified in first part of the definition by amended Section are to be Central Excise Officer. The Section 2(b) of the Act, 1944 (unamended) clearly meant an Officer of the Central Excise Department to be the Central Excise Officer and no further action or any formality was required to be completed or contemplated. Investing of the power of the Central Excise Officer was contemplated when "any person" (including an officer of the State Government) was given the power of the Central Excise Officer. The object is loud and clear. When the power is to be vested in any person, who may be an officer of the State Government or an officer of any other Department, power is to be necessarily invested by the Board in such an officer because without investing the power he cannot function as Central Excise Officer under the Act, 1944.

20. Rule 4 of the Rules, 1944 as quoted above contemplated appointment of such persons *as it thinks fit by the Board* to exercise all or any of the powers conferred by these Rules. It is relevant to note that Rule 4 of the Rules, 1944 did not contemplate appointment by a notification in the Gazettee.

21. For the first time by 2002, Rules, Rule 2(f) and Rule 3(1),

appointment of such officer by notification to be published in the Official Gazette has been introduced. Thus, when a power is invested on an officer belonging to third category of the definition 2(b) of the Act, the appointment has to be notified in the Official Gazette. Notification in the Official Gazette for appointment of *such persons* as the Board thinks fit has a purpose so as to persons who are dealt with such officers may know about the authority of the persons who is exercising the power qua then under the Act.

22. From the Scheme of Section 2(b) of the Act, 1944 and the Rules framed thereunder as noted above, it is thus clear that the appointment under the Rules as Central Excise Officer was contemplated only in the last category of the persons in the definition clause i.e. "any person" (including an officer of the State Government) invested by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963……"

23. The Scheme of Section 2(b) of the Act, 1944 never contemplates appointment of the Officers of the Central Excise Department under the Rules. The Rules have to be read to supplement the provisions of the Act and to carry the purpose and object of the Act.

24. In case, Rule 3 of the 2002, Rules is interpreted to mean that the Board even if the Officer is Chief Commissioner of Central Excise or the Commissioner of Central Excise is to be invested with the power by the Board to work as Central Excise Officer, the said is wholly redundant and useless exercise. The Chief Commissioner, Central Excise is the highest officer of the department and the Chief Commissioner, Central Excise or Commissioner, Central Excise undoubtedly can exercise all the powers of the Central Excise Officers under the Act. If the argument of the petitioner's counsel is accepted then even when the Commissioner, Central Excise issues notice under Section 11A of the Act, 1944 there has to be notification in the Official Gazettee of his appointment as Central Excise Officer this interpretation leads to absurdity since neither Section 2(b) of the Act, 1944 nor Rule 3 of the 2002, Rules can be read to mean that even appointment of Commissioner of Central Excise is to be notified in the Official Gazettee before he exercises power under Section 11A of the Act, 1944. This reinforces our view that appointment by notification which is to be published in the Official Gazettee is contemplated only with regard to the persons who are not already officers of the Central Excise Department. Since investing of power by the Board is contemplated in only last category in the definition of Section 2(b) of the Act, 1944 and all three categories are joined by the word "or" which is disjunctive.

25. What is the intent and purpose of providing for investing with any of the powers by the Board as provided for in Section 2(b) of the Act, 1944 needs to be found out. The word "invest" has been defined in **LEGAL THESAURUS by WILLIAM C.BURTON** in following words. "INVEST (Vest), verb appoint, authorize, charge, charter, commission, confer power, deferre, delegate, depute, empower, enable, endow with authority, entrust, furnish with rank, give a mandate, give authority, give power, grant authority, grant power, inaugurate, induct, install, instate, institute, license, mandare, name, nominate, ordain, permit, privilege put in commission, sanction". The concept of investing

power by the Board presupposes that the person on whom the power is being vested does not have power to act as such. As observed above, Chief Commissioner of Central Excise or Commissioner of Central Excise who are Head of the Department and one of the highest officers of the Central Excise respectively are already invested with the power to carry out duties and functions under the Act, 1944. This can be explained by taking a illustration: An officer of the Central Excise Department is appointed as a Commissioner of Central Excise, and a notification is published of his appointment as a Commissioner of Central Excise. Now as per the argument of the learned counsel for the petitioner, for exercising any power of "Central Excise Officer" under the Act, 1944, a notification under Rule 3(1) of the Rules, 2002 is mandatory and without any notification under Rule 3(1) of the Rules, 2002 published in the Official Gazette, investing the power of "Central Excise Officer" to the Commissioner of Central Excise., he is incapacitated to exercise any power entrusted to Central Excise Officer. The argument has to be rejected since by virtue of a person being a Commissioner of Central Excise, the power to function as a Central Excise Officer is already invested in him and no further investment is required or necessary. This makes it clear that the submission of the learned counsel for the petitioner that unless a notification under Rule 3(1) of the 2002, Rules investing power is issued, no person even though he is Commissioner of Central Excise can function as a Central Excise Officer is incorrect.

26. The Apex Court had occasion to consider the principles of statutory interpretation in context of the word "or" in *Competition Commission of India* v. *Steel Authority of India Ltd. & Anr*, (2010) 10 SCC 744. In the said case the Apex Court was considering the provisions of Section 53-A(1)(a) of the Competition Act, 2002. In the aforesaid context following was laid down in paragraphs 42, 43, 44 and 45 :

> "42. The provisions of Section 53A(1)(a) use the expression "any direction issued or decision made or order passed by the Commission". There is no occasion for the Court to read and interpret the word "or" in any different form as that would completely defeat the intention of the legislature. The contention raised before us is that the word "or" is normally disjunctive and "and" is normally conjunctive, but at the same time they can be read vice versa. The respondent argued that the expression "any direction issued" should be read disjunctive and that gives a complete right to a party to prefer an appeal under Section 53A, against a direction for investigation, as that itself is an appealable right independent of any decision or order which may be made or passed by the Commission.
>
> 43. It is a settled principle of law that the words "or" and "and" may be read as vice versa but not normally.
>
> "...You do sometimes read 'or' as 'and' in a statute... But you do not do it unless you are obliged because 'or' does not generally mean 'and' and 'and' does not generally mean 'or'." [*Green* v. *Premier Glynrhonwy Slate Co.* (1928) 1 KB 561 p. 568)].

44. As pointed out by Lord Halsbury, the reading of "or" as "and" is not to be resorted to, "unless some other part of the same statute or the clear intention of it requires that to be done." (*Mersey Docks and Harbour Board* v. *Henderson Bros.* (1888) 13 AC 595 at pg 603). The Court adopted with approval Lord Halsbury's principle and in fact went further by cautioning against substitution of conjunctions in the case of *Municipal Corporation of Delhi* v. *Tek Chand Bhatia* (1980) 1 SCC 158, where the Court held as under: (SCC p.163, para 11)

11. ……As Lord Halsbury L.C. observed in Mersey Docks & Harbour Board v. Henderson Bros (1888) 13 AC 595 (AC at p.603), the reading of "or" as "and" is not to be resorted to 'unless some other part of the same statute or the clear intention of it requires that to be done'. The substitution of conjunctions, however, has been sometimes made without sufficient reasons, and it has been doubted whether some of the cases of turning 'or' into 'and' and vice versa have not gone to the extreme limit of interpretation."

45. To us, the language of the Section is clear and the statute does not demand that we should substitute "or" or read this word interchangeably for achieving the object of the Act. On the contrary, the objective of the Act is more than clear that the legislature intended to provide a very limited right to appeal. The orders which can be appealed against have been specifically stipulated by unambiguously excluding the provisions which the legislature did not intend to make appealable under the provisions of the Act. It is always expected of the Court to apply plain rule of construction rather than trying to read the words into the statute which have been specifically omitted by the legislature."

27. Another recent judgment which is relevant to be noticed is *Union of India & Ors* v. *Ind-Swift Laboratories Ltd*., (2011) 4 SCC 635 = 2011 (265) E.L.T. 3 (S.C.) = 2012 (25) S.T.R. 184 (S.C.), where the Apex Court had occasion to interpret Rule 14 of the Cenvat Credit Rules, 2004 and held that the word "or" used in Rule 14 by which two phrases cannot be read as word "and". Following was laid down in paragraphs 15, 16 and 17.

15. In order to appreciate the findings recorded by the High Court by way of reading down the provision of Rule 14, we deem it appropriate to extract the said Rule at this stage which is as follows :

"**14. Recovery of CENVAT credit wrongly taken or erroneously refunded :** - Where the CENVAT credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest shall be recovered from the manufacturer or the provider of the output service and the provisions of Sections 11A and 11AB of the Excise Act or Sections 73 and 75 of the Finance Act, shall apply mutatis mutandis for effecting such recoveries."

A bare reading of the said Rule would indicate that the manufacturer or the provider of the output service becomes liable to

pay interest along with the duty where CENVAT credit has been taken or utilized wrongly or has been erroneously refunded and that in the case of the aforesaid nature the provision of Section 11- AB would apply for effecting such recovery.

16. We have very carefully read the impugned judgment and order of the High Court. The High Court proceeded by reading it down to mean that where CENVAT credit has been taken and utilized wrongly, interest should be payable from the date the CENVAT credit has been utilized wrongly for according to the High Court interest cannot be claimed simply for the reason that the CENVAT credit has been wrongly taken as such availment by itself does not create any liability of payment of excise duty. Therefore, High Court on a conjoint reading of Section 11AB of the Act and Rules 3 & 4 of the Credit Rules proceeded to hold that interest cannot be claimed from the date of wrong availment of CENVAT credit and that the interest would be payable from the date CENVAT credit is wrongly utilized. In our considered opinion, the High Court misread and misinterpreted the aforesaid Rule 14 and wrongly read it down without properly appreciating the scope and limitation thereof.

17. A statutory provision is generally read down in order to save the said provision from being declared unconstitutional or illegal. Rule 14 specifically provides that where CENVAT credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest would be recovered from the manufacturer or the provider of the output service. The issue is as to whether the aforesaid word "or" appearing in Rule 14, twice, could be read as "and" by way of reading it down as has been done by the High Court. If the aforesaid provision is read as a whole we find no reason to read the word "or" in between the expressions "taken" or "utilized wrongly" or "has been erroneously refunded" as the word "and". On the happening of any of the three aforesaid circumstances such credit becomes recoverable along with interest."

The proposition of law laid down by the Apex Court in the aforesaid case do support our view that in Section 2(b) of the Act, 1944, all the three clauses which are joined by the work "or" have to be read as a disjunctive clause and the requirement of investing power by the Board in the third category cannot be read in first two categories.

28. The Division Bench of the Delhi High Court in *Duncan Agro Industries Ltd.* v. *Union of India*, 1989 (39) E.L.T. 211 (Del.), also supports the interpretation which we have put to Section 2(b) of the Act, 1944. It is useful to quote paragraphs 21, 22, 23, 24, 25 and 26 of the said judgment which are as under :

"21. The recruitment to the Indian Customs, Central Excise Service Group A is made in accordance with the Rules framed in exercise of the powers conferred by proviso to Article 309 of the Constitution. The President has made the existing rules called the

Indian Customs and Central Excise Service Group A Rules, 1987 but the method of recruitment is *pari materia* in the earlier Rules. Recruitment is made as a result of combined competitive examination consisting of preliminary examination and main examination conducted by the Union Public Service Commission for recruitment to the service. The recruitment to the service is also made by promotion in the manner provided in the said rules. On appointment of these officers, they became members of the Central Excise Department and by virtue of the definition contained in Section 2(d) read with Rule 4, they became Central Excise Officers.

22. Under the Allocation of Business Rules, 1961, the Directorate General of Inspection and Audit (Customs & Central Excise), New Delhi is under the Ministry of Finance, Department of Revenue. The Department of Revenue handles all matters relating to Central Board of Excise and Customs and Central Board of Direct Taxes. The Government of India in the Department of Revenue and Banking vide order dated September 22, 1976 set up a Directorate of Internal Audit for Customs and Central Excise Department and posts were sanctioned and Director of Inspection (Audit) to oversee the working of the internal audit organisation of the various customs houses and central excise collectorates was set up. It formed part of the Directorate of Inspection (Customs and Central Excise) including Directorate of Audit under the Department of Revenue as a separate department and not part of or a subordinate organisation of the Central Excise Department. There are four subordinate organisations detailed in the Allocation of Business Rules, 1961, namely, Income-tax Department, Customs Department, Central Excise Department and the Narcotics Department but they are separate and distinct from the Directorate general of Inspection and Audit (Customs & Central Excise). By the aforesaid notification dated January 21, 1987, Shri M. M. Bhatnagar assumed charge of the post of Director (Audit). Customs and Central Excise in the Directorate. The Director (Audit) is thus, in our view, not a Central Excise Officer.

23. The definition contained in Section 2(b) of the Act says in addition that Central Excise Officer means any person (including an officer of the State Government) invested by the Central Board of Excise and Customs constituted under the Central Board of Revenue Act, 1963 (54 of 1963) with any of the powers of the Central Excise Officer under this Act. By the impugned notification dated May 29, 1986 in exercise of the powers conferred by clause (b) of Section 2 of the Act, and Rule 4 of the Rules, the Central Board of Excise and Customs thereby appointed a Director (Audit) in the Directorate General of Inspection and Audit (Customs & Central Excise), New Delhi, as Central Excise Officer and invested him with the powers of Collector of Central Excise, to be exercised by him throughout the territory of India. The power, however, was restricted for the purposes

of investigation and adjudication of such cases, as may, from time to time, be assigned to him by the said Central Board of Excise and Customs. Under the second part of the definition contained in Section 2(b) any person including an officer of the State Government, could be invested by the Central Board of Excise and Customs with any of the powers of a Central Excise Officer under the Act and this has exactly what has been done by the impugned notification dated May 29, 1986. It is not necessary in this case to determine whether "any person" would include an existing officer of the Central Excise Department as, in fact, the Director (Audit) is not already an officer of the Central Excise Department. The Board has been conferred with the jurisdiction to invest a person with any of the powers of a Central Excise Officer under the Act. The Legislature has authorised the Board to confer on such person all or any one or more powers and that would necessarily include the power of a Collector exercisable under Section 11-A of the Act. There is no warrant to give a limited or a narrow meaning to the language employed by the legislature in the second part of Section 2(b) so as to restrict to the investing of powers under Sections 19, 21, 25 or 26 as is suggested and not Section 11-A. The investing of the powers means the totality of the powers, administrative, territorial and pecuniary. This interpretation would effectuate the power under Section 2(b).

24. Section 2(b) of the Act defines a Central Excise Officer to mean besides an officer of the Central Excise Officer, any person invested with any of the powers of a Central Excise Officer under the Act. Every provision of a statute has to be given full effect to. The Court cannot place a construction on a provision which would tend to make it redundant. On the contrary, the Court's duty is to give effect to all portions of a statute. One of the principles for construction is that a statute ought to be so construed that, if possible, no word shall be superfluous, void or insignificant. If we accept the construction of the counsel for the petitioners, that would have the effect of ignoring the second part of Section 2(b) of the Act. Such a construction is plainly not permissible.

25. This Court has to take into consideration the object for which and intention with which such a power was conferred. Similar powers have been in existence in various fiscal statutes starting from Sea Customs Act, 1878, Section 6. In "*Ram Kirpal* v. *State of Bihar*, the question arose because of the non-applicability of the Land Customs Act, 1924 in Santhal Parganas. Their Lordships indicated as to how because of the application of Section 6 of the Sea Customs Act, officers of the Land Customs Act were treated as Customs Officers having jurisdiction under Section 6 appointing Land Customs Officers to be officers of customs for their respective jurisdiction and to exercise the powers conferred and to perform the duties imposed on such officers by the Sea Customs Act. Section 6 of the Customs

Act, 1962 now makes provision for entrustment of functions on any officer of the Central Government and the State Government. Section 5 of Foreign Exchange Regulation Act, 1947 as well as of 1973 similarly make provisions for entrustment of functions. Our attention has been invited to notifications issued from time to time, right from 1957 under Section 2(b) of the Act investing designated officers with all the powers of a Central Excise Officer. Particularly by notification dated August, 15, 1964, the Officer on Special Duty appointed as such by the President by the order of the Government of India in the Ministry of Finance, was invested with the powers of the Collector of Central Excise for the purpose of investigation and adjudication of such cases as may, from time to time, be assigned to him by the Board. It must be attributed to the legislature that it was aware of the provisions contained in Section 12-A of the Act (inserted with effect from December 27, 1985) permitting exercise of powers of a Central Excise Officer by a senior rank officer or the provisions contained in Section 37-A (inserted with effect from July 1, 1978) empowering delegation of powers on junior rank officers, yet it allowed the provisions in Section 2(b) to remain to cover the eventualities or the field left uncovered by Section 12-A and Section 37-A as a repository of power in the Central Board for investing in any person any of the powers of the Central Excise Officer under the Act. When the legislature has used words in a statute, a meaning has to be assigned to it.

26. Some arguments were addressed by Mr. Venugopal that the definition clause cannot be a substantive provision and it could not contemplate the conferment of power on any person. Reliance is placed on the scope of interpretation clause stated in "*Inland Revenue Commissioners* v. *Joiner*", 1975 (3) All. E.R. 1050 thus :

"....If it states at greater length what an expression used in other provisions in the statute 'means', it is no more than a drafting device to promote economy of language. It is a direction to the reader : 'Wherever you see this shorter expression in the statute you must treat it as being shorthand for the longer one.'. Alternatively an interpretation clause may be used by the draftsman not to define the meaning of an expression appearing in the statute but to extend it beyond the ordinary meaning which it would otherwise bear. An indication that this may be its purpose is given if it purports to state what the expression 'includes' instead of what it 'means'; but the substitution of the one verb for the other is not conclusive of its being a direction to the reader : 'Wherever you see this shorter expression in the statute you may treat it as bearing either its ordinary meaning or this other meaning which it would not ordinarily bear.' Where the words used in the shorter expression are in themselves too imprecise to give a clear indication of what is included in it, an explanation of their meaning which is introduced by the verb

'includes' may be intended to do no more than state at greater length and with more precision what the shorter expression means."

Reference was also made to Bennion on Statutory Interpretation. It is true that the purpose of a definition clause is to provide a key to the proper interpretation of the enactment and to shorten the language of the enacting part of the statute to avoid repetition. Ordinarily the scheme of the definition clause is only to define but a definition clause can, in our view, lay down substantive provision as in the instant case. When a word is defined to mean such and such, the definition is *prima facie* restrictive and exhaustive. But the definition in Section 2(b) gives an extended meaning of Central Excise Officer and the word is to be interpreted by its extended meaning. When the word 'means' are used it affords an explanation of the meaning which must inevitably be attached to those expressions. In this case it is dependent on investing. A meaning has to be attributed to each word used by the legislature in Section 2(b) and the language employed by legislature shows that a person could be invested with any of the powers of the Central Excise Officer under the Act, and he would be a Central Excise Officer. The investing of the powers on any person is, therefore, clearly contemplated. Second part of Section 2(b) has to be treated as a substantive provision."

29. Justice Bhagwati Prasad Banerjee of the Calcutta High Court had also occasion to consider Rule 4 of the Rules, 1944. In *I.T.C. Ltd. & Anr* v. *Union of India & Ors*, AIR 1989 Calcutta 294 = 1988 (34) E.L.T. 473 (Cal.), wherein by notification dated 27-3-1986, power of Collector was conferred on a person namely: Director Anti Evasion in relation to entire country. The argument that the notification was ultra-vires was repelled and it was held that the power could be rightly exercised. Following was laid down in paragraph 34 which is quoted below :

"34. In my view when Central Board had been conferred with the jurisdiction to appoint an officer to exercise the powers conferred under the Act and/or the rules thereunder, can that power be limited and narrowed down as sought to be argued by Mr. Nariman in the instant ease. It is firmly Established principle that "whatever may fairly be regarded as incidental to or consequent upon, those things which the legislature has authorised, and not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires. (See *Attorney General* v. *Great Eastern Railway Co.* (1880) 5 AC 473 at p. 478). Relying upon the principles laid down by the House of Lords in the aforesaid case in my view unless the Statute in question had expressly prohibited conferring such concurrent jurisdiction, the notification cannot be declared to be ultra vires, particularly in view of the fact that such a power, even assuming that it does not directly flow from Rule 4 of the said Rules should be held to be an incidental or consequent upon those things which the legislature have authorised upon the authorities particularly in view of the object of the

Act. The jurisdiction of an officer appointed by the Central Board should not also be interfered with unless it could be shown that either it is prohibited under the law or is contrary to law. In the instant case certainly it cannot be said that the petitioner would be in a most disadvantage position if notice were issued by 5 different Collectors than by one Collector in respect of all the areas and on the basis of a single show cause notice in respect of the self-same matter, and in my view it would not cause any prejudice or injury to the petitioner and further such a power is, in my view, reasonable, and incidental to the exercise of the statutory powers expressly conferred upon the respondents. In my view the ultra vires doctrine could not be made applicable in the facts and circumstances of the case inasmuch as it is not intended to perpetrate any direct interference with the rights of individual without specific legal authority and is not intended to harass and cause prejudice to any party. Accordingly, I hold that the learned single Judge and the learned Judges of the Division Bench of the Madras High Court in the case mentioned above had rightly decided that the notification No. 215/86 dated 27th March, 1986 was legal and valid and as such I hold that the respondent No. 3 had jurisdiction to issue the impugned show cause notice. I am constrained to take this view apart from the decision of the Madras High Court and the observation by the House of Lords mentioned above but also because of the observation of *Denning L.J. in Magor* and *St. Mellons RDC* v. *Newport Corporation* reported in (1950) 2 All ER 1226 that "We do not sit here to pull the language of Parliament and of Ministers to pieces and make nonsense of it. That is an easy thing to do and it is a thing to which lawyers are too often prone. We sit here to find out the intention of Parliament and of Ministers and carry it out and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis."

Against the above judgment of the learned Single Judge of the Calcutta High Court an appeal was filed before the Division Bench of the same High Court and the Division Bench affirmed the view taken by the learned Single Judge. The judgment of the Division Bench is reported in *I.T.C. Ltd.* v. *Union of India*, 1991 (53) E.L.T. 234 (Cal.) In the case before the Division Bench by notification dated 27-3-1986, Director, Directorate of Anti Evasion, was notified to be of rank of Collector. The argument was that the Director, Anti Evasion cannot function as a Collector under the Act, 1944. The said argument was repelled and following was laid down in paragraphs 62, 63, 64 and 65 which is quoted below :

"62. The first contention is that the show cause notice under Section 11-A of the Central Excises and Salt Act, 1944, has been issued by Sri Narendra Kumar Bajpai, the Director, Directorate of Anti-Evasion (Central Excise), Block No. 8. It has been contended that the alleged evasion of excise duty has taken place all over India. Only a Collector of Central Excise has been given jurisdiction under

the proviso to Section 11-A to issue a show cause notice where an assessee is guilty of fraud, collusion or any wilful misstatement or suppression of fact or contravention of any of the provisions of the Excise Act as a result of which excise duty has not been levied or paid or has been short levied or short paid. Sub-section (2) of Section 11-A makes it clear that the Collector of Central Excise is the only authority which can determine the amount of excise due in such a contingency. It has been argued that under the provisions of the Central Excise Rules, a Collector exercises its jurisdiction in certain areas. The jurisdictions of the Collectors have been specified in Rule 2. It has, therefore, been contended that one single person cannot be invested with the jurisdiction of a Collector all over India.

63. I am unable to uphold this contention. All that the impugned Notification dated 27-3-1986 has done is to invest certain Officers of the Directorate of Anti-Evasion (Central Excise) with all the power of the Officers of Central Excise. The power to be exercised is throughout the territory of India and is commensurate with the rank of the Officer concerned as stated in the Table given in the Notification :-

TABLE

Serial No.	Officers of the Directorate of Anti Evasion (Central Excise)	Rank of the Officers of Central Excise
1.	Director	Collector
2.	Deputy Director	Deputy Collector
3.	Assistant Director	Assistant Collector
4.	Senior Intelligence Officer	Superintendent
5.	Intelligence Officer	Inspector

64. It will, therefore, be seen that the Director of the Directorate of Anti- Evasion has been invested with all the powers of a Collector. A Central Excise Officer under Section 2(b) of the Central Excise Act means any Officer of the Central Excise Department or any person invested by the Central Board of Excise and Customs “with any of the powers of a Central Excise Officer under this Act.”

65. Therefore, the powers of the Collector of Central Excise under the Central Excise Act may be exercised by a person like the Director of Anti Evasion when the Director has been authority to exercise such power by the Notification. The Central Excise Act does not lay down that a Collector cannot exercise jurisdiction throughout India. The word ‘Collector’ has not been defined in the Act. There is nothing in the Act which requires the Central Government or the Board to divide the country into several zones and appoint Officers of limited territorial jurisdiction to exercise power only within the

specified zones."

30. Learned counsel for the petitioner during the course of his submission has placed before us the papers and the details of posting of Dr. Devender Singh and according to him for the first time he was made Commissioner, Central Excise and was posted in Jammu and Kashmir on 7-8-2006. According to the petitioner's case Dr. Devender Singh was posted as Additional Director, Directorate General of Central Excise Intelligence at the relevant time when he issued the show cause notice. In the counter affidavit which has been brought on record the notification issued by the Board dated 26-6-2001, under the Rules, 2001 has been annexed where the Additional Director General has been specified to be in the rank of Commissioner, Central Excise.

31. Dr. Devender Singh, who issued the impugned show cause notice dated 1-10-2009 was Commissioner of Central Excise and for Commissioner, Central Excise it is not necessary that he be invested with the power of Central Excise Officer and his appointment be published in the Official Gazettee. The Commissioner, Central Excise is fully entitled to exercise all powers of Commissioner under the Act, 1944. The Notification dated 26-6-2001, may have been issued for the convenience of the officers, and investing of the powers may be required for the persons who are not working in the Central Excise Department. The notification dated 26-6-2001, contains several designations of the officers who were not working in the Department of Central Excise and for them the appointment was necessary by the Board for investing the power. Since the notification dated 26-6-2001 was issued by the Board under the 2001 Rules, all action done under the 2001, Rules, have been saved in the 2002, Rules as noticed above. The said Notification still continues to hold the field and the argument of the learned counsel for the petitioner that after the 2002, Rules, publication of appointment of Additional Director General/Commissioner in the Official Gazettee was necessary cannot be accepted. We, however observe that in view of Rule 3(1) read with Rule 2(f) of the 2002, Rules, whenever the Board appoints a persons (not belonging to the Department of Central Excise), his appointment is to be made by way of notification after due publication in the Official Gazettee. This is the plain meaning of Section 2(b) of the Act, read with Rule 2(f) of the 2002, Rules.

32. Learned counsel for the petitioner during the course of hearing has placed before us the Gazettee Notification dated 22-5-2009, by which certain appointments were made in the Customs and Central Excise. The said Gazettee notification relates to appointment of officers of the Indian Revenue Services (Customs and Central Excise) to the Grade of Chief Commissioner of Customs and Central Excise which is to be necessarily gazetted looking to the rank and the post. The said notification has nothing to do with regard to the power of Central Excise Officer to be exercised by the Officers of the Central Excise Department.

33. The Apex Court in the case of *Pahwa Chemicals (P) Ltd.* v. *Commissioner of Central Excise, New Delhi*, 2005 (2) SCC 720 = 2005 (181) E.L.T. 339 (S.C.), had occasion to consider the provisions of the Act, 1944. In

the said case, a notice was issued by the Superintendent of Central Excise under Section 11-A determining the duty and penalty. Appeal was filed by the appellants before the Commissioner Central Excise (Appeal) contending that the Superintendent of Central Excise was not competent to issue the show cause notices, the Commissioner (Appeals) upheld the contention and however remitted the matter back for consideration. The matter was taken by the appellant before the Tribunal and the Tribunal directed the Commissioner (Appeals) to decide the matter on merits. The Commissioner (Appeals) confirmed the judgment against which the appeal filed before the Tribunal was rejected. The Apex Court in the said case considered the provisions of the Act, 1944 as well as the Circular dated 27-2-1997 issued by the Board. The Apex Court referring to the definition of Section 2(b) held that the Superintendent was fully competent to issue the show cause notice and the Board's circular being the administrative direction could not have taken away the jurisdiction to issue the show cause notice or to the adjudicating authority. It is useful to quote paragraphs 5, 6, 10, 11 and 12 of the said judgment.

> "5. No stay was granted in this Appeal, therefore, the Commissioner (Appeals) adjudicated and confirmed the demand by an Order dated 17th July, 2002. The Appellants then filed an Appeal before CEGAT wherein the only contention taken was that the Superintendent had no jurisdiction to issue show-cause-notices and the Deputy Commissioner had no jurisdiction to adjudicate. CEGAT has dismissed the Appeal by the Order dated 25-6-2003. The Appellants have filed Civil Appeal No. 406 of 2004 against this Order.
>
> 6. It must be mentioned that the only point agitated is that the Superintendent had no jurisdiction to issue the show-cause-notices and that the Deputy Commissioner had no jurisdiction to adjudicate. This is because in an earlier round it has already been held by CEGAT, by its order dated 17-10-2000 that the appellants are not entitled to the benefit of the notifications. Against that Order Civil Appeal No. 4050 of 2001 is pending before this Court.
>
> 10. Section 2(b) of the Act defines a "Central Excise Officer" as follows :
>
> 2(b). "Central Excise Officer" means the Chief Commissioner of Central Excise, Commissioner of Central Excise, Commissioner of Central Excise (Appeals), Additional Commissioner of Central Excise, Deputy Commissioner of Central Excise, Assistant Commissioner of Central Excise or any other officer of the Central Excise Department, or any person (including an officer of the State Government) invested by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) with any of the powers of a Central Excise Officer under this Act.
>
> Thus, even an Additional Commissioner or an Assistant Collector or a Deputy Commissioner or any other Officer of the Central Excise or any person invested by the Board with the power of the Central

Excise Officer would be a Central Excise Officer. Even though the Legislature made this change, the Board issued a Circular dated 27-2-1997 which reads as follows :

"I am directed to say that the Board has decided to review the powers of adjudication with the objective that cases are decided expeditiously, there is even distribution of workload and various doubts in this regard are clarified.

2. In this connection, the following facts and legal position has been taken into consideration :-

(i) By virtue of Clause (a) of Section 33 of Central Excise Act, 1944, Commissioners can adjudicate the cases of confiscation and penalty without limit. This power has been delegated to Deputy Commissioners by CBR Notification No. 12-C.Ex., dated 17th May, 1947, to Assistant Commissioners of Central Excise by CBR Notification No. 8-C.E., dated 2nd September, 1944 and to Superintendent of Central Excise by CBR Notification No. 93/59, dated 28th November, 1959.

(ii) So far as the confirmation of duty is concerned, it is observed that Section 11A empowers any Central Excise Officer to issue the notice and determine the duty due.

(iii) Likewise, the "proper officer" i.e. Jurisdictional Central Excise Officer can issue notice and adjudicate the demands under Rule 9(2)/Rule 57-I/Rule 57U of Central Excise Rules, 1944.

(iv) In order to bring about uniformity and objectivity the Board issued instructions defining powers of adjudication of specified Central Excise Officers taking 'duty involved' as the criterion.

3. Those show cause notices where adjudication orders are not passed upto 28-2-1997, will be adjudicated as provided here-inafter :-

(A) All cases involving fraud, collusion, any willful mis-statement, suppSression of facts, or contravention of Central Excise Act/Rules made thereunder with intent to evade payment of duty and/or where extended period has been invoked in show cause notices, (including MODVAT cases, Rule 9(2) cases of this type) will be adjudicated by :-

(Amt. of duty involved)

Commissioners	Without limit
Addl. Commissioners	Upto Rs. 10 lakhs

(B) In respect of cases which do not fall under the category (A) above, will be adjudicated by :-

(Amt. of duty involved)

Commissioners	Without limit
Addl. Commissioners/	above Rs. 2 lakhs and upto
Dy. Commissioners	Rs. 10 lakhs
Assistant Commissioner	Upto Rs. 2 lakhs

Notwithstanding the powers of Assistant Commissioners to adjudicate the cases involving duty amount upto Rs. 2 lakhs only as above, all cases of determination of valuation and/or classification other than those covered under Category (A) above, will be adjudicated by the Assistant Commissioners without any limit as hitherto, as also MODVAT disputes, other than those at category (A) above.

(C) Cases related to issues mentioned under first proviso to Section 35B(1) of Central Excise Act, 1944 would be adjudicated by the Addl. Commissioners/Dy. Commissioners without any monetary limit, as was the position under Board's Circular No. 13/93-CX., dated 15-10-1993.

4. The value of goods/conveyance, plants, machinery and building etc., liable to confiscation will not alter above powers of adjudication which will solely depend upon the amount of duty/Modvat credit involved on the offending goods.

5.1 In respect of cases covered under Category (A) of para 3 above, the show cause notices will be issued by the same rank of officers who will adjudicate them. Wherever the posts of Commissioner-I and Commissioner-II (Judicial) are in existence, the show cause notices will be issued by Commissioner-I.

5.2 In respect of cases covered under Category (B) of para 3 above, show cause notices will be issued by the Range Superintendent where they are to be adjudicated by the Assistant Commissioner and such notices will be issued by Assistant Commissioner when they are adjudicated by Dy. Commissioner/Addl. Commissioner/Commis-sioner.

5.3 In respect of cases covered under category (C) of Para 3 above, show cause notices will be issued by Assistant Commissioner.

6. The definition of expression 'Commissioner' contained in Rule 2(ii) was amended by Notification No. 11/92-C.E. (N.T.), dated 14-5-1992. Accordingly, an Additional Commissioner of Central Excise is not a Commissioner for the purposes of appeal. Therefore, appeal against the Order-in-Original passed by an Addl. Commissioner of Central Excise shall lie to the Commissioner of Central Excise (Appeals) and not to the CEGAT.

7. All Previous Board's Circulars relating to issue of show cause notices and their adjudications except the Circular No.

13/93-C.X., are hereby rescinded.

8. An immediate exercise should be undertaken thereafter to take stock of the pendencies as on 1st March and transfer of the relevant files and records to respective adjudicating authorities by 15th March, 1997 under proper receipt. These recast figures should be reflected suitably in the Monthly Technical Report of March, 1997 to be submitted in April, 1997.

9. Receipt of this Circular may please be acknowledged.

10. The trade and field formations may be suitably informed."

By clauses 3(A) and 5.1 of this Circular, the Board is directing that in cases of fraud, collusion, willful misstatement or suppression of facts the notice must be issued and adjudication must take place by the Commissioner without limit and by the Deputy Commissioner up to a limit of Rs. 10,00,000/-. Thereafter the Board by another Circular dated 13-8-1997 reiterated the above position.

11. The Appellants place strong reliance upon these two Circulars and submit that by virtue of these Circulars the Superintendent had no jurisdiction to issue the show-cause-notices and that the Deputy Commissioner had no jurisdiction to adjudicate.

12. As noted above, the Legislature has purposely omitted the word "Collector" from the proviso to Section 11-A and replaced it with the words "Central Excise Officer". It is the Act which confers jurisdiction on the officer(s) concerned. The Act permits any Central Excise Officer to issue the show-cause notices even in cases where there are allegations of fraud, collusion, willful misstatement and suppression of facts. The question therefore is: can the Board override the provisions of the Act by issuing directions in the manner in which it is done and if the Board cannot do so then what is the effect of such circulars?"

34. Learned counsel for the petitioner has placed much reliance on the judgment of the Gauhati High Court in *Union of India & Ors* v. *M/s. Kushi Aromatics* (supra). He submits that the Division Bench of the Gauhati High Court has held that the notification under Rule 3(2) of the Rules, 2002 is required to be published in the Gazette and since no notification was published in the Gazette, the exercise of jurisdiction by the Chief Commissioner, Central Excise, Ranchi was invalid. It is useful to note the facts of the said case in some detail. In the said case show cause notice dated 13-9-2006, was issued under Section 11A. The Commissioner, Central Excise, Dibrugarh dropped the charges levelled against the respondents M/s. Khusi Aromatics and M/s. Kothari Products Ltd. The Revenue preferred the appeals before the Tribunal in terms of the review order passed on 15-2-2008 by a Committee. The Committee consists of Shri H.K. Saran, Chief Commissioner, Central Excise, Shillong Zone and Shri Amar Singh, Chief Commissioner, Central Excise, Ranchi. Before the Tribunal the assessee objected to the Constitution of the committee. It was contended that the members thereof

were not authorised to act as such for want of appropriate notification conferring them the jurisdiction. Shri Amar Singh who was promoted as Chief Commissioner, Central Excise, Ranchi was assigned the additional charge of Chief Commissioner, Central Excise, Shillong. It was contended by the assessee that no notification as contemplated by Rule 3(2) of Rules, 2002 conferring the jurisdiction on the Committee was issued and published in the official gazette, the Committee was not authorised to review the order of the Commissioner. The Tribunal had dismissed the appeal of the Revenue against which the Central Excise Appeal No. 7/2009 was filed. The Division Bench dismissed the appeal by upholding the order of the Tribunal. The Division Bench held that no notification under Rule 3(2) of the Rules, 2002 conferring the jurisdiction of the Chief Commissioner, Central Excise to be a member of the Committee having been issued the order of the Commissioner could not have been reviewed. Following was laid down by the Division Bench in paragraphs 15, 18, 21 and 22.

> "15. Admittedly, there was no notification Under Rule 3(2) to confer on Shri Amar Singh, the then Chief Commissioner, Central Excise, Ranchi the jurisdiction to act as Chief Commissioner Shillong as a member of the aforementioned committee.
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> 18. In view of the definition of "notification" provided in Rule 2(f) of the Rules, the same would clearly signify that the same has to be published in the official gazette. Such is the peremptory mandate of the above legal provision that any omission in that regard has to be assuredly viewed to vitiate the resultant act.
>
> 21. In view of the authoritative pronouncement as above and having regard to the scheme of the Act and the underlying purpose of the notification to acquaint all concerned about the composition of the Review Committee for the sake of transparency, fairness and predictability of its decisions we are of the unhesitant opinion that the word "may" used in Rule 3(2) of the Rules is of mandatory connotation leaving the Department with no discretion what so ever but to notify the jurisdiction of the Officers as and when sought to be conferred. This applies per force in the matter of constitution of the Review Committee as contemplated under section 35B(1B) of the Act.
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> 22. The admitted fact is that on the date on which the Committee involved herein had rendered its decision i.e. 24-7-2008, there was no notification conferring jurisdiction on Shri Amar Singh to function as the Chief Commissioner of Central Excise, Shillong. Moreover as is affirmed by the learned Standing counsel in course of the arguments, there was no regular incumbent in the office of the Central Excise, Shillong Zone. The Office Order No. 23-2008 dated 31-1-2008 whereby the Chief Commissioner of Central Excise, Ranchi, had been assigned the additional charge of the Chief Commissioner of Central Excise, Shillong, for the limited purpose of reviewing the orders passed by the Commissioners of Dibrugarh and

Shillong until further orders not only on the face of it was a make shift arrangement, but also not at all in conformity with the peremptory prescription of Rule 3(2) of the Rules. As by the said order the Chief Commissioner of Central Excise, Ranchi, was being endowed with the jurisdiction to act as the Chief Commissioner of Central Excise, Shillong, the same could not have been effected without a notification ordained by Rule 3(2). This coupled with the admitted absence of regular incumbent in the office of the Chief Commissioner of Central Excise, Shillong, in our opinion, has rendered the proceedings before the Committee comprised of Shri Amar Singh and Shri Hrishikesh Sharan a nullity."

35. From the judgment of the Gauhati High Court as noted above, it is clear that there was no issue in the aforesaid case as to whether the Chief Commissioner, Ranchi was Central Excise Officer within the meaning of Section 2(b) of the Act, or not. The objection was raised regarding exercise of jurisdiction by the Chief Commissioner, Ranchi as a member of the Committee, which committee was to be constituted in accordance with Section 35-B (1B) of the Act.

36. In the present case, the issue which has been raised by the learned counsel for the petitioner is that Dr. Devender Singh, who was working as Additional Director General/Commissioner was not authorised to issue the show cause notice dated 1-10-2009, since he was not a Central Excise Officer because no notification having been issued and published in the Official Gazette as required under Rule 3(1) of the 2002, Rules. We have already considered the issue and held that Dr. Devender Singh, Additional Director General, Directorate General of Central Excise Intelligence having been authorised to act as a Commissioner, Central Excise was a Central Excise Officer, within the meaning of Section 2(b) of the Act, 1944 and was fully authorised to issue the show cause notice. Thus, the above judgment of the Gauhati High Court is clearly distinguishable and does not help the petitioner in the present case.

37. The submission which has been next pressed by the learned counsel for the petitioner is that the authority who had issued the show cause notice ought to have obtained prior permission from the adjudicating authority before issuing the show cause notice. The impugned show cause notice dated 1-10-2009, directed the petitioner and others as mentioned therein to show cause before the Commissioner, Central Excise, Kanpur who was the adjudicating authority. The Additional Director General, Directorate General, Central Excise Intelligence having been specified as a Commissioner, Central Excise was fully entitled to issue the show cause notice under Section 11-A of the Act, 1944 he being a Central Excise Officer. No such provision has been referred to nor shown which may require approval before issuing the show cause notice of the adjudicating authority/officer.

38. In the counter affidavit, the notification dated 26-6-2001 has been brought on the record as Annexure-CA-1, which mentions that the Additional Director General was mentioned in the rank of Commissioner was to exercise

the jurisdiction throughout the *territory of India* of an Officer of the Central Excise.

39. Present is not a case, where there is any lack of jurisdiction in the Commissioner in issuing the show cause notice. The submission of the learned counsel for the petitioner that prior permission of the adjudicating authority is required before issuing the show cause notice dated 1-10-2009 is without any substance.

40. The Apex Court in the case of *Pahwa Chemicals Pvt. Ltd.* (supra) had rejected the similar contention raised by the assessee as noted above.

41. In view of the foregoing discussion, we are of the considered opinion that the Additional Director General/Commissioner, Central Excise had every jurisdiction to issue the show cause notice dated 1-10-2009 and no ground has been made out to quash the same.

42. The writ petition is dismissed.

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5. *There should be application of mind before issuing 'Search Warrant'-Bombay High Court*

Samadhan Steel Traders Vs U.O.I.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
[AURANGABAD BENCH]

B.P. Dharmadhikari and Sunil P. Deshmukh, JJ.
SAMADHAN STEEL TRADERS
Versus
UNION OF INDIA
Writ Petition No. 6043 of 2011, decided on 14-8-2012

CASES CITED

Income Tax Officer v. Lakhmani Mewal Das — 1976 (103) ITR 437 — *Referred…..*[Paras 4, 13]
Indru Ramchand Bharvani v. Union of India — 1992 (59) E.L.T. 201 (S.C.) — **Distinguished…..**[Paras 5, 12]
Spacewood Furnishers Pvt. Ltd. v. Director General of Income Tax — 2012 (3) Mh.L.J. 239 — **Applied…..**[Para 13]

REPRESENTED BY : Shri Raviraj R. Chandak, Advocate, for the Petitioner.
Shri Alok Sharma, ASG, for the Respondent.

[Judgment per : B.P. Dharmadhikari, J. (Oral)]. - Heard. Rule. Rule made returnable forthwith. Heard finally by consent of parties.

2. The question is, whether before ordering search under Section 105 of the Customs Act, the competent authority had formed a legal opinion and was there a reason to believe that it would lead to goods liable to confiscation or any document or thing in his opinion would be useful or relevant to any proceedings under the Customs Act, 1944?

3. This court had issued a notice on 20th August, 2011 and on 15-6-2012 after briefly recording the question, we directed respondents to produce the original record. The reply affidavits by respondent Nos. 1 to 4 have been filed initially on 28th September, 2011 and after said order, on 13th July, 2012.

4. Shri Chandak submits that warrant for search issued under Section 105 shows satisfaction record by one D.S. Mane, Assistant Director, while the files produced does not reveal any such satisfaction reached by that Officer. He points out that there, satisfaction is reached by two other persons, namely, Additional Director and Additional Director General. He further contends that even if the fact of receipt of some intelligence as disclosed is presumed to be

true, none of the responsible officers have accepted, atleast on record, the responsibility of its receipt and there is no disclosure about the actual information gathered. He is relying upon the Apex Court judgment reported at 1976 (103) ITR 437 (*Income Tax Officer* v. *Lakhmani Mewal Das*).

4. Shri Sharma, learned ASG has assisted the court. He has invited attention to original records to show the material looked into has been correctly shown there and on the strength of that material honestly, the responsible Officers have reached a particular belief. He contends that name of the person, who gave secret information cannot be disclosed and, therefore, it has not been recorded. He further contends that additional Director Shri Ashish Chandan, has on further appreciation of material, put a remark "may be permitted under the search mode please" and authorized search. This remark dated 20-12-2010 is, thereafter accepted by still higher authority, namely, Shri Jitendra Chaturvedi, Additional Director General.

5. His contention is, in this situation, preparation of warrant by Assistant Director, by itself, is not sufficient to vitiate the exercise of search. He is also attempting to point out the material discovered after search, particularly, cash of Rs. 35 Lakhs and statement of brother of the petitioner in which said brother has accepted clandestine operations. He places reliance upon the judgment of the Apex Court reported at JT 1988 (3) SC page 732 = 1992 (59) E.L.T. 201 (S.C.) (*Indru Ramchand Bharvani* v. *Union of India*), to urge that facts there are identical.

6. Though initially some effort was made by Advocate Chandak to show that on 11-12-2010, when the summons was issued to petitioner securing the presence on 14-1-2011, no proceedings were pending under the Act, Learned ASG has invited our attention to signature of Senior Intelligence Officer on it to show that it is actually issued on 11-1-2011 i.e. after search which was conducted on 21st December, 2010.

7. Perusal of the document produced before this court alongwith affidavit reveals that there was information with the Department. Note relied upon to show "reason to believe" reveals that it is a note prepared by 3 officers, who have placed signatures in same line, namely, Inspector (MKP), SIO (VMD) and then, AD (DSA). Below this signature, there is seal (D.S. Mane) AD. All these signatures are on same date. Below this, designation of Additional Director has been written and it has been struck off, by black pen and signature of said officer, disclosed to us as Ashish Chandan appears. He has stated above his signature, "May be permitted under Search Mode Please". He has not marked the file/papers thereafter to anybody else. At the bottom, there is again remark dated 12-1-2011 signed by the Inspector (SIO) and IO (IMD). This remark is obviously after search on 21-12-2010. In open space between this last remark and signature of Mr. Ashish Chandan, a signature appears and that signature is disclosed to us to be of Jitendra Chaturvedi, Additional Director General. Thus, this document which reveals mention of Intelligence Report dated 21-12-2010, is first page in the file. It is not very clear whether Intelligence Report dated 20-12-2010 was accompanying it. The note prepared on the basis of alleged Intelligence

Report shows that clandestine clearances of finished goods through 2 concerns named in it was resulting in evasion of Central Excise duty. After names of these two persons, it is proposed that their premises may be searched on 21-12-2010 to recover incriminating documents/records. The estimated approximate duty which could have been detected is valued at Rs. 50 Lakhs. The list of officials participating in the operation is given thereafter. Name of petitioner is at Sr. No. 2 in the list of 2 concerns/persons. Shri Mane has simply signed this note like two other officers.

8. Section 105 of the Customs Act, reads thus :-

> **"105. Power to search premises -** (1) If the Assistant Commissioner of Customs or Deputy Commissioner of Customs, or in any area adjoining the land frontier or the coast of India an office of customs specially empowered by name in this behalf by the Board, has reason to believe that any goods liable to confiscation, or any documents or things which in his opinion will be useful for or relevant to any proceedings under this Act, are secreted in any place, he may authorize any officer of customs to search or may himself search for such goods, documents or things.
>
> (2) The provisions of the Code of Criminal Procedure, 1898 (5 of 1898) relating to searches shall, so far as may be, apply to searches under this Section subject to the modification that sub-section (5) of Section 165 of the said Code shall have effect as if for the word, "Magistrate", wherever it occurs, the words Commissioner of Customs were substituted."

Thus, the authority named therein, must have a reason to believe that any goods liable to confiscation or any document or things, which in his opinion, will be useful for or relevant to any proceedings under the Act are secreted in any place, & then, he can authorize the search or may himself search for such goods, documents or things.

Therefore, a "reason to believe" that the goods liable to confiscation or documents or things, are secreted in any place, must be recorded by the concerned officer. Inspector (MKD), SIO (VMD) are not the Officers who could have recorded any such satisfaction. The note which we have extracted above, does not contain any such opinion. It only recommends search without disclosing or recording reason to believe. The note also does not contain reference to material relevant for such belief. Only document referred to, is intelligence report.

That intelligence report is third document from last in the original file handed over to us. The said intelligence report contains only last paragraph which is different than the proposal for search submitted. It is mentioned that petitioner is maintaining manual records in the form of register/note books containing details of such purchases and sales of MS TMT Bars. This material or possibility is not reflected in the note and authorities who have granted authorization also do not refer to it.

9. In fact, the first authority competent to search has not said anything and if it is presumed that Shri D.S. Mane had that authority, he has not used

that power or authority but he has placed the file for perusal and approval before the higher authorities, namely, Additional Director. Additional Director also only suggests grant of permission under the search mode. The remarks put in by him and reproduced by us above, cannot be construed as an express authorization. Reliance upon said remark by the respondent is misconceived for present purposes. He, at the most, placed the matter before still higher authority namely, Shri Chaturvedi. Shri Chaturvedi has simply signed without putting any remark. It is, therefore, very difficult to find out which authority has actually applied mind and granted necessary authorization. It is also not very clear whether note styled as Intelligence Report dated 20-12-2010 was perused by Shri Mane, or Shri Chandan or then Shri Chaturvedi. Thus authority who reached the satisfaction is untraceable. Similarly there is nothing to show that any such satisfaction has been reached at all before the search was conducted or ordered.

10. In this situation, grant of authorization by Shri Mane cannot be said to be legal and valid. Warrant issued is under signature of Shri D.S. Mane and in it, he has stated that there are reasons to believe that excisable goods liable to confiscation and documents and things, which in his opinion would be useful for and relevant to proceedings under the Central Excise Act, 1944 and Customs Act, 1962, are secreted in places mentioned in it. He (D.S. Mane) authorized and required the persons named therein to search. Thus, this court is concerned with the material looked into by Shri Mane, while authorizing such search. The discussion above, clearly shows that Shri D.S. Mane has not authorized any such search and for reasons best known to him, he placed the alleged material before his superior, namely, Shri Chandan and that officer, in turn, placed the matter before still higher authority, namely, Shri Chaturvedi.

11. The intelligence report dated 20-12-2010 does not show who has received alleged information. We are not concerned with the person outside department who has furnished that information to the department. The Officer or employee in the department who got that information is not specified. Whether it was Inspector, or then, Senior Intelligence Officer, or then, any other Senior Intelligence Officer, who signed that report, got that information; or then, it was somebody else, is not disclosed. The authority granting permission as contemplated under Section 105 has also not considered the authenticity of the alleged material, in this background.

12. We, therefore, find that there was no material before the Department, as required under Section 105(1) of the Customs Act, which could have supported “reason to believe” which is cardinal. The judgment of the Apex Court in *Indru Ramchand Bharvani* v. *Union of India* (supra) considers the provisions of Section 123 of the Customs Act, which deals with proof and it’s sub-section (1) stipulates that where goods to which Section 123 applies are seized under the said Act, in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods is on the person from whose possession same are seized. Paragraph 2 of the judgment shows that secret information that smuggled diamonds have been kept by petitioner Nos. 1 and 2 in a particular premises was received and,

thereafter, after obtaining the necessary search warrant, the Customs Officer searched the business premises on 16-11-1979. The following two questions were referred to this High Court :-

> "(1) Whether, in the facts and circumstances of the case the Tribunal was justified in holding that the seizing Customs Officer had adequate material to form the reasonable belief as contemplated in Section 110 read with Section 123 of the Act, that the diamonds found in the business premises of M/s. Gems Impex Corporation were smuggled goods?
>
> (2) Assuming that Section 123 applied and burden of proof was on the appellants, whether the Tribunal should have held that the appellants had discharged this burden by tendering affidavits of persons claiming ownership of the seized diamonds."

The proceedings were then transferred to Delhi High Court. In para 12, the Honourable Apex Court has accepted the finding of High Court that there was evidence to presume that goods in question were smuggled. Para 13 shows that the stock found in possession of the petitioner was much more than the stock reflected in the stock book. It is in this background that the Honourable Apex Court has appreciated the controversy.

13. We find that the issue is squarely covered by Division Bench judgment of this court in *"Spacewood Furnishers Pvt. Ltd.* v. *Director General of Income Tax"* reported at 2012 (3) Mh.L.J. 239 to which one of us (B.P. Dharmadhikari, J) is party. The law as laid down by Honourable Apex Court in "*Income Tax Officer* v. *Lakhmani Mewal Das*" (supra) has been used in it.

14. Here, we have already found that the authority which had issued warrant which was ultimately executed had not applied its mind to form "reasonable belief" and the material on record does not support any such satisfaction. The Search carried on 21-12-2010, therefore, cannot be said to be in accordance with law. The same is accordingly quashed and set aside.

15. Rule made absolute accordingly. No costs.

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6. *Statement recorded before Customs Officer U/S 108 of C.A., 1962 is admissible in evidence - Delhi High Court*

Krishan Vs R. K. Virmani, Air Customs Officer

IN THE HIGH COURT OF DELHI

Mukta Gupta, J.
KRISHAN
Versus
R.K. VIRMANI, AIR CUSTOMS OFFICER

Crl. Rev. P. No. 516 of 2008, decided on 24-4-2012

CASES CITED

Anand Kumar v. Naresh Arora — 2006 (3) JCC 1491 — *Referred*….[Paras 2, 18]
Mathura Dass v. State — 2003 (2) JCC 639 — *Relied on*….[Paras 12, 13, 17, 18]
Mohtesham Mohd. Ismail v. Spl. Director, Enforcement Directorate — 2007 (220) E.L.T. 3 (S.C.) = 2009 (13) S.T.R. 433 (S.C.) — **Distinguished…..**[Paras 2, 15, 18]
Naresh J. Sukhawani v. Union of India — 1996 (83) E.L.T. 258 (S.C.) — *Relied on*…..[Paras 14, 17, 18]
Paramjit Singh v. Commissioner — 2002 (143) E.L.T. 485 (Del.) — *Relied on*…..[Paras 16, 17, 18]
Percy Rustomji Basta v. State of Maharashtra — 1983 (13) E.L.T. 1443 (S.C.) — *Relied on*…..[Paras 6, 17, 18]
R.S. Nayak v. A.R. Antulay — AIR 1986 SC 2045 — *Relied on*…..[Paras 11, 17, 18]
Ramesh Chandra Mehta v. State of West Bengal — 1999 (110) E.L.T. 324 (S.C.) — *Relied on*…..[Paras 7, 17, 18]
Ripen Kumar v. Department of Customs — 2003 (160) E.L.T. 60 (Del.) — *Referred*…..[Paras 2, 18]

REPRESENTED BY : S/Shri Naveen Malhotra and Nitendra Kumar, Advocates, for the Petitioner.

Shri Satish Aggarwala, Advocate, for the Respondent.

[Order]. - By this petition the Petitioner seeks setting aside of order dated 20th June, 2008 whereby the Learned ACMM, New-Delhi ordered framing of

charges against the Petitioner under Section 135A of the Customs Act, 1962 and the consequential order dated 18th August, 2008 framing charge in Case No. 507/1 titled as *R.K. Virmani* v. *Shri Krishan.*

2. Learned counsel for the Petitioner contends that the statement of the Petitioner recorded under Section 108 of the Customs Act is exculpatory in nature and the statement of Virender Singh Batra, recorded under Section 108 of the Customs Act, 1962 cannot be relied upon for the purpose of framing charges as he was not examined as a witness in terms of Section 244 Cr.P.C in the complaint case. Reliance is placed on *Mohtesham Mohd. Ismail* v. *Spl. Director, Enforcement Directorate & Anr.* - 2007 (11) SCALE 741 = 2007 (220) E.L.T. 3 (S.C.) = 2009 (13) S.T.R. 433 (S.C.). Relying on *Ripen Kumar* v. *Department of Customs,* 2001 Cr.LJ 1288 = 2003 (160) E.L.T. 60 (Del.) and *Anand Kumar* v. *Naresh Arora*, 2006 (3) JCC 1491 it is further contended that the testimony of Subhash Narain (PW1) recorded during the pre-trial stage cannot be relied upon as his testimony is not complete. Further since Virender Singh Batra is not being tried jointly, his statement is not admissible under Section 30 of the Evidence Act.

3. Learned Counsel for the Respondent contends that only a *prima facie* case needs to be made out against the Petitioner at the stage of framing of charge. He further contends that the statement of Virender Singh Batra recorded under Section 108 of the Customs Act, 1962 can be read as evidence against the Petitioner for *prima facie* making out a case against him and thus, there is sufficient evidence at this stage for framing charge against the Petitioner.

4. I have heard the learned counsels for the parties. Briefly the facts giving rise to the present petition are that on 15th October, 1992, on the basis of a secret information, one Virender Singh Batra was apprehended by the Respondent, R.K. Virmani while he was in Flight No. BA 035 on Seat No. 33G. He was found in possession of foreign currency equivalent to Rs. 18,01,236.35, which he had not declared before the customs officials. His statement was recorded under Section 108 Customs Act, 1962 by one Shri Subhash Narain wherein, he admitted the recovery and further stated that he was helped in carrying this foreign currency out of India by Shri Krishan, the Petitioner herein, who was working as Aero Bridge Operator at IGI Airport for a consideration of Rs. 5000/-. Statement of the Petitioner was also recorded under Section 108 of the Customs Act, 1962 wherein he denied delivery of the said currency to Virender Singh Batra. Thereafter, on 5th November, 1993, a complaint was filed by the Respondent before the Ld. ACMM, New-Delhi against the Petitioner for offences punishable under Sections 135(1)(a) and 135A Customs Act, 1962. In the said complaint, statements of two witnesses namely PW1 Subhash Narain and PW2 R.K. Virmani were recorded during pre-charge evidence under Section 244 CrPC. Subsequently, on 20th June, 2008 the Learned ACMM, New-Delhi ordered the framing of charge under Section 135A Customs Act, 1962 and as a consequence of which, charges against the Petitioner under Section 135A Customs Act, 1962 was framed vide

order dated 18th August, 2008.

5. Before dealing with the first contention of the Petitioner that the statement of Virender Singh Batra, recorded under Section 108 Customs Act, cannot be looked at for the purpose of framing charges as he was not examined under Section 244 Cr.P.C., it would be necessary to reproduce Section 108 of the Customs Act :

> "**SECTION 108. Power to summon persons to give evidence and produce documents. -** (1) Any Gazetted Officer of customs shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making under this Act.
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> (2) A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned.
>
> (3) All persons so summoned shall be bound to attend either in person or by an authorised agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such documents and other things as may be required :
>
> Provided that the exemption under section 132 of the Code of Civil Procedure, 1908 (5 of 1908), shall be applicable to any requisition for attendance under this section.
>
> (4) Every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of section 193 and section 228 of the Indian Penal Code, 1860 (45 of 1860).

6. From the perusal of the section, it is evident that the inquiry under Section 108 Customs Act is deemed to be a judicial proceeding by virtue of sub-section (4) and the person who is summoned under this section is bound to appear and state the truth while giving evidence. If he does not do so he makes himself liable for prosecution under Sections 193 and 228 IPC. Their Lordships in *Percy Rustomji Basta* v. *State of Maharashtra*, 1971 (1) SCC 847 = 1983 (13) E.L.T. 1443 (S.C.) held :

> "22. We are not inclined to accept the contention of Mr. Chari that in the circumstances mentioned above any threat has proceeded from a person in authority to the appellant, in consequence of which the statement Ex. T was given. Section 108 of the Act gives power to a Customs Officer of a gazetted rank to summon any person to give evidence in any inquiry in connection with the smuggling of any goods. The inquiry made under this section is by virtue of sub-section (4) deemed to be judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code. A person summoned under Section 108 of the Act is bound to appear and state the truth when giving the evidence. If he does not answer he would render himself liable to be prosecuted under Section 228 IPC. If, on the other hand,

he answers and gives false evidence, he would be liable to be prosecuted under Section 193 IPC for giving false evidence in a judicial proceeding. In short, a person summoned under Section 108 of the Act is told by the statute itself that under threat of criminal prosecution he is bound to speak what he knows and state it truthfully. But it must he noted that a compulsion to speak the truth, even though it may amount to a threat, emanates in this case note from the officer who recorded the statement, but from the provisions of the statute itself. What is necessary to constitute a threat under Section 24 of the Evidence Act is that it must emanate from the person in authority. In the case before us there was no such threat emanating from PW 5, who recorded the statement of PW 19, who was guiding the proceedings. On the contrary the officers recording the statement were only doing their duty in bringing to the notice of the appellant the provisions of the statute. Even if PW 5 had not drawn the attention of the appellant to the fact that the inquiry conducted by him is deemed to be a judicial proceeding, to which Section 193 IPC applies, the appellant was bound to speak the truth when summoned under Section 108 of the Act with the added risk of being prosecuted, if he gave false evidence."

7. In *Ramesh Chandra Mehta* v. *the State of West Bengal,* AIR 1970 SC 940 = 1999 (110) E.L.T. 324 (S.C.), the Constitution Bench while examining the admissibility of a statement recorded under Section 171A of the Sea Customs Act, 1878 (now repealed) corresponding to Section 108 of the Customs Act, 1962 held :

"24. In certain matters the Customs Act of 1962 differs from the Sea Customs Act of 1878. For instance, under the Sea Customs Act search of any place could not be made by a Customs Officer of his own accord: he had to apply for and obtained a search warrant from a Magistrate. Under Section 105 of the Customs Act, 1962, it is open to the Assistant Collector of Customs himself to issue a search warrant. A proper officer is also entitled under that Act to stop and search conveyances: he is entitled to release a person on bail, and for that purpose has the same powers and is subject to the same provisions as the officer in charge of a police station is. But these additional powers with which the Customs Officer is invested under the Act of 1962 do not, in our judgment, make him a police officer within the meaning of Section 25 of the Evidence Act. He is, it is true, invested with the powers of an officer in charge of a police station for the purpose of releasing any person on bail or otherwise. The expression "or otherwise" does not confer upon him the power to lodge a report before a Magistrate under Section 173 of the Code of Criminal Procedure. Power to grant bail, power to collect evidence, and power to search premises or conveyances without recourse to a Magistrate, do not make him an officer in charge of a police station. Proceedings taken by him are for the purpose of holding an enquiry into suspected

cases of smuggling. His orders are appealable and are subject also to the revisional jurisdiction of the Central Board of Revenue and may be carried to the Central Government. Powers are conferred upon him primarily for collection of duty and prevention of smuggling. He is for all purposes an officer of the revenue.

25. For reasons set out in the judgment in Criminal Appeal No. 27 of 1967 and the judgment of this Court in *Badku Joti Savant* case, (1966) 3 SCR 698 = AIR 1966 SC 1746 = 1978 (2) E.L.T. (J323) (S.C.) we are of the view that a Customs Officer is under the Act of 1962 not a police officer within the meaning of Section 25 of the Evidence Act and the statements made before him by a person who is arrested or against whom an inquiry is made are not covered by Section 25 of the Indian Evidence Act."

8. Thus, it is evident that a statement made by a person, who is subsequently made an accused, before a Customs Officer under Section 108 of the Customs Act is a confession made to a person other than a police officer and thus not hit by the bar of admissibility under Section 25 of the Evidence Act.

9. The next issue that arises for consideration is whether it is essential to examine the maker of the confession or the person before whom this confession by co-accused has been made can prove the confession. The law on the point is well settled. An accomplice is a competent witness against the co-accused. In case the accomplice is cited as a witness then it is essential to examine him under Section 244 Cr.P.C. However if the confession of the co-accused made to any person has to be proved, then the confession so recorded has to be exhibited like any other document under Section 244 Cr.P.C. At this stage it would also be relevant to reproduce Section 244 Cr.PC :-

"**Section 244. Evidence for prosecution. -** (1) When, in any warrant - case instituted otherwise than on a police report, the accused appears or is brought before a Magistrate, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution.

(2) The Magistrate may, on the application of the prosecution, issue a summons to any of its witnesses directing him to attend or to produce any document or other thing".

10. Sub-section (1) of Section 244 Cr.P.C. employs the words 'shall' and 'may'. So when these two words are used together in sub-section (1) of Section 244 Cr.P.C., in the sense that they are generally used, denote that words "the Magistrate shall proceed to hear" would mean that the Magistrate is under a duty to hear the witnesses at the pre-charge stage. However, these witnesses are the ones that 'may' be produced by the prosecution in support of their case thus, the prosecution is under no duty to produce all its witnesses at this stage. Further under sub-section (2) of Section 244 Cr.P.C. the Magistrate is under no obligation to summon any witness on his own. It is only on the application of the prosecution that the witnesses are produced at this

stage. Thus, it is clear that at the pre-charge stage the discretion to produce a witness lies with the prosecution and not the court or the accused. Further the prosecution at this stage needs to satisfy the court of the existence of a '*prima facie*; case for the purpose of framing charges.

11. Their Lordships in *R.S. Nayak* v. *A.R. Antulay,* AIR 1986 SC 2045 observed :

> "44……The Code contemplates discharge of the accused by the Court of Sessions under Section 227 in a case triable by it; cases instituted upon a police report are covered by Section 239 and cases instituted otherwise than on police report are dealt with in Section 245. The three sections contain some what different provisions in regard to discharge of the accused. Under Section 227, the trial Judge is required to discharge the accused if he 'considers that there is no sufficient ground for proceeding against the accused.' Obligation to discharge the accused under Section 239 arises when "the Magistrate considers the charge against the accused to be groundless." The power to discharge is exercisable under Section 245(1) when "the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction." It is a fact that Sections 227 and 239 provide for discharge being ordered before the recording of evidence and the consideration as to whether charge has to be framed or not is required to be made on the basis of the record of the case, including documents and oral hearing of the accused and the prosecution or the police report, the documents sent along with it and examination of the accused and after affording an opportunity to the two parties to be heard. The stage for discharge under Section 245, on the other hand, is reached only after the evidence referred to in Section 244 has been taken. Notwithstanding this difference in the position there is no scope for doubt that the stage at which the Magistrate is required to consider the question of framing of charge under Section 245(1) is a preliminary one and the test of "*prima facie*" case has to be applied. In spite of the difference in the language of the three sections, the legal position is that if the trial Court is satisfied that a *prima facie* case is made out, charge has to be framed".

12. It was further observed by this Court in *Mathura Dass & Ors.* v. *State* - 2003 (2) JCC 639 as :-

> "7. After considering the submissions made by learned counsel for the parties and examining the material on record, this Court is of the considered view that a Judge, at the time of framing of charge, is not to act merely as a post-office or mouth-piece of the prosecution, but has powers to sift and weigh the evidence but for a limited purpose only. This exercise has to be undertaken by him only with a view to find out as to whether a *prima facie* case is made out or not. The existence of a *prima facie* case may be found even on the basis of strong suspicion against an accused. The assessment, evaluation

and weighing of the prosecution evidence in a criminal case at the final stage is on entirely different footing than it is at the stage of framing a charge. At the final stage if two views are possible, one of which suggests that the accused may be innocent, then the view favorable to the accused has to be accepted whereas at the stage of framing of the charge, the view which is favorable to the prosecution, has to be accepted for the purpose of framing charge so that in the course of the trial, the prosecution may come out with its Explanations in regard to the draw-backs and weaknesses, if any, being pointed but by an accused."

13. Thus, if the prosecution is able to prove the existence of a *prima facie* case on production of 'a few' and not 'all' witnesses, charge has to be framed against the accused. Further, from perusal of *Mathura Dass & Ors.* (supra) it can be seen that at the stage of framing charges, if two views are possible, one that favours the prosecution has to be taken. In the present case though the accomplice Virender Singh Batra has been cited as a witness, however he has not been examined under Section 244 Cr.P.C. Thus, there is no evidence in the form of accomplice evidence before the Court to form a *prima facie* opinion that charge can be formed against the Petitioner.

14. In *Naresh J. Shukawani* v. *Union of India* - 1996 (83) E.L.T. 258 (S.C.) it was observed that the statement made before the Customs officials is not a statement recorded under Section 161 of the Criminal Procedure Code, 1973 and therefore, it is a material piece of evidence collected by Customs officials under Section 108 of the Customs Act. It was further stated by the Hon'ble Court that if such a statement incriminates the accused, inculpating him in the contravention of the provisions of the Customs Act, it can be considered as a substantive evidence to connect the accused with the contravention of the provisions of this Act. Para 4 of the said judgment is thus reproduced as :-

"4. It must be remembered that the statement made before the Customs officials is not a statement recorded under Section 161 of the Criminal Procedure Code, 1973. Therefore, it is a material piece of evidence collected by Customs officials under Section 108 of the Customs Act. That material incriminates the petitioner inculpating him in the contravention of the provisions of the Customs Act. The material can certainly be used to connect the petitioner in the contravention inasmuch as Mr. Dudani's statement clearly inculpates not only himself but also the petitioner. It can, therefore, be used as substantive evidence connecting the petitioner with the contravention by exporting foreign currency out of India. Therefore, we do not think that there is any illegality in the order of confiscation of foreign currency and imposition of penalty. There is no ground warranting reduction of fine."

15. The learned Counsel for the Petitioner has placed reliance on *Mohtesham Mohd. Ismail* v. *Spl. Director, Enforcement Directorate & Anr.* - (2007) 8 SCC 254 = 2007 (220) E.L.T. 3 (S.C.) = 2009 (13) S.T.R. 433 (S.C.)

in support of his contention that the statement recorded u/s 108 Customs Act cannot be looked at the stage of framing charge as the same was not recorded under Section 244 Cr.P.C at the pre-trial stage. However, on perusal of the said judgment especially para 20, it is evident that the Hon'ble Supreme Court has stated that such statements are, although, not inadmissible, they should be scrutinized by the Court in the same manner as confessions made by an accused person to any non-police personnel. Thus, according to the Hon'ble Supreme Court it should also pass the test of Section 24 of the Evidence Act. It was held :-

> "20. In *The Assistant Collector of Central Excise, Rajamundry* v. *Duncan Agro Industries Ltd.* - 2000 CriLJ 4035, this Court held :
>
> ...The inculpatory statement made by any person under Section 108 is to non-police personnel and hence it has no tinge of inadmissibility in evidence if it was made when the person concerned was not then in police custody. Nonetheless the caution contained in law is that such a statement should be scrutinised by the court in the same manner as confession made by an accused person to any non-police personnel. The court has to be satisfied in such cases, that any inculpatory statement made by an accused person to a gazetted officer must also pass the tests prescribed in Section 24 of the Evidence Act. If such a statement is impaired by any of the vitiating premises enumerated in Section 24 that statement becomes useless in any criminal proceedings."

16. This Court in *Paramjit Singh* v. *Commissioner of Customs & Others* 2002 (2) JCC 916 = 2002 (143) E.L.T. 485 (Del.) further observed that the statement of any person called for enquiry by the customs officer under the Customs Act can be recorded by such officer and such a statement is admissible in evidence by virtue of Section 30 of the Evidence Act and the protection under Article 20(3) of Constitution of India is not available at the stage of recording of such statement the person giving the statement is not an accused. Their Lordships thus observed :-

> "5. As per settled law, statement of any person called for enquiries during investigation by the authorities under the Customs Act, can be recorded by the customs officer. Such statement is admissible in evidence. Protection under Article 20(3) of the Constitution of India is not available at that stage [see *Poolpandi etc.etc.* v. *Superintendent, Central Excise and others etc. etc.*, 1992 CriLJ 2761 = 1992 (60) E.L.T. 24 (S.C.)]. The confession of the co-accused in the case would also be admissible by virtue of Section 30 of the Evidence Act. As per statement of witnesses, the petitioner absconded after the seizure. His conduct would be relevant."

17. The contention of learned counsel for the Petitioner at this stage is that the statement was not recorded under Section 244 Cr.P.C at the pretrial stage and hence, inadmissible as evidence for framing charges. The reliability of the statement will have to be examined during trial. At this stage, it is sufficient to hold that the statement is admissible without examining the co-

accused as a witness if the person before whom the confession is made is examined under Section 244 Cr.PC. As can be observed from the conjoint reading of the judgments in *Percy Rustomji Basta* (supra), *Ramesh Chandra* v. *the State of West Bengal* (supra), *Naresh J. Shukawani* (supra) and *Paramjit Singh* (supra), a statement recorded by Customs officer under Section 108 of the Customs Act, 1962 is admissible in evidence and not hit by provisions of Article 20(3) of the Constitution or Section 25 of the Evidence Act. Further, such statement is presumed to be truthful as it is recorded under a proceeding which is judicial in nature and if upon such statement a *prima facie* case can be made out for framing the charge, by virtue of *R.S. Nayak* (supra) and *Mathura Das* (supra), the Magistrate is well within his powers to order framing of charges.

18. Thus, though Virender Singh Batra was not called as a witness, his statement, recorded under Section 108 Customs Act, can definitely be looked at the stage of framing charges by virtue of the judgments aforementioned. Further the said statement of Virender Singh Batra stands proved by the testimony of PW1 Subhash Narayan who in his statement under Section 244 Cr.P.C., stated that he recorded the statement of Virender Singh Batra and exhibited the same. Also PW2 in his testimony under Section 244 Cr.P.C. stated that Virender Singh Batra, during his interrogation, stated that the packets containing the foreign exchange apprehended from him were handed over to him by the Petitioner.

19. However, the moot question is whether the statement of Virender Singh Batra recorded under Section 108 Customs Act duly proved by PW1 Subhash Narayan is admissible for the further reason that he is not jointly tried with the Petitioner. I find force in the contention of learned counsel for the Petitioner. A confession of the co-accused is admissible only under Section 30 of the Evidence Act. One of the essential requirements of the said provision is that the two accused should be tried jointly. Since the confession of the co-accused is not admissible as he is not being jointly tried with the Petitioner and besides this piece of evidence there is no other evidence, no charge can be framed against the Petitioner for offence under Section 135A of the Customs Act.

20. Hence the order dated 20th June, 2008 directing framing charge and the consequent order dated 18th August, 2008 framing charge against the Petitioner for offence under Section 135A Customs Act are set aside. Petition is disposed of accordingly.

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7. *Statement of co-accused recorded under section 108 of Customs Act, 1962 can be used against other accused- Allahabad High Court*

Praveen Kumar Saraogi Vs U.O.I.

IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD
Ashok Srivastava, J.
PRAVEEN DUMAR SARAOGI
Versus
UNION OF INDIA

Application No. 1471 of 1998, decided on 9-5-2013

CASE CITED

Naresh J. Sukhawani v. Union of India — 1996 (83) E.L.T. 258 (S.C.) — *Referred…..*[Para 8]

REPRESENTED BY : S/Shri Manish Tiwary and A.K. Awasthi, Counsels, for the Petitioner.

Govt. Advocate, for the Respondent.

[Order]. - This petition under Section 482 of Cr.P.C. has been moved on behalf of the applicant with the prayer to quash the complaint in question and also to set aside the order of issuing non-bailable warrant against the applicant passed by the Special Chief Judicial Magistrate (Economic Offences), Varanasi in Case No. 25 of 1998 (*Union of India* v. *Vikram Chaudhary and Others*) under Section 135 of the Customs Act, 1962 (for short 'the Act'), Police Station D.R.I., Varanasi.

2. This case was listed for hearing on 9-4-2013. On that date learned counsel for the applicant and learned A.G.A. were present but no one was present on behalf of Union of India. Arguments were heard in the case.

3. The brief facts of the case are that on 27-2-1998, the Assistant Commissioner of Customs (Preventive), Gorakhpur filed a complaint against one Vikram Chaudhary and Praveen Dumar Saraogi, the applicant, under Section 135 of the Act. The allegation as levelled in the complaint are that on 6-12-1995 the Directorate of Revenue Intelligence, Varanasi received a search information that various foreign origin goods concealed in various containers were kept under a cement bench on platform no. 6 at Mughalsarai Railway Station. It was also informed that silk yarn of foreign origin were to arrive at the same railway station concealed in three holdalls. A surveillance was initiated

on the basis of such information and a raid was conducted. The officers of D.R.I, succeeded in nabbing one Vikram Chaudhary with huge amount of foreign goods having their value at Rs, 5,01,040/-. The seized goods and Vikram Chaudhary were brought to the office of D.R.I. The detained person Vikram Chaudhary was examined by the office under Sections 107 and 108 of the Act. In his voluntarily made statement Vikram Chaudhary clearly admitted the time, place and mode of recovery of the seized goods from his possession. He also admitted that silk yarn was delivered to him by one Rajendra Singh, a Constable of G.R.P. and it was to be delivered to the applicant. It was also disclosed that the goods were illegally brought from Nepal. Vikram Chaudhary also stated that he was knowingly operating and indulging in the smuggling activities and he had delivered foreign goods to the applicant four or five times in the past. The applicant was also examined by the officers of the D.R.I, but he denied his connection with the seized goods and also told the officers that he did not know Vikram Chaudhary.

4. After filing of the complaint the learned Magistrate took cognizance of the case on 27-2-1998 and on that very day he issued a non-bailable warrant against the applicant fixing 23-3-1998. Feeling aggrieved by such order the present petition has been filed.

5. It has been submitted from the side of the applicant that there is no evidence against him except the statement of co-accused which cannot be relied upon against the applicant. It has further been submitted that the complaint was filed in the court of learned Magistrate on 27-2-1998. The learned Magistrate outrightly issued non-bailable warrant against the applicant which is against the spirit and provisions of law. It has also been submitted that in the past the customs authorities have searched the house of the applicant but nothing incriminating was found from his residence. It has also been argued that learned Magistrate completely ignored the fact that no summons was ordered to be issued by him against the applicant and he issued illegally a non-bailable warrant against the applicant on the date of taking cognizance of the case.

6. The petition has been opposed by the learned A.G.A. He states that keeping in view the provisions of Section 107/108 of the Act and Section 204 of Cr.P.C., issuance of the non-bailable warrant was legal and since there is evidence against the applicant, the complaint cannot be quashed.

7. From perusal of the complaint it is evident that the co-accused of this case Vikram Chaudhary was examined by the offices of D.R.I, under Section 107/108 of the Act. In his statement the co-accused has stated that all the foreign origin goods recovered from his possession were to be delivered to the applicant. He has also said that in the past he had delivered such goods to the applicant four or five times.

8. In the instant case it has to be seen whether the evidence of co-accused can be read against an accused or not. In JT 1995 (8) S.C. 160 = 1996 (83) E.L.T. 258 (S.C.) (*Naresh J. Sukhawani* v. *Union of India*) the Apex Court has said that the statement of co-accused can be used against the accused of a case. Such opinion has been given in respect of Section 108 of

the Act. From perusal of paras 1 and 4 of the said case law it is evident that if a Customs Officer examined any person under Section 107/108 of the Act and there is admission on the part of the co-accused, the same can be read against the co-accused.

9. In the above set of circumstances, I find that there is nothing on the record in favour of the applicant on the basis of which the complaint filed against him also under Section 135 of the Act may be quashed and set aside. Therefore, such prayer is rejected.

10. Further from perusal of the ordersheet dated 27-2-1998 it is evident that the learned Magistrate issued warrant on the first date of the case. It is true that under Section 204 of Cr. P.C. a Magistrate can issue a non-bailable warrant on the very first date if he is of the opinion that a case before him is a warrant case but such power is not limitless keeping in view the provisions as contained under Section 87 of the Cr. P.C. Keeping in view the spirit of law it is desirable that there should be some genuine grounds to issue a non-bailable warrant against the accused on the very first instance where normally a summon should be issued. If the accused does not respond to the summon in that event a warrant may be issued which may be bailable or not. It was not appropriate in the facts and circumstances of the case to issue a non-bailable warrant outrightly on the first date.

11. In the above circumstances the petition is partly allowed. The following orders are passed :

i. The part of the order dated 27-2-1998 through which a non-bailable warrant was issued against the applicant is set aside and quashed.

ii. The complaint cannot be quashed and set aside. It will be proceeded in accordance with law. The applicant is directed to appear before the learned Magistrate within 15 days from today and cooperate with the proceedings of the case. If the applicant does not appear before the learned Magistrate as directed by this Court within time allowed, it will be open for the learned Magistrate to issue a warrant against him and after securing attendance of the applicant it will dispose of the matter at the earliest possible because the case is very old.

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8. *Central Excise officer can arrest without warrant- Jharkhand High Court*

Gaurav Budhia Vs U.O.I.

IN THE HIGH COURT OF JHARKHAND AT RANCHI

R.R. Prasad, J.
GAURAV BUDHIA
Versus
UNION OF INDIA

W.P. (Cr.) No. 100 of 2009, decided on 28-10-2009

CASES CITED

Directorate of Enforcement v. Deepak Mahajan — 1994 (70) E.L.T. 12 (S.C.) —*Followed* …..[Para 22]

Km. Rajni v. Union of India — 2003 (156) E.L.T. 28 (All.) — **Distinguished…..**[Paras 7, 18]

State of Bombay v. Kathi Kalu Oghad — AIR 1961 SC 1808 — *Relied on…..*[Para 28]

Sunil Gupta v. Union of India — 2000 (118) E.L.T. 8 (P & H) — *Relied on…..*[Paras 12, 18]

REPRESENTED BY : S/Shri N.K. Pasari and Indrajit Sinha, Advocates, for the Petitioner.
S/Shri P.K. Prasad, A.G. & Ratnesh Kumar, Advocates, for the Respondent

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[Judgment]. - Through this writ application, extraordinary jurisdiction of this Court, as enshrined under Article 226 of the Constitution of India, has been invoked on behalf of the petitioner for declaring his arrest made by the respondent No. 3 in purported exercise of power conferred under Section 13 of the Central Excise Act, 1944 (hereinafter referred to as the 'said Act') as unconstitutional and unlawful, as he in absence of any warrant of arrest, issued by the court of competent jurisdiction, is not competent to arrest a person for contravention of provision of Section 9 of the said Act, as the offences, under the said provision in terms of Section 9A of the said Act, are non-cognizable.

At the same time, proceeding of a case bearing C.O. No. 1 of 2009, pending in the court of Sub-judge-II-cum-Special Judge (Economic Offences),

Dhanbad, has also been sought to be quashed, as neither the said proceeding has been initiated on a complaint, as defined under Section 2(d) of the Code of Criminal Procedure nor it has been initiated upon an F.I.R.

2. That apart, the petitioner through an Interlocutory Application bearing I.A. (Cr.) No. 1170 of 2009 has also sought to quash the order dated 18-5-2009, passed by the Special Judge (Economic Offences), Dhanbad, whereby he directed the prosecution to take out printouts from the Laptop seized in presence of the parties and the petitioner was directed to authenticate the printouts to be taken out from the Laptop failing which his bail bond shall be cancelled.

3. Before adverting to the submissions made on behalf of the parties, the facts, which have given rise to this application, are that the petitioner is one of the Directors of M/s. Bihar Foundry and Castings Limited (hereinafter referred to as the 'Company'), engaged in manufacturing of Silico Manganese and other ancillary products. On 16th/17th October, 2008, the premises of M/s. Bihar Foundry and Casting Limited and its other Units, being run as M/s. Gautam Ferro Alloy, were searched by the team of the officials of Director General of Central Excise Intelligence, Jamshedpur and Raurkella. During the search operation, some documents were recovered, which were seized in presence of the petitioner who was all along present over there and his statement was recorded under Section 14 of the Central Excise Act. In course of search, a Laptop was recovered from the factory premises, containing Datas in Tally-9, which was having seven files out of which three files were found corrupt. When those four files were opened, two were related to accounted sale of the said Company, but two files were not found to have been tallying with the statutory records, rather they appeared to have contained total actual accounted sale as well as non-accounted sale. Thereafter with the help of C.D. Rom printouts were taken out over which it was certified by the petitioner that those documents related to B.F.C.L. and as per the case of the prosecution, the petitioner also made statement on seeing some files that in certain cases Central Excise Duty might have not been paid and, therefore, cheques of Rs. 2.5 Crores were given for its deposit as advance payment. However, it has been denied by the petitioner that he voluntarily gave the cheques, rather he was forced to give cheques of that amount. Further, case of the prosecution is that the petitioner also made statement that after examining the file, he may find the reason for the difference in sale value and other details which are there in those two files. After taking out the printouts from the Laptop, it was duly sealed for further investigation. The petitioner was summoned at several occasions, but he appeared on 14-11-2008 along with his Advocate and when the presence of his Advocate was disallowed, the petitioner sought adjournment of the proceeding so that he may move a court of law for redressal of his grievance. On the same day, one Satyanand Jha, friend of the petitioner, who had also been summoned, sent a FAX claiming ownership of the Laptop.

4. Meanwhile, the petitioner filed a writ application before this Court

bearing W.P. (C) No. 5522 of 2008, challenging the search and seizure operation, which was admitted, but the investigation was allowed to be carried out with the cooperation of the petitioner.

5. Thereafter, when the petitioner appeared along with his Advocate on 2-2-2009, they were asked to verify the remaining printouts which were to be taken from the Laptop. After removing the seal, when the Laptop was turned on, the petitioner did not give his consent for taking printouts of the relevant Datas on the ground that the Laptop never belongs to him, rather according to him, it belongs to Satyanand Jha. Thereupon, the Laptop was resealed and finding *prima facie* evidence of evasion of duty by the petitioner and his hostile attitude towards the investigation and the act of influencing the witnesses, he was arrested with the approval of the Competent Authority. Thereafter, on getting transit remand from the Special Judge (Economic Offences), East Singhbhum, the petitioner was produced before the Sub-Judge-II-cum-Special Judge (Economic Offences), Dhanbad on 3-2-2009 on which date, offence report, which has been termed as preliminary complaint, was lodged which was registered as C.O. Case No. 1 of 2009 and the petitioner was sent to judicial custody. Thereafter, under the orders of the court, printouts of the files even of the corrupt files stored in the Laptop were taken out in presence of the petitioner as well as his representative, which were also sealed. From those printouts, it could be *prima facie* known about the illegal sale and, therefore, in order to carry out further investigation and to determine the actual amount of duty to be paid, it was necessary to open the sealed envelop before the court in presence of the petitioner as well as his counsel so that the same be authenticated and, therefore, an application to that effect was filed but before any order was passed, the petitioner filed the instant writ application before this Court, which was admitted for hearing, but in the meantime, order was passed to the effect that the documents, which were seized at the time of seizure, be authenticated by the petitioner on the next date fixed. Pursuant to that order, passed by this Court, an application was made for directing the petitioner to authenticate the documents. Accordingly, the court *vide* its order dated 18-5-2009 directed the petitioner to authenticate those documents, printouts of which have been taken out in the court in presence of both the parties.

6. Being aggrieved with that order, the petitioner by way of an Interlocutory Application challenged that order.

7. Mr. Indrajit Sinha, learned counsel appearing for the petitioner submits that as per the prosecution, the petitioner was arrested by the Authority in exercise of power conferred under Section 13 of the said Act for contravention of the offences under Section 9 of the said Act but those offences under deeming clause of Section 9A of the said Act are non-cognizable offences and as such, the Authority under the Central Excise Act will have no jurisdiction to arrest a person without there being warrant of arrest and as such, the act of the officials of the Central Excise Department of arresting the petitioner without there being warrant of arrest is unconstitutional and illegal. Learned counsel in support of his submission has referred to a

decision rendered in a case of *Km. Rajni and Others* v. *Union of India and Others* [(2003 Cri.L.J. 2062) = 2003 (156) E.L.T. 28 (All.)].

8. He would further submit that the phraseology, made in the application, upon which said complaint case bearing C.O. No. 1 of 2009 was initiated, is so contradictory that it is difficult for the petitioner to assume it to be a complaint or any other application, as at some places it has been stated that the petitioner has committed offences under Section 9(1)(b)(bb)(bbb) read with Section 9AA of the Act and as such, cognizance of those offences be taken. However, some of the statements made in certain paragraphs would disclose that the investigation is still pending and in that event and also in view of the circular of the Department, as annexed under Annexure-6, the same could not be a complaint, as according to mandate of the circular, the prosecution should not be initiated before the claims put by the parties are adjudicated upon. Admittedly, no adjudication process has been initiated for alleged evasion of duty by the Company and under this situation, the proceeding, assumed to be a complaint, is fit to be set aside.

9. Learned counsel further submits that on account of accusation made in the offence report/purported complaint, the petitioner would always be considered as an accused in terms of Article 20(3) of the Constitution of India and consequently, he cannot be compelled to give evidence against himself, but the learned Magistrate, by passing order dated 18-5-2009, directing the petitioner to authenticate printouts taken from the Laptop failing which his bail bond shall be cancelled, has put compulsion upon the petitioner to give evidence against himself, which is against the principle of protection of self-incrimination, as enshrined under Article 20(3) of the Constitution of India.

Learned counsel further submits that the said order is also bad in view of the fact that the case is still under the stage of enquiry in terms of Section 14 of the said Act and as such, any judicial intervention in the matter, relating to inquiry of this case, would be unwarranted.

10. As against this, Mr. P.K. Prasad, learned Advocate General, submits that by virtue of power vested upon the Central Excise Officer under Section 13 of the said Act, Central Excise Officer, with the prior approval of the Commissioner of Central Excise is competent to arrest any person whom he has reason to believe to be liable to punishment under this Act or the Rules made thereunder and in exercise of such power, the Central Excise Officer in course of raid laid at the premises of the petitioner when *prima facie* found huge evasion of excise duty, arrested the petitioner and forwarded him before the Magistrate.

11. He Would further submit that such power of arrest has never been limited by Section 18 of the said Act stipulating therein that all searches or arrests made under this Act shall be carried out in accordance with the provisions of the Code of Criminal Procedure which means that the arresting Authority needs to observe the formalities laid down in the relevant provisions of the Code in the matter of arrest and search. Thus, the provision, as enshrined under Section 18 of the said Act, never means that the competent officer can never arrest a person even he has reason to believe that the said

person is liable to punishment under the Act in absence of warrant of arrest, as has been submitted on behalf of the petitioner keeping in view the provision as contained in Section 9A of the said Act which speaks about the offences under Section 9 of the said Act being non-cognizable. If such submission is accepted, the entire purpose of the Act would be frustrated, as even the competent officer having reason to believe that a person has committed offence under the said Act, he would not be able to arrest the petitioner in absence of warrant of arrest, which is never the intention of the Legislature. Therefore, all the provisions need to be construed harmoniously so that none of the provisions of the Act be deemed to be redundant.

12. In this respect, it was further submitted that the power of excise officer to arrest a person in exercise of power conferred under Section 13 of the said Act appears to be absolute which power never gets curtailed by the provision, as contained in Section 9A of the said Act and as such, any embargo of arresting a person is not upon the excise officer, rather that relates to any other person including the police officer who would be arresting a person accused of committing an offence under the Central Excise Act. Same proposition has been laid down by the Punjab & Haryana High Court in a case of *Sunil Gupta* v. *Union of India* {2000 (118) E.L.T. 8 (P & H)}. Thus, it was submitted that the arrest of the petitioner by the Central Excise Officer never appears to be unconstitutional or illegal. It was further submitted that though certain incontradictory statements have been made in the complaint petition, but from those statements, basic thing *i.e.* substance which emerges is that the Central Excise Officer having reason to believe that the petitioner has committed offence under the Central Excise Act has forwarded him before the Magistrate to whom a complaint, which can be taken to be an offence report, was lodged making certain statements indicating therein that the matter is still under investigation. Once the petitioner was forwarded before the Magistrate in connection with the commission of an offence under the Excise Act, the Magistrate does have every power to remand the petitioner in judicial custody. Subsequently, whatever orders were passed by the Magistrate, it was in aid of investigation/inquiry and hence, those orders cannot be said to be illegal.

13. Thus, by referring to the provisions of the said Act, learned counsel for the petitioner made his point that the Central Excise Officer does not have power to arrest a person without there being warrant of arrest, whereas according to learned counsel for the respondents, though there appears to be manifest contradiction but that never effects the power of the Central Excise Officer to arrest if the provision of the Act is construed harmoniously. At this stage, as the matter relating to construction of the provision has arisen, I would refer to passage from the Maxwell of Statutes (10th Edition) at Page-229 which read as under :-

> "Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the

words, and even the structure of the sentence…….. where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskillfullness or ignorance of the law except in a case of necessity or the absolute intractability of the language used.

Keeping in mind the said principles the courts presumably at number of occasions have held that normally the courts should be slow to pronounce the legislature to have been mistaken in its constantly manifested opinion upon a matter resting wholly within its will and take its plain ordinary grammatical meaning of the words of the enactment as affording the best guide, but to winch up the legislative intent, it is permissible for the courts to take into account of the ostensible purpose and object and the real legislative intent. Otherwise a bare mechanical interpretation of the words and application of the legislative intent devoid of concept of purpose and object will render the legislature inane."

14. Keeping in view the said principle and also the cardinal principle of law that every law is designed to further ends of justice but not to frustrate on the mere technicalities, I will be dealing with the submissions advanced on behalf of the parties in the background of the principles of statutory interpretation and of the purpose and the spirit of the concerned Act as enshrined from their intendment.

15. The main purpose of the Act is to levy and collect excise duty for which the Central Excise Officers have been appointed. In order that they may carry out their duties in this behalf, powers have been conferred on them to see that the duty is not evaded and the persons guilty of evasion of duty are brought to book. Section 9 of the said Act provides for punishment for contravention of any of the provisions of a notification issued under Section 6 or Section 8 of the said Act or Rules made under clause III of Section 37(2) of the said Act, for evading the payment of any duty payable under the Act or for failing to supply any information which is required by the rules. The maximum punishment as stipulated under the Act is seven years. Section 9A of the said Act is a deeming clause, which stipulates that the offence under the Act would be non-cognizable. Section 13 of the said Act lays down that any Central Excise Officer, duly empowered by the Central Government, in this behalf, may arrest any person whom he has reason to believe to be liable to punishment under this Act. Section 18 of the said Act lays down that all searches made under this Act or any rules made thereunder and all arrests made under this Act shall be carried out in accordance with the provisions of the Code of Criminal Procedure, relating respectively to searches and arrests made under that Code. Section 19 of the said Act lays down that every person arrested under this Act shall be forwarded without delay to the nearest Central Excise Officer empowered to send persons so arrested to a Magistrate, or, if there is no such Central Excise Officer within a reasonable distance, to the Officer-In-Charge of the nearest police station. Then Section 21 of the said Act, which will have much bearing on the issue involved, needs to be taken

notice of extensively which reads as follows :-

"(1) When any person is forwarded under Section 19 to a Central Excise Officer empowered to send persons so arrested to a Magistrate, the Central Excise Officer shall proceed to enquire into the charge against him.

(2) For this purpose the Central Excise officer may exercise the same powers and shall be subject to the same provisions as the Officer-in-Charge of a police station may exercise and is subject to under the Code of Criminal Procedure, 1989 when investigating a *cognizable case :*

Provided —

(a) if the Central Excise Officer is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused person, he shall either admit him to bail to appear before a Magistrate having jurisdiction in the case, or forward him in custody to such Magistrate;

(b) if it appears to the Central Excise Officer that there is no sufficient evidence or reasonable ground of suspicion against the accused person, he shall release the accused person on his executing a bond, with or without sureties as the Central Excise Officer may direct, to appear, if and when so required, before the Magistrate having jurisdiction, and shall make a full report of all the particulars of the case to his official superior."

16. These sections clearly show that the powers of arrest and search conferred upon the Central Excise Officer are in support of the main function of collection/levy of duty on excisable goods. Significantly, it be noted that apart from the Central Excise Officer who has been empowered under Section 13 to arrest a person, other person seems to have also been empowered under Section 19 to arrest a person but that person needs to forward the person arrested before the Central Excise Officer empowered to send person so arrested to a Magistrate and if such Central Excise Officer is not available within the vicinity to the Officer-In-charge of the nearest police station. Thereupon, the Officer-In-Charge of police station has been enjoined with an obligation under Section 20 either to admit him on bail to appear before the Magistrate or in default forward him in custody to such Magistrate. Further, it appears that if a person arrested under Section 19 is forwarded before the Central Excise Officer, he in terms of Section 21(2) shall inquire into the matter by exercising all the powers which the Officer In-Charge of the police station does have in the matter of investigation of a cognizable case and if the Central Excise Officer finds sufficient evidence, he shall either admit him on bail to appear before the Magistrate or to forward him in custody to such Magistrate.

17. Thus, it would be significant to note that if a person is arrested by any other person than the Central Excise Officer, the person arrested needs to be forwarded either before the Central Excise Officer or the police officer and if the person arrested is forwarded to the Central Excise Officer, he will have in

course of inquiry all the powers which the Officer-In-Charge does have in the matter of investigation of a cognizable offence. Obviously, he will have power to detain that person without any warrant. Therefore, it would be quite unreasonable to hold that when the Central Excise Officer himself finds a person *prima facie* to be liable to punishment, he cannot arrest that person without there being warrant of arrest on account of the provision as enshrined in Section 19 of the Central Excise Act. This could not have been the intention of the Legislature to treat the same offence as cognizable offence in one situation and in other situation, it be treated as non-cognizable offence so far it relates to arrest of a person. Thus, the logical conclusion, would be that restriction, if any, on the matter of arrest on account of offences being non-cognizable is there, that never seems to have been imposed upon the Central Excise Officer rather it is upon other person including the police officer and that mandate of the Legislature is not without any purpose rather it is purposeful as a tool for the safeguard so that the person may not be harassed unnecessarily by other than Central Excise Officer who is not expected to be conversant with the provisions of law relating to excise as that of Central Excise Officer. Such intend of the Legislature gets reflected from the provision stipulating therein that whenever a person-accused is forwarded before the police, the police has no other alternative but to grant him bail and in case of default of bail, person needs to be forwarded before the Magistrate.

18. Thus, the intend of the Legislature is never to put any restriction on the power of the Central Excise Officer except what is there under Section 13 of the said Act. So far as provision under Section 18 of the said Act is concerned, that is related to procedure to be adopted in the matter of arrests and searches as is there in the Code of Criminal Procedure. In other words, that is confined only with respect to procedure to be adopted in the matter of arrests and searches and it never undermines or denudes the power of arrest as conferred under Section 13 of the said Act upon the Central Excise officer. This proposition has also been laid down by the Punjab & Haryana High Court in a case of *Sunil Gupta* (supra), whereas the decision rendered in a case of *Km. Rajni and Others* v. *Union of India and others* - [(2003 Cri. L.J. 2062) = 2003 (156) E.L.T. 28 (All.)] (supra) holding therein that the Authority working under a Special Act such as Central Excise Act, 1944 cannot override the provisions of the Code of Criminal Procedure as regards the arrest or filing of the complaint is in the context of altogether different facts wherein when a raid was conducted at the premises of a Company, three persons were arrested who made statements against the persons who were the petitioners in that case about their culpability and that led the petitioners to move before the High Court for a direction to the Authority not to arrest and the court in the backdrop of the fact that neither there is any complaint nor there is any FIR instituted by the Excise Authority against the petitioner held so. However, at the same time, the court observed as under :-

> "Coming to the conclusion from the aforesaid discussion, it is apparent that the authorities have no power under the Excise Act to arrest anybody except in the cases as prescribed under Section 13 of

the said Act as enumerated in Section 13(2) of the said Act. On completion of the inquiry, they have also power to file a complaint and pray before the court for action in accordance with law."

Thus, there has been no hesitation in holding that the Central Excise Officer does have power in terms of Section 13 of the said Act to arrest a person and that power has never been subjected to any other provision of the Act.

19. Coming to the other point, it be stated that the proceeding pending before the Special Judge, Economic Offences as C.O. No. 1 of 2009 has been sought to be quashed on the ground that any prosecution by way of complaint cannot legitimately be launched while the matter is still under investigation/enquiry and as such, continuation of such proceeding would amount to abuse of the process of law.

20. The other point taken in this respect is that there has been executive instruction as contained in Annexure-6 which stipulates that the prosecution is not warranted to be initiated until the matter is adjudicated before the Authority but ignoring the said instruction complaint has been lodged and as such, under both counts, the proceeding needs to be quashed.

21. From perusal of the application, on which said case has been instituted, one may get confused as to whether it is complaint petition or an offence report which has been termed as preliminary complaint but from the substance, it does appear that in fact, it is an offence report as the matter is still under investigation. It has been stated in the said application that the prosecution is normally launched after adjudication process is completed. Thus, one can say that no complaint has been filed in terms of Section 200 Cr.P.C. as investigation/enquiry on the allegation is still going on and that adjudication process is still to be completed. In that view of the matter, I do not find any substance in the submission made on behalf of the petitioner.

22. Moreover, I may refer to a case of *Directorate of Enforcement* v. *Deepak Mahajan and Another* [A.I.R. 1994 S.C. 1775 = 1994 (70) E.L.T. 12 (S.C.)] wherein amongst other questions, one of the questions fell for consideration as to whether the detention authorized by the Magistrate either to judicial custody or otherwise to a person forwarded under Section 35(2) of the FERA and Section 104(2) of the Customs Act becomes *ab initio* void and illegal.

23. I may indicate that Section 35(2) of the FERA and Section 104(1) of the Customs Act are similar to that of Section 19 of the Central Excise Act. Section 35(2) of the FERA and Section 104(2) of the Customs Act speak about the forwarding of the accused before the Magistrate.

24. The Hon'ble Supreme Court after taking into consideration several provisions of the Code of Criminal Procedure did hold that the inevitable consequence that follows is that 'any person is arrested' occurring in the first limb of Section 167(1) of the Code takes within its ambit 'every person arrested' under Section 35 of FERA or Section 104 of the Customs Act also as the case may be and the 'person arrested' can be detained by the Magistrate in exercise of his power under Section 167(2) of the Code of Criminal

Procedure. In other words, the 'person arrested' under FERA or Customs Act is assimilated with the characteristics of an 'accused' within the range of Section 167(1) and as such liable to be detained under Section 167(2) by a Magistrate when produced before him.

25 Thus, for the reasons, discussed above, any submission with respect to proceeding being illegal is devoid of any merit.

26. Lastly, the order, passed on 18-5-2009, has been challenged on the ground that under Article 20(3) of the Constitution of India one cannot be compelled to be a witness against himself but learned court below ignoring the protection guaranteed under the aforesaid provision of the Constitution of India has passed the order directing the petitioner to authenticate the documents failing which his bail bond would be cancelled.

27. This submission requires consideration in the backdrop of the facts that when raid was laid in the premises of the factory on 16th/17th October, 2008, a Laptop was seized and then printouts of some of the files stored in the Laptop were taken which was authenticated by the petitioner. However, subsequently when the printouts of other files were taken pursuant to order of the court in presence of the parties, the petitioner refused to authenticate those documents and now the said order has been challenged on the ground that such authentication would amount to self-incrimination which is prohibited under Article 20(3) of the Constitution of India, but the question is as to whether such authentication would be self-incriminatory or not.

28. I have already noticed the fact that the printouts of certain files were taken out under the order of the court in presence of the parties which only requires to be authenticated in order to avoid further complication. Therefore, whatever information whether it is self-incriminating or not is there in the printouts from before and the petitioner has never been asked to confirm the said information, rather he has simply been asked to authenticate those documents. In that situation, simple authentication of the documents by the petitioner would not amount as self-incriminatory statement and if it is not self-incriminatory, the petitioner would not enjoy the protection as guaranteed under the Constitution. At this stage, I may refer to a decision rendered in a case of *State of Bombay* v. *Kathi Kalu Oghad* (A.I.R. 1961 S.C. 1808), wherein the court has laid down :

> "In order that a testimony by an accused person may be said to have been self-incriminatory the compulsion of which comes within the prohibition of the Constitutional provision, it must be of such a character that by itself it should have the tendency of incriminating the accused, if not, also of actually doing so. In other words, it should be a statement which makes the case against the accused person at least probable, considered by itself."

29. In view of the discussion made above, I do not find any merit in this submission also. However that part of the order stating therein that bail bond of the petitioner shall be cancelled on account of non-observance of the direct on contained therein is not sustainable in law as consequence of non-observance of the direction has been contemplated under Section 14 of the

said Act itself and as such, that part of the order dated 18-5-2009 where it has been stated that the bail bond of the petitioner shall be cancelled is hereby quashed.

30. Thus, respondent No. 3 never appears to have acted without jurisdiction in the matter of arrest of the petitioner nor the proceeding pending before the Special Judge (Economic Offences), Dhanbad including the order dated 18-5-2009 is bad except that part of the order wherein it has been stated that bail bond of the petitioner shall be cancelled on account of non-observance of direction contained therein which part of the order stands quashed.

31. In the result, this application is allowed in part to the extent indicated above.

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9. Photocopy of seized documents is to be given to the party if so desired - Gujrat High Court

Harshvadan Rajnikant Trivedi Vs U.O.I.

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

M.R. Shah and K.J. Thaker, JJ.
HARSHVADAN RAJNIKANT TRIVEDI
Versus
UNION OF INDIA

Special Civil Application No. 6723 of 2014, decided on 18-6-2014
REPRESENTED BY : Shri D.K. Trivedi, Advocate, for the Petitioner.

Shri Y.N. Ravani, Advocate, for the Respondent.

[Judgment per : M.R. Shah, J. (Oral)]. - *Rule :* Shri Y.N. Ravani, learned Counsel waives service of notice of rule on behalf of the respondents.

2. In the facts and circumstances of the case, the present petition is taken up for final hearing today.

3. By way of this petition under Article 226 of the Constitution of India the petitioners have prayed for the following relief;

> "That the Hon'ble Court may be pleased to issue writ of mandamus, certiorari and/or any other appropriate writ, order or direction in the nature of writ and thereby may order suitably so that the respondents herein may provide photocopies of the records and documents seized by them under cover of the panchnama dated 7-12-2013 from the possession of the petitioners herein."

4. It is the case on behalf of the petitioners that the petitioners require the photocopies of the documents/files seized under the panchnama, dated 7-12-2013, which have been seized from the possession of the petitioners, in his day-to-day business and while having correspondence with different authorities. It is submitted that when the petitioners approached the authority and requested for photocopies of the documents seized by them under cover of the panchnama, dated 7-12-2013, the same has been denied. It is submitted that the petitioners are as such not asking for the original record and documents seized, however, is asking for the photocopies of the same, which may be at the cost of the petitioners.

5. Shri Trivedi, learned advocate appearing on behalf of the petitioners has stated at the bar that the petitioners are ready and willing to deposit Rs. 10,000/- more, than the actual cost of the photocopies of the record and

documents seized, towards manpower, etc.

6. In response to the notice issued by this Court, Shri Yogesh Ravani, learned Counsel has appeared on behalf of the respondents. An affidavit-in-reply is filed on behalf of the respondents objecting the prayer and the request of the petitioners to provide the photocopies of the record and documents seized by them under the cover of the panchnama, dated 7-12-2013. It is submitted that as such the inquiry and the investigation is pending against the petitioners and the same could not be completed as the petitioners are not cooperating. It is submitted that number of notices have been issued to the petitioners to cooperate in the inquiry/investigation, however, the petitioners are not cooperating. Relying upon Clause 55(m) of the Central Excise Intelligence and Investigation Manual it is submitted that till the inquiry and/or investigation is concluded the petitioners are not entitled to the record seized. It is submitted that as such the petitioners would have a right of inspection of the seized documents only. It is submitted that considering Clause 55(m) of the Central Excise Intelligence and Investigation Manual the petitioners shall not be entitled to get back the documents seized till the investigation/inquiry is concluded and the show cause notice on the same has been issued. It is submitted that as such whatever shall be relied upon by the Department the same shall be supplied along with the show cause notice.

7. Heard the learned advocates appearing on behalf of the respective parties at length. At the outset, it is required to be noted that the petitioners have demanded the photocopies of the record and documents seized from them under the cover of the panchnama, dated 7-12-2013, which came to be seized from the possession of the petitioners. It is required to be noted that as such the petitioners are not demanding the original of the record and documents seized under the cover of the panchnama, dated 7-12-2013. The petitioners are ready and willing to bear the expenditure towards the photocopies of the record and documents seized and are ready and willing to deposit Rs. 10,000/- more towards the manpower, etc. The aforesaid request has been denied mainly relying upon Clause 55(m) of the Central Excise Intelligence and Investigation Manual as well as on the ground that the petitioners are not cooperating in the inquiry/investigation. An affidavit-in-rejoinder is filed on behalf of the petitioners disputing that the petitioners are not cooperating. On the ground that the petitioners are not cooperating in the inquiry/investigation, the prayer of the petitioners to supply the photocopies of the documents seized cannot be denied. If, it is found that, the petitioners are not cooperating in the inquiry/investigation, it will always be open for the Department to proceed further with the inquiry/investigation *ex parte* on the basis of the material on record and proceed further with the same.

8. Now so far as reliance placed upon Clause 55(m) of the Central Excise Intelligence and Investigation Manual is concerned the entire Clause 55 is required to be read, which reads as under;

> "55. The legal safeguards relating to search are provided in Section 100 and other Sections of the Cr.PC. These safeguards have been detailed at para 14 of Chapter III of the Manual. The judicial

pronouncements relating to search and seizure are also listed in para 56 of this Chapter. Together they provide a comprehensive picture. In the course of search, it has to be ensured that the legal rights of the person being searched are respected because any violation thereof may affect the search adversely. The assessee/occupant of the premises has the following rights:-

(a) To see the warrant of authorisation duly signed & sealed by the issuing authority.
(b) To verify the identity of each member of the search party.
(c) To have at least two responsible and independent residents of the locality, as witnesses.
(d) To have personal search of all members of the search party before the start of the search and after conclusion of the search.
(e) To insist on a personal search of females by another female only with strict regard to decency.
(f) To have a copy of the panchnama together with all the annexures. However, he is not entitled to a copy of the search warrant.
(g) To put his own seals on the packages containing the seized assets.
(h) To call a medical practitioner, if unwell.
(i) To have his children permitted to go to school, after examination of their bags.
(j) To inspect the seals placed on various receptacles, sealed in course of searches and subsequently reopened for continuation of searches.
(k) To have the facility meals etc. at the normal time.
(l) To have a copy of any statement before it is used against him in assessment or prosecution proceedings.
(m) To have inspection of the statutory books of account, etc., seized or to take extracts therefrom in the presence of any of the authorised officers or any other person empowered by him. However, such rights are not available with respect to private records till such time a Show Cause Notice is issued."

9. On considering Clause 55 of the Central Excise Intelligence and Investigation Manual as a whole it confers certain right upon the assessee/occupant of the premises at the time of search and seizure. One of the right conferred is Clause 55(m). However, there is no specific bar and/or provisions under which the petitioners can be denied the photocopies of the documents seized that too when it is asked at the cost of the petitioners.

10. Under the circumstances, we are of the opinion that as such there is no justification on the part of the concerned respondents in not providing photocopies of the documents seized under the panchnama, dated 7-12-2013.

11. In view of the above and for the reasons stated hereinabove, the present petition succeeds. The concerned respondents are hereby directed to provide the photocopies of the record and documents seized by them under

the panchnama, dated 7-12-2013, which were seized from the possession of the petitioners, at the cost of the petitioners and on deposit of a further sum of Rs. 10,000/- towards the manpower, etc. (over and above the actual expenses of photocopies). At the initial stage, the petitioners shall deposit a sum of Rs. 25,000/- towards the probable cost of the photocopies, which includes the additional sum of Rs. 10,000/- towards manpower. If, it is found that, some more amount than Rs. 15,000/- was required to be incurred, the petitioners shall pay the balance amount to the Department before getting the actual photocopies. It goes without saying that if less amount is incurred than Rs. 15,000/- the Department shall return the balance amount to the petitioners. The aforesaid exercise shall be completed within a period of four weeks from the date of the aforesaid deposit of Rs. 25,000/-. Rule is made absolute to the aforesaid extent. There shall be no order as to costs.

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10. 'Reason to believe' is subject to judicial scrutiny – Supreme Court

U.O.I. Vs Agarwal Iron Industries

IN THE SUPREME COURT OF INDIA

Dipak Misra and Uday Umesh Lalit, JJ.
UNION OF INDIA
Versus
AGARWAL IRON INDUSTRIES

Civil Appeal No. 7499 of 2004 with C.A. No. 7502 of 2004, decided on 12-11-2014

CASES CITED

Ajit Jain v. Union of India — (2000) 242 ITR 302 (Delhi) — *Referred….*[Para 4]
Commissioner v. Vindhya Metal Corporation — (1997) 5 SCC 321 — *Referred…..*[Para 4]
District Registrar and Collector v. Canara Bank — (2005) 1 SCC 496 — *Relied on…..*[Para 7]
L.R. Gupta v. Union of India — (1992) 194 ITR 32 (Delhi) — *Referred….*[Para 4]
N.L. Tahiliani v. Commissioner — (1988) 170 ITR 592 (Allahabad) — *Referred…..*[Para 4]
Pooran Mal v. The Director of Inspection (Investigation) — (1974) 1 SCC 345 — *Relied on…..*[Para 6]
Ravi Iron Industries v. Director of Investigation — 2005 (191) E.L.T. 105 (All.) — **Overruled…..**[Para 1]

REPRESENTED BY : S/Shri Guru Krishna Kumar, Sr. Advocate, Ms. Madhurima Tatia, Ms. Rashmi Malhotra, Vikas Malhotra, Mrs. Anil Katiyar, B.V. Balaram Das, Advocates with him, for the Appellant.
S/Shri Vinay Kr. Garg, Sr. Advocate, Rajendra Singh, K.L. Gautam, Imran Ahmad Abbasi, Ashok Kumar Singh, Advocates with him, for the Respondent.

[Judgment per : Dipak Misra, J.]. - In these appeals the assail is to the legal tenability of the order, dated 3-9-2003 passed by the Division Bench of the High Court of Judicature at Allahabad in Civil Writ Petition No. 275 of 2000 [2005 (191) E.L.T. 105 (All.)] whereby the High Court has quashed the search and seizure conducted on 16-2-2000 in the factory premises of the 1st respondent.

2. Filtering the unnecessary details, the facts that constitute the filament of the controversy is that the 1st respondent is engaged in the manufacture of C.I. pipes, fittings and manholes and has obtained the licence under the Central Excise Act. The factory in question has been filing income-tax returns under the Income Tax Act, 1961 (for brevity 'the Act'). On 16-2-2000 when the sole proprietor of the factory Shri Om Prakash Agarwal was absent, the officer of the Income Tax Department conducted a search both at the residential as well as the business premises. During the search of the residential premises, son of the sole proprietor was informed by the Income Tax Officer that the search operations were also being conducted at the factory premises. Despite such information he was not allowed to leave the house. Assailing the search and the seizure, the 1st respondent preferred a writ petition before the High Court and contended therein that there was no information in possession of the officer which could have persuaded any reasonable person to form an opinion about the existence of undisclosed assets of the writ-petitioner. It is further urged that the warrant of authorization was issued mechanically, arbitrarily and there was total non-application of mind and moreover there was no formation of opinion about the existence of undisclosed assets as contemplated under Section 132(1) of the Act. On this foundation, the search and seizure were sought to be quashed.

3. A counter affidavit was filed by the revenue asseverating that there was no illegality in the initiation of the seizure and it had been conducted in accordance with law and the revenue had enough material against the 1st respondent herein for the assessee had suppressed the vital information pertaining to production and sale and the same was also evidenced during the search operation. It was contended that the productions declared by the 1st respondent in the official record was not even 1/5th of the actual production revealed by the seized documents.

4. It is interesting to note that the High Court by its order, dated 29-3-2000 appointed an Advocate Commissioner to prepare an inventory of the goods in question in respect of which the restraint order was passed. The said Advocate Commissioner had submitted a report which was taken on record. The High Court placed reliance on decisions in *Commissioner of Income-Tax* v. *Vindhya Metal Corporation* - (1997) 5 SCC 321, *Dr. N.L. Tahiliani* v. *Commissioner of Income Tax* - (1988) 170 ITR 592 (Allahabad), *L.R. Gupta* v. *Union of India* v. *Union of India* - (1992) 194 ITR 32 (Delhi) and *Ajit Jain* v. *Union of India* - (2000) 242 ITR 302 (Delhi) and extensively quoting from *Dr. Tahiliani's* case came to hold as follows:-

> "At this stage it is relevant to refer to Para 40 of the writ petition, which is quoted below :
>
> "40. That in the facts and circumstances the Petitioner *bonafidely* believes that there was no information in possession of the officer issuing the warrant of authorization for search which could lead any reasonable person to form an opinion about existence of undisclosed assets with the Petitioner. The warrant of authorization, even if assumed that there was any, was issued mechanically arbitrarily and

without application of mind and without forming the opinion about existence of undisclosed assets, as contemplated by Sub-Section (1) of Section 132."

The reply of the said paragraph has been given by the Respondents in Para 33 of the counter affidavit, which reads as under:

"33. That in reply to Paragraph 40 of the writ petition, it is denied that the warrant of authorization was issued mechanically, arbitrarily and without application of mind."

From the aforesaid reply it is clear that there is no specific denial of the averments made in Para 40 of the writ petition. Order 8 Rule 5 of the Code of Civil Procedure provides that every allegation of fact in the plaintif not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant shall be taken to be admitted except against the person under disability. In view of this provision in absence of a specific denial in the counter affidavit to the assertions made in the writ petition, it can safely be concluded that there is no denial of the facts stated in the writ petition. We are aware that the explanation to Section 141 of the Code of Civil Procedure provides that the provisions of Code of Civil Procedure shall not be applicable to the writ petition. However, the principles as stated in the Code of Civil Procedure are also applicable to the writ proceedings."

5. We have no hesitation in opining that the reasons ascribed in the aforesaid paragraphs, leaves us absolutely unimpressed. We really cannot comprehend how an Advocate Commissioner was appointed to take inventory of the goods in respect of which the restraint order was passed by the revenue under the Act. That apart, it is difficult to appreciate how the denial in the counter affidavit filed by the revenue could be treated as an admission by implication to come to a conclusion that no reason was ascribed for search and seizure and, therefore, action taken under Section 132 of the Act was illegal. The relevant confidential file, if required and necessary could have been called for and examined. Revenue in the counter affidavit was not required to elucidate and reproduce the information and details that formed the foundation.

6. In this context, we may profitably refer to the decision in *Pooran Mal* v. *The Director of Inspection (Investigation), New Delhi and Others* - (1974) 1 SCC 345, wherein the Constitution Bench, while upholding the constitutional validity of Section 132 of the Act opined thus:

"Search and seizure are not a new weapon in the armoury of those whose duty it is to maintain social security in its broadest sense. The process is widely recognized in all civilized countries. Our own Criminal Law accepted its necessity and usefulness in Sections 96 to 103 and Section 165 of the Criminal Procedure Code. In *M.P. Sharma* v. *Satish Chandra* - AIR 1954 SC 300 = 1978 (2) E.L.T. (J287) (S.C.) the challenge to the power of issuing a search warrant

under Section 96(1) as violative of Article 19(1)(f) was repelled on the ground that a power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. As pointed out in that case a search by itself is not a restriction on the right to hold and enjoy property though a seizure is a restriction on the right of possession and enjoyment of the property seized. That, however, is only temporary and for the limited purpose of investigation".

Thereafter, proceeding with the ratiocination, the Court ruled that the provision has inbuilt spheres. Proceeding to enumerate the spheres and other consequent facets, the Court ruled :

"In the first place, it must be noted that the power to order search and seizure is vested in the highest officers of the department. Secondly, the exercise of this power can only follow a reasonable belief entertained by such officer that any of the three conditions mentioned in Section 132(1)(a), (b) and (c) exists. In this connection it may be further pointed out that under sub-rule (2) of Rule 112, the Director of Inspection or the Commissioner, as the case may be, has to record his reasons before the authorisation is issued to the officers mentioned in sub-section (1). Thirdly, the authorisation for the search cannot be in favour of any officer below the rank of an Income Tax Officer. Fourthly, the authorisation is for specific purposes enumerated in *(i)* to *(v)* in sub-section (1) all of which are strictly limited to the object of the search. Fifthly when money, bullion, etc. is seized the Income Tax Officer is to make a summary enquiry with a view to determine how much of what is seized will be retained by him to cover the estimated tax liability and how much will have to be returned forthwith. The object of the enquiry under sub-section (5) is to reduce the inconvenience to the assessee as much as possible so that within a reasonable time what is estimated due to the Government may be retained and what should be returned to the assessee may be immediately returned to him. Even with regard to the books of account and documents seized, their return is guaranteed after a reasonable time. In the meantime the person from whose custody they are seized is permitted to make copies and take extracts. Sixthly, where money, bullion, etc. is seized, it can also be immediately returned to the person concerned after he makes appropriate provision for the payment of the estimated tax dues under sub-section (5) and lastly, and this is most important, the provisions of the Criminal Procedure Code relating to search and seizure apply, as far as they may be, to all searches and seizures under Section 132. Rule 112 provides for the actual search and seizure being made after observing normal decencies of behaviour. The person in charge of the premises searched is immediately given a copy of the list of articles seized. One copy is forwarded to the authorising officer.

Provision for the safe custody of the articles after seizure is also made in Rule 112. In our opinion, the safeguards are adequate to render the provisions of search and seizure as less onerous and restrictive as is possible under the circumstances.

7. In *District Registrar and Collector, Hyderabad and Another* v. *Canara Bank and Others* - (2005) 1 SCC 496, while referring to Section 132 of the Act, it has been ruled that :

> "There are safeguards. Section 132 uses the words "in consequence of *information* in his possession, *has reason to believe*". (emphasis supplied) Section 132(1-A) uses the words "in consequence of information in his possession, has reason to suspect". Section 132(13) says that the provisions of the Code of Criminal Procedure, relating to searches and seizure shall apply, so far as may be, to searches and seizures under Sections 132(1) and 132(1-A). There are also Rules made under Section 132(14). Likewise Section 132-A(1) uses the words "in consequence of *information* in his possession, *has reason to believe*". (emphasis supplied) Section 133 which deals with the power to call for information from banks and others uses the words *"for the purposes of this Act"* and Section 133(6) permits a requisition to be sent to a bank or its officer".

8. The provision contained in Section 132(1) of the Act enables the competent authority to direct for issue of search and seizure on the basis of formation of an opinion which a reasonable and prudent man would form for arriving at a conclusion to issue a warrant. It is done by way of an interim measure. The search and seizure is not confiscation. The articles that are seized are the subject of enquiry by the competent authority after affording an opportunity of being heard to the person whose custody it has been seized. The terms used are 'reason to believe'. Whether the competent authority had formed the opinion on the basis of any acceptable material or not, as is clear as crystal, the High Court has not even remotely tried to see the reasons. Reasons, needless to say, can be recorded on the file and the Court can scrutinize the file and find out whether the authority has appropriately recorded the reasons for forming of an opinion that there are reasons to believe to conduct search and seizure. As is evincible, the High Court has totally misdirected itself in quashing the search and seizure on the basis of the principles of non-traverse.

9. In our considered opinion, the High Court would have been well advised to peruse the file to see whether reasons have been recorded or not and whether the same meet the requirement of law.

10. In view of our foregoing analysis, we allow the appeals, set aside the impugned order passed by the High Court and remand the matter to the High Court for fresh disposal in accordance with law. The revenue shall produce the file before the High Court, whereafter the High Court shall proceed to adjudicate the lis. There shall be no order as to costs.

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