PETITIONER:
CHUHARMAL

Vs.

RESPONDENT:
UNION OF INDIA & ORS.

DATE OF JUDGMENT02/05/1988

BENCH:
MUKHARJI, SABYASACHI (J)
BENCH:
MUKHARJI, SABYASACHI (J)
RANGNATHAN, S.

CITATION:
1988 AIR 1474 1988 SCR (3) 797
1988 SCC (3) 257 JT 1988 (2) 433
1988 SCALE (1)1105

ACT:
Customs Act, 1962: Sections 110(2), 111(2), 111, 112, 123 and 124-Goods seized under the Act-Extension of period of six months from date of seizure-Cannot be ordered ex parte by Collector-To be preceded by notice to affected party-Value of goods seized-Determination of for purposes of levy of penalty-Quantum of penalty-Not to be arbitrary or excessive.

HEADNOTE:
On or about 12th May, 1973 the Superintendent of Central Excise issued search warrant under s. 105 of the Customs Act, 1962 authorising an Inspector of Central Excise to search the residential premises of the petitioner. A search was made and 565 foreign wrist watches were recovered from the premises. The petitioner was given a notice to showcause why the period of six months fixed by s. 110(2) should not be extended.

On December 26, 1975 the Collector of Central Excise passed an order directing confiscation of 565 wrist watches seized from the petitioner's possession on May 12, 1973 under Section 111, and the imposition of penalty of Rs.2 lacs under section 112 of the Act.

The petitioner's appeal to the Central Board of Excise and Customs, and revision to the Government of India having been dismissed, the petitioner challenged the order of the Collector in a writ petition to the High Court.

The High Court dismissed the writ petition, on the ground that the Collector was justified in passing the order of confiscation of the watches and imposing a penalty of Rs.2 lacs, as the petitioner had not refuted the facts alleged in the show-cause notice by availing of the opportunity given to him at the enquiry.

In the Special Leave Petition to this Court it was contended that: (1) the notice dated May 4, 1974 issued under section 124 of the Act was issued beyond the period of six months of the seizure of the goods and as such the entire proceedings were invalid for this reason; and that the
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extension of the period of six months by another period of

six months in accordance with the proviso to section 110(2) could not be made ex-parte without notice to the petitioner, (2) there was no evidence to determine the value of watches, so the quantum of penalty could not be determined for want of such evidence, and (3) the quantification of the penalty was very high.

Dismissing the Special Leave Petition, this Court,

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HELD: 1(i) Extension of time takes away a valuable right of a party whose goods are proposed to be seized. Such deprivation of the valuable right must be upon notice, otherwise it violates the principles of natural justice.[802D-E]

(ii) An ex-parte determination by the Collector would expose his decision to be one sided and perhaps one based on an incorrect statement of facts. [802F]

(iii) Whether a notice was given or not within a stipulated time for extension as contemplated under s. 110(2) is a question of fact. The onus that the order was passed without notice is on the person who asserts it to be so and this is a question of fact. [802H;803A]

In the instant case, a notice has been given. There was an assertion to this effect in the Collector's order. The assertion remained uncontroverted by any specific evidence and also by failure to urge this point. In that view of the matter, the inference drawn by the High Court that such notice was given as contemplated under section 110(2), was not unwarranted. [803A-B]

2. The value of the watches was mentioned as one of the particulars in the show-cause notice given to the petitioner and this value was not refuted by the petitioner in his reply. The petitioner did not avail himself of the opportunity at any stage to oppose the extension of time or to refute the allegations made in the show-cause notice given thereafter. The petitioner thus failed to discharge the burden of proof cast on him by section 123 of the Act. [803C-D]

3. The quantum of penalty should not be arbitrary or excessive. [804E]

In the instant case, the value of the smuggled goods was Rs.87,455. The penalty permissible is upto five times the value of the goods. The Collector imposed the penalty of Rs.2 lacs by his order in

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1975. Admittedly, for about ten years, the amount of penalty had not been paid by the petitioner. The High Court noted that the benefit derived by the petitioner by non-payment of the penalty for ten years indicates that the penalty could not be treated as arbitrary. That by itself is not always a safe guide. In the facts and circumstances of this case, the penalty was not heavy. [804C-E]

Asstt. Collector of Customs v. Charan Das Malhotra 1971 3 SCR 802, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Special Leave Petition (Civil) No. 1008 of 1986.

From the Judgment and Order dated 25.11.1985 of the Madhya Pradesh High Court in Misc. Petition No. 551 of 1981.

Dr. N.M. Ghatate and S.V. Deshpande for the Petitioners.

Kuldip Singh, Additional Solicitor General, B.B. Ahuja and Miss. A Subhashini for the Respondents.

The Judgment of the Court was delivered by

SABYASACHI MUKHARJI, J. This is a petition for leave to appeal under Article 136 of the Constitution of India directed against the judgment and order dated 25th November, 1985 of the High Court of Madhya Pradesh at Jabalpur. The petitioner herein had challenged by a petition under Article 226 of the Constitution the order dated 26th December, 1975 passed by the Collector of Central Excise, Nagpur, directing confiscation of 565 wrist watches seized from the petitioner's possession on 12th May, 1973 under Section 111 of the Customs Act, 1962 (hereinafter called 'the Act') and the imposition of penalty of Rs.2,00,000 under section 112 of the Act and as well as the order dated 10th August, 1979 passed by the Central Board of Excise and Customs dismissing the petitioner's appeal and thereafter the order dated 8th January, 1981 passed by the Government of India dismissing the petitioner's revision.

It appears that the petitioner along with his father and brothers migrated to India from Pakistan. It is stated that the petitioner started business of cutlery in Indira Market Durg and has got this separate business from other two brothers. The petitioner further asserted that he was not also associated in any business with his cousin Hariram or

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business of his father. He stated that he lives separately from his brother and father. In or about April, 1966, the petitioner purchased a piece of land for Rs.6250 from one Yeshwant Ram under the registered sale deed in respect of the plot bearing Khasra No. 1167 admeasuring about 182 sq. ft. Similarly his brothers had also purchased plot adjoining the plot of the petitioner. Since 1973, the petitioner stated that he was living in two temporary rooms constructed by his brothers and petitioner's plot was lying vacant. On or about 12th May, 1973 Superintendent of Central Excise Raipur issued search warrant under section 105 of the Act authorising one L.B. Tiwari Inspector, Central Excise to search the residential premises of the petitioner. They searched the residential premises at Durg and it was alleged that the house belonged to the petitioner. On 1st April, 1974, the petitioner was detained under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter called 'COFEPOSA'). On or about 22nd March, 1975, the petitioner while in jail received the letter issued by the Collector for the purpose of extension of six months' time for the issuance of show cause notice under section 110(2) of the Act under which the period was extended upto 14.11.74. The petitioner alleged that this letter was never received by him. There was another order on or about 5th January, 1976 passed by the Collector, Central Excise under which it was held that the petitioner had acquired the possession of the wrist watches and these were smuggled goods and imposed a penalty of Rs.2,00,000.

The High Court noted the facts as below:

> "On 12.5.1973 in a search made of the petitioner's bed room at Durg, a total of 565 wrist watches of foreign mark valued at Rs.87,455 were seized from a suit case, a secret cavity in a locked steel almirah, and behind the almirah concealed in a bundle of waste-paper from the petitioner's possession during his presence. A panchnama was prepared at the same time mentioning these facts. The petitioner found himself unable to make any statement at that time on account of which recording of his statement was deferred. However,

the petitioner went out of station on 14.5.1973. His statement was then recorded on 30.5.1973, as soon as he was available for this purpose. In his statement Annexure R-III duly signed by him, he admitted these facts and merely denied knowledge of the manner in which the watches came to be in his house. the

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petitioner was also given a notice to show cause why the period of six months fixed by section 110(2) of the Customs Act should not be extended but no reply was given by him till 10.11.1973 or even thereafter, therefore, by an order dated 10.11.1973 before expiry of the period of six months' time was extended by the collector of customs for a further period of six months for giving a notice as required by section 124(a) of the Act. Within proviso to sub-section (2) of section 110, a show cause notice specifying the requisite particulars was given to the petitioner on 4.5.1974. In reply the petitioner made a general denial. The enquiry was fixed for giving a personal hearing to the petitioner on 31.10.1975 when the petitioner's counsel appeared and sought an adjournment to 20.11.75 which was granted. However, on 20.11.1975 the petitioner's counsel stated that the petitioner did not want to avail the opportunity of personal hearing or to even cross-examine the witnesses in whose presence the panchnama the time of the seizure of the watches was made.

In the above circumstances and on the basis of facts alleged in the show cause notice which the petitioner did not even care to refute by availing the opportunity given to him at the enquiry, the Collector of Central Excise passed the order dated 26.12.1975, as aforesaid. This order has been affirmed on appeal by the Board and thereafter in revision by the Government of India."

It was contended before the High Court by the petitioner's counsel that the notice dated 4th May, 1974 issued under section 124(a) of the Act was issued beyond the period of six months of the seizure of goods made on 12.5.1973 and as such the entire proceedings were invalid for this reason. It was also contended that the extension of the period of six months by another period of six months in accordance with the proviso to sub-section (2) of section 110 could not be made ex parte without notice to the petitioner. Reliance was placed on the decision of this Court in Asstt. Collector of Customs v. Charan Das Malhotra, [1971] 3 S.C.R. 802. The High Court found that this contention had not been urged before the lower authorities. However, the High Court noted that the Collector's order dated 26th December 1975 had specifically mentioned that a show cause notice was issued to the petitioner for extension of the period for issue of notice in accordance with section 110(2) of the Act by another six months but no reply was

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given by the petitioner and the Collector, therefore, extended the period by another six months by his order. This order coupled with the petitioner's failure to even raise this point at an earlier stage was sufficient, according to the High Court, to indicate that the order extended the period by another six months under the proviso to subsection

(2) of section 110 was made after giving an opportunity to the petitioner which he had failed to avail. Sub-section (2) of section 110 stipulates as follows:

> "Where any goods are seized under sub-section (1) and no notice in respect thereof is given under clause (a) of section 124 within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized:
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> Provided that the aforesaid period of six months may, on sufficient cause being shown, be extended by the Collector of Customs for a period not exceeding six months."

Extension of time takes away a valuable right of a party whose goods are proposed to be seized. Such deprivation of the valuable right must be upon notice otherwise it violates the principles of natural justice. In the aforesaid decision of this Court in Asstt. Collector of Customs v. Charandas Malhotra, (supra), this Court affirmed the view of the Calcutta High Court that the power under the proviso was quasi-judicial, or at any rate, one requiring a judicial approach. This Court reiterated that the right to restoration of the seized goods is a civil right which accrues on the expiry of the initial six months and which is defeated on an extension being granted, even though such extension is possible within a year from the date of the seizure. Therefore, according to this Court an ex parte determination by the collectorwould expose his decision to be one-sided and perhaps one based on an incorrect statement of facts. How then can it be said that his determination that a sufficient cause exists is just and fair if he has done it before by one-sided picture without any means to check it unless there is an opportunity to the other side to correct or controvert it? But in the facts of this case a notice has been given and it has been so found from the records as well as the inference drawn from in absence of pleading, which inference drawn by the High Court in the facts of this case was not an improper inference. In our opinion, the order was passed not in violation of the principles of natural justice. It must be reiterated whether a notice was given or not within a stipulated time for extension as contenplated under section 110(2) is a
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question of fact. It is also true that the onus that the order was passed without notice, was on the person who asserts it to be so and this is a question of fact. There was an assertion to this effect in the collector's order, the assertion remained uncontroverted by any specific evidence and also by failure to urge this point. In that view of the matter, the inference drawn by the High Court that such notice was given as contemplated under section 110(2), in our opinion, was not unwarranted.

The next contention that was raised before the High Court was that there was no evidence to determine the value of the watches so that the quantum of penalty could not be determined for want of such evidence. It was contended that determination of quantum was arbitrary. It appears, however, as the High Court noted that the value of the watches was mentioned as one of the particulars in the show cause notice given to the petitioner and this value was not refuted by the petitioner in his reply. The petitioner did not avail himself of the opportunity at any stage to oppose the extention of time or to refute the allegations made in the show cause notice given thereafter. Furthermore, these facts must be considered in conjunction with the fact that there

was a statement by the petitioner recorded on 30th May, 1973. Section 123 of the Act provides as follows:

> "123(1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be
> (a) in a case where such seizure is made from the possession of any person
> (i) on the person from whose possession the goods were seized; and
> (ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other person;
> "(b) in any other case, on the person, if any, who claims to be the owner of the goods so seized.
> (2) This section shall apply to gold, diamonds, manufactures of gold or diamonds, watches, and any other class of

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> goods which the Central Government may by notification in the Official Gazette specify."
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> (Emphasis supplied)

This provision had been substituted by the Act 36 of 1973 and would be applicable in the instant case. The petitioner failed to discharge the burden of proof of trust on him by the aforesaid section. The next question which was canvassed before the High Court was that the quantification of the penalty was very high. The High Court however, noted that the liability was incurred by the petitioner in 1973 and the collector made the order in 1975. Admittedly, for about ten years even after the collector's order imposing the penalty, the amount of penalty had not been paid by the petitioner. The value of the smuggled goods was Rs.87,455 even at that time. On that there is no dispute. The penalty permissible is upto five times the value of the goods. The High Court noted that the benefit derived by the petitioner by nonpayment of the amount of Rs.2,00,000 at least for ten years is sufficient indication that the penalty could not be treated as arbitrary. That of course, by itself in our opinion is not always a safe guide. But in the facts and circumstances of this case, the penalty was not heavy and the High Court was right. It is true that this Court in Malhotra's case (supra) had laid down that the penalty could not be arbitrary and excessive. But in the facts of this case, it was not so. As far as the value of the wrist watches is Rs.87,455 it was not arbitrary because it was not denied even though it was so stated in the show cause notice.

In that view of the matter, the High Court was right in not entertaining the petition under Article 226 of the Constitution. We decline to interfere in this case under Article 136 of the Constitution. The special leave petition is rejected.

N.V.K. Petition dismissed.

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