ORIGINAL CIVIL.

Before Ameer Ali J.

1939

June 26; *July* 5, 15.

WAN TEN LANG

v.

COLLECTOR OF CUSTOMS.*

Sea Customs—*Jurisdiction in revenue matters—High Court, Power to interfere—Bill of entry, Concealment and misstatement in—Assessment of duty—Specific Relief Act (I of 1877), s. 45—Sea Customs Act (VIII of 1878), ss. 30, 31, 32, 87, 167* (37)*—Government of India Act, 1935 (25 & 26 Geo. V, c. 42), s. 226* (1)*—Government of India Act, 1915 (5 & 6 Geo. V, c. 61), s. 106* (2).

The bill of entry in respect of a consignment of miscellaneous goods did not show that it consisted of packets of cotton cord as also silk scarves which was described as silk haberdashery. The Customs authorities detained the goods and assessed them for duty by the addition of 50 per cent. on each item of the value declared in the bill of entry and a penalty of Rs. 5 was imposed. They intimated to the importer that the duty short levied must be paid. In the final order of the Customs authorities there was reference to the penalty and also to the payment of correct duty assessed under s. 87 of the Sea Customs Act. In an application by the importer for an order upon the Customs authorities to proceed under s. 32 of the Sea Customs Act,

held : (*i*) that the action of the Customs authorities was not outside revenue or collection of revenue ;

(*ii*) that the High Court has not any original jurisdiction to interfere in the matter ;

(*iii*) until the applicant has exhausted his right of appeal under ss. 188 and 191 the Court will not interfere by way of *mandamus* ;

(*iv*) that the assessment of duty by the addition of 50 per cent. on each item of value declared was not warranted by any provision of the Act.

Alcock, Ashdown and Company v. *Chief Revenue-Authority of Bombay* (1) and *Thin Yick* v. *Secretary of State for India in Council* (2) referred to.

Willaitiram Jaishiram v. *Secretary of State* (3) discussed.

APPLICATION under s. 45 of the Specific Relief Act.

The facts of the case appear sufficiently from the judgment.

S. N. Banerjee (*Sr.*) and *P. B. Mukharji* for the applicant. The Customs authorities can only proceed under s. 32 and they are not proceeding according

*Application.

(1) (1923) I. L. R. 49 Bom. 742 ; L. R. 50 I. A. 227.

(2) I. L. R. [1939] 1 Cal. 257.

(3) [1936] A. I. R. (Sind.) 127.

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to their legal obligation. They have no option of proceeding independently of ss. 31 and 32. Printed note at the bottom of the bill of entry shows that the respondent regarded that their power of assessment and levy of duty were derived from ss. 31 and 32 and no other section. The Customs can confiscate, they can impose a penalty under s. 167 (*37*), but their action in making a penal assessment by increasing by 50 per cent. was not warranted by law. The High Court has power to make the order, the power not being "exercise of original jurisdiction "in any matter concerning the revenue". *Alcock, Ashdown and Company* v. *Chief Revenue-Authority of Bombay* (1).

Sir Asoka Roy, Advocate-General, and *S. R. Das* for the respondent. The High Court has no original jurisdiction, as the matter is one concerning revenue or collection of revenue: s. 226(*1*) of the Government of India Act, 1935, corresponding to s. 106(*2*) of the Government of India Act, 1915; *Thin Yick* v. *Secretary of State for India in Council* (2) and the cases referred to therein. The Customs authorities were entitled to assess under s. 87. There is no question of assessment under s. 32 and the only provision for assessment is under s. 87. Where there is a question of discrepancy of value and not of class or description of goods s. 32 comes into operation. The Customs authorities have an option of proceeding under s. 32 but they are not bound to do so. *Willaitiram Jaishiram* v. *Secretary of State* (3). The applicant not having appealed under ss. 188 and 191, this application is not maintainable.

Banerjee, in reply.

Cur. adv. vult.

AMEER ALI J. This is an application under s. 45 of the Specific Relief Act for an order upon the Customs authorities to proceed under s. 32 of the

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Sea Customs Act. The questions are three: (i) whether the Court has any jurisdiction at all, a point of demurrer; (ii) whether, on a proper construction of the Act, the Customs authorities are refusing to perform a statutory duty; in other words, what, if anything, have the Customs authorities done wrong? (iii) whether, assuming jurisdiction, relief under s. 45 should be granted?

The particular facts are as follows:—

The goods in question arrived on February 17, 1939. On the previous day, on February 16, 1939, we find a bill of entry, which is annexed to the affidavit in support of this application. It shows that the consignment consisted of a number of miscellaneous goods. The amount, or real value, appears in the appropriate column inserted by the importer or his agent. At the bottom of the bill of entry is a printed note, cl. 3 of which is material. It reads as follows:—

> It is hereby declared that the acceptance of the deposit of duty calculated on the declared value and description of the goods specified in this bill of entry before examination and assessment shall not be deemed to imply acceptance by Government of such declared value or description or to affect the rights of Government under ss. 31 and 32 of the Sea Customs Act, until the Appraising Department shall have finally accepted such declared value and description.

The consignment, I have mentioned, consists of articles as different as felt caps, silk haberdashery, hardware, saddlery, pipes, and wooden beams.

On February 21, 1939, under existing practice, the duty according to the declared value was deposited in advance.

On February 28, 1939, the Customs authorities had the goods opened and they found amongst them not declared 116 packets of cotton cord. They also found that what were described in the invoice, I believe, as silk tassels and in the bill of entry as silk haberdashery were in fact silk scarves. The latter appears to be a most momentous fact, as it makes a difference in duty of the sum of Rs. 5. The 116 packets of cotton cord of course requires explanation. The Customs authorities justifiably regarded it as an attempt to smuggle.

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On March 8, 1939, the Customs authorities gave notice to show cause why the goods should not be forfeited. This is in accordance with the law under s. 167, item 37. On March 21, the goods being detained in the meantime, the goods, under an order which is endorsed on the bill of entry, were reassessed for duty by the addition of 50 per cent. on each item of the value declared and a penalty was imposed of Rs. 5. The letter to the importer states that "the "duty short-levied must be paid" (the phrase should be noted). On April 1, there is a final order of the Assistant Collector of Customs. It refers to the penalty. It also refers to the "payment of correct "duty assessed under s. 87 of the Sea Customs Act", which is the first reference to assessment under that section or to any assessment at all. This application was made on April 28, 1939. There is no letter actually calling upon the Customs authorities to proceed under any particular section, but in the letter of March 15, 1939, para. 4, the applicant asks that "action under s. 167 may not be taken and that he "may be allowed to pay the sums found deficit."

There is in this case, as in all cases of this nature, an important point of demurrer, but, as so often happens, that point of demurrer will depend to a great degree on the facts, namely, the question, what, if anything, have the Customs authorities done wrong? We have first to find whether they have failed to carry out or are refusing to carry out a statutory duty and, secondly, we have, by reason of the particular section of the Government of India Act, to decide whether what they are doing or the matter in which the Court is asked to exercise jurisdiction does or does not "concern revenue".

I now proceed to deal with the construction of the Act and what the Customs authorities have done. It seems to me clear that, if the only course open to the Customs under the statute is to proceed under s. 32, they are wrong and they are refusing to proceed according to their statutory obligations. When the

matter was first presented to me, I thought that the Customs were proceeding or purporting to proceed wholly criminally, that is to say, under s. 167 and had made some kind of anomalous order purporting to be made under the power to impose a penalty, but that is not so. Although this is clearly a penal assessment, the main contention of the Customs before me is not that it is irregular or an anomalous order under s. 167 but that they are entitled to assess, levy and detain irrespective of s. 32 and in particular, under s. 87.

There were three points which were argued before me by the Advocate-General. The first is that there is no question of assessment under s. 32 and that the only provision providing for assessment is under s. 87. Secondly, and this was the Advocate-General's point with which I was not at the time at all impressed,—that s. 32 only applies to a limited class of cases, where there is a question of discrepancy of value and no question of class or description of goods. In other words, s. 32 applied only to a limited class of disputes. Lastly, that, under s. 32, the Customs have the option of either detaining or not detaining, of proceeding or not proceeding, but they are not compelled to detain the goods under that section, and not compelled either to deliver them or to sell them or to offer them conditionally as provided in that section. For that point, learned Advocate-General relied on *Willaitiram Jaishiram* v. *Secretary of State* (1).

As I first read the Act, during the course of the argument before me, it appeared to me that s. 87 was a section providing general enabling power to assess, and that ss. 30, 31 and 32 provide the actual machinery for appraisement, assessment and levy. As I read the Act, during the course of the argument, it seems to me that on this basis levy was not intended to be made or enforced save by the process set out in s. 32. On the other hand, as I myself pointed out, there is s. 39 providing for levy of duty short-levied,

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Section 89, as to which I shall question the lay client when he is here, and s. 192 the last section specifically providing for the power to detain pending payment of any duty outstanding as the result of increase of rate.

The question which then arose and which I reserved to consider was whether there are under this Act concurrent powers to levy an assessment of duty by different processes. Has the Customs the option of proceeding under ss. 30 and 31 and 32 or independently of these sections.

Now, I first treated the matter of silk scarves and tassels somewhat lightly, but the question so put does raise an important question of principle. There is power to check or penalise or confiscate under s. 167. There is power to check an under-value under s. 32 undoubtedly. Is there a general power to assess, apart from the section, and to detain, against which a trader has no protection other than appeal? That is the question of principle.

The procedure under s. 32 undoubtedly does protect a trader as well as the State.

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Although the Advocate-General's point regarding s. 32, in my view, is wrong, the real point which the Customs might have made, which apparently they are not anxious to make, is that ss. 30 and 32 relate to a particular class of goods and it provides a procedure relating to a particular class of goods. The side-note to s. 31 speaks of "*ad valorem* goods," and the marginal note to s. 32 is "procedure where "*such* goods are under-valued by the owner". Turning back to s. 22, we find the power to fix tariff-values of goods. Reading through the whole Act (see for instance s. 34) we find stress laid on the difference between the tariff-value goods and *ad valorem* goods.

Section 30 provides for "real value". Now so far as I can see, "real value" only comes into operation or is only of importance in dealing with non-tariff-value goods, *i.e.*, *ad valorem* goods. Leaving

this point as to the antithesis as between the two classes of goods, I go on to ask the question regarding s. 39, last clause, by which the Customs Collector may refuse to pass any goods until such deficiency or excess is paid. What is the meaning of "refuse "to pass". Does it mean, detain? Is it the same as clearing order under s. 89? What is the clearing order under s. 89? How were the goods in this case dealt with? When the duty is paid on the declared value, are they cleared or are they not cleared? Were they allowed entry or were they not allowed entry?

Chapter IX is headed "discharge of". The provisions of the sections, to which I have referred, are included in the Chapter dealing with "Levy of "Duty". Chapter IX, ss. 86, 87 and 89, are sections to be considered. Section 87, upon which the Customs authorities base their case, still appears to me to be the section which indicates the stage at which goods shall be assessed.

The other matter, upon which I shall ask questions of the Customs authorities, is this matter of the bill of entry, payment of duty on the value set out by the import trader and the note. As I already indicated, I don't know under what section or rule this is done, or whether on this payment, goods are regarded as cleared, or what happens. But the point for the Collector of Customs to consider is this: Note 3 appears to suggest very strongly that the Customs authorities regard their only power of assessment and levy of excess duty as under ss. 31 and 32 and no other section.

I return to the main question upon which I wish the assistance of the legal advisers of the Customs authorities and that is the antithesis between tariff-value goods and non-tariff-value goods and it does appear to me, speaking generally, subject to further argument on this subject, that ss. 30 and 32 relate only to particular class of goods, non-tariff-value goods, *i.e.*, *ad valorem* goods.

Whether the goods here are tariff-value goods or non-tariff-value goods has not been explained to me.

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I assume from what has transpired that the bulk of them at any rate, the silk haberdashery, are tariff-value goods and I also infer—and this is what I wish confirmed, that, in the case of tariff-value goods, some value is put on the goods by weight or bulk and the question of "appraisement" does not arise.

It is therefore inferred that this Act intends to prescribe different procedures for different classes of goods. There is no question of option. If it is *ad valorem* goods there is a special class of procedure, ss. 30 and 32. If it is tariff-value goods then the assessment is under the general powers and the power to detain under the general power.

If that view is right (and indeed upon any view), the action of the Customs in making a penal assessment, merely increasing it by 50 per cent., is not warranted by any provision of the Act. They can confiscate, they can impose a penalty under s. 167. On the view that I have expressed, if they are *ad valorem* goods they proceed under ss. 30 and 32. If they are tariff-value goods they proceed by way of normal assessment on the tariff-value.

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I now return to the question of law. I am dealing first with the point of demurrer. I will deal with that point of demurrer on the basis that the Customs were bound to proceed under s. 32. The obstacle is s. 106, sub-s. (*2*) of the Government of India Act. High Courts have not and cannot exercise any original jurisdiction in any matter "concerning revenue or concerning any act, ordered "or done for the collection of revenue according to "the usage and practice of the country or law for the "time being in force". Now, on the operation of that section, there are various decisions, some of this Court and that of the Judicial Committee in *Alcock, Ashdown's* case (1). In that case it was held that the refusal to state a case under the Indian Income-tax Act, for the opinion of the

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Court, on a matter of law, did not fall within the prohibition. That was something *de hors* the collection of revenue or "revenue", that it was something which concerned the judicial powers of the Revenue authorities. On the facts of this case, can it be said that what was done is outside "revenue" or collection of revenue? I think there can be only one answer to this question. I think it is not outside.

There arises the further question of law on the demurrer, which was actually not discussed before me, but upon which I shall not call on counsel again, as I have my own views upon it, and it is this: Can it be said under the second part of that s. 106, this is an act *in* the collection of revenue which is not according to the law for the time being in force? I have taken the view that it was not according to law for the time being in force. I do not propose to consider in this case whether there is any actual antithesis between the two phrases of this section or any independent significance to be attached to the second portion of that section and whether I should go on to consider whether the act done by the Customs was reasonable or *bona fide*. There appears to be some law upon that point. It is referred to by Panckridge J. in *Thin Yick* v. *Secretary of State for India in Council* (1). I think that to interfere in this matter would be to exercise jurisdiction in a matter concerning revenue. The further obstacle in the way of the applicant is that he has not exhausted his remedies. Until his right of appeal under ss. 188 and 191 is exhausted, the Court does not interfere by way of *mandamus*.

The application, therefore, fails on a point of law.

Going back to discuss, however, the question that had to be discussed, there is one case, to which I shall refer; this Sindh case relied upon by the Advocate-General. That case is, in my opinion, if the view I have expressed is correct, somewhat misleading and

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for this reason. It ignores altogether the question of *ad valorem*, tariff-value goods. The real point was whether s. 167 was excluded by s. 32, *i.e.*, whether the Customs were precluded from proceeding criminally and were not bound to proceed under s. 32. The learned Judge does go on to say that there are three alternatives. Then he goes on to say "there is an option on the part of the Customs "authorities", and his point is not that there is an alternative procedure or option to proceed under s. 32 or by way of some other section, but that, under s. 32, by reason of the word "may", notwithstanding that he is applying s. 32, he need not follow the course there laid down. That was the learned Advocate-General's argument based on this case. That argument is I think wrong. If s. 32 applies, "may" is "must". If s. 32 applies, there is no other procedure.

On the other hand, in my view, there are alternative procedures with regard to different classes of goods.

I think that the learned Judge in that case was in the same difficulty as I have been, and had not explained to him the system upon which the Customs work.

The application will be dismissed with costs.

The portion of this judgment (pp. 546-8) relating to the antithesis between "Tariff-value goods" and "*ad valorem* goods" was intended to invite further argument from the Advocate-General and further information from his clients.

That invitation having been declined except in so far as I have been told that all the goods in this case are "*ad valorem* goods" the judgment will remain.

Application dismissed.

Attorney for applicant: *M. N. Sen.*

Attorney for respondent: *S. C. Sen.*

A. C. S.