

**IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE**

Present:

The Hon'ble Justice Sugato Majumdar

CS/1252/1957

SHIVA RATAN BAJORIA
VS
UNION OF INDIA & ORS.

For the Plaintiff	:	Mr. Pramit Kumar Roy, Sr. Adv. Ms. R. Roy, Adv. Ms. Shreya Singh, Adv. Mr. Nirmalya Dasgupta, Adv. Ms. Nikita Rathi, Adv. Ms. Atmaja Bandyopadhyay, Adv.
For the Defendant no. 1	:	Mr. Uday Sankar Bhattacharya, Adv. Mr. Tapan Bhanja, Adv. Ms. Banani Bhattacharya, Adv.
For the Defendant no. 5	:	Mr. Samarajit Ray Chowdhury, Adv.
Hearing concluded on	:	26.09.2023
Judgment on	:	16.10.2023

Sugato Majumdar, J.:

The instant suit is filed by the original Plaintiffs praying for declaration, delivery of the goods, damages along with other reliefs.

The plaint case may be summarized as follows:

The original Plaintiff no. 1 was the wife of the original Defendant no. 6, Late Ramnath Bajoria; the original Plaintiff no. 2 was the wife of Late Shambhu Prasad Bajoria and the original Plaintiff no. 3 was wife of Late Kishan Prasad Sekhsaria and mother of the original Plaintiff no. 1. The Plaintiff no. 1 and 2 were residents of 1-B, Halwasia Road, Kolkata and the original Plaintiff no. 3 was resident of 60/2 Babulal Lane, Kolkata.

On 18th and 19th May, 1956 the Defendant no. 1, the Union of India through its servants and agents lead by the Defendant no. 2 broke open and entered into the rooms of the Plaintiff no. 1 and 2 in the premises no. 1B, Halwasia Road, Kolkata and seized and carried away gods and articles as detailed in schedule 'A', 'B' and 'C' of the plaint. The Plaintiff no. 1 and 2 were present. They protested seizure and carrying away of goods by the Defendant no. 2 and other servants and agents of the Defendant no.1, Union of India. The goods belonging to the Plaintiff no. 3 was kept in the safe custody of the Plaintiff no. 1. The Defendant no. 6 also protested against the said seizure.

It is further averred in the plaint that after such seizure the customs authorities continued to detain goods, save and except the Defendant no.3 purported to make release order of the goods detailed in Schedule 'D' of the plaint which had been so seized. The then Income Tax Officer, District I (1), on behalf of the Defendant no. 1 detained the goods on the pretext of income tax due. In nutshell, the goods and articles, as detailed in the schedules

of the plaint, were not returned to the original plaintiffs who claimed the seized articles as their own. On being constrained the suit was filed by the original Plaintiffs praying for declaration that the goods and effects mentioned in the Schedule 'A', 'B' and 'C' belonged and belong to the Plaintiff no. 1 – 3 respectively and that they were and entitled to be in possession thereof; delivery of the said goods respectively belonging to the Plaintiffs as aforesaid or payment to the Plaintiff no. 1 Rs. 3,00,425/-, Plaintiff no.2, Rs. 10,000/-; Plaintiff no. 3 Rs.7,000/- in case delivery cannot be had; damages in addition to the above reliefs, in the sums of Rs. 2,00,000/- for the Plaintiff no.1, Rs. 50,000/- to the Plaintiff no. 2 and Rs. 25,000/- to the Plaintiff no.3 along with incidental prayers.

The Defendant no. 1, 2, 3 & 4 filed separate written statement. The Defendant no. 1 – 4 denied allegations raised in the plaint that on 18th or 19th May 1956, the Defendant no. 1 its servants and agents led by the Defendant no. 2 broke open or entered into the room of the Plaintiff no. 1 or 2 in the premises no. 1B, Halwasiya Road, Kolkata by force or otherwise. It is the case of these answering Defendants that the said premises was lawfully searched under search warrant issued by the Chief Presidency Magistrate, Calcutta in accordance with the provisions of the Sea Customs Act 1878. The premise no. 1B, Halwasiya Road, Kolkata belonged to the original Defendant no. 6. He was allowed his legal advisers to be present. The original Defendant no. 6 claimed ownership of the seized articles and endorsed the search list as owner thereof and also obtained a receipt therefor in the presence of two independent witnesses. It was denied by the present answering Defendants that the original Plaintiff no. 1 and 2 were present during the search.

The goods and the articles belonged to the original Defendant no. 6 who were given ample opportunities to adduce satisfactory evidences to the effect that the articles were legally imported into the country. On or about 28th and 30th May 1956, the original Defendant no. 6 along with others appeared before the Defendant no. 3 for examination of the goods when the original Defendant no. 6 made certain submissions as owner of the articles. On or about 10th July 1956, a memorandum was issued to the original Defendant no. 6 to show cause why action should not be taken to confiscate the goods in case of failure to give satisfactory evidence that the articles were legally imported into the country. In the said show-cause memorandum, in the light of submissions made by the original Defendant no. 6, benefit of doubt was expressed in respect of the articles mentioned in Schedule 'D' of the plaint. These articles were ordered to be released. But the order of release could not be given effect to as, in the meanwhile, order of attachment in execution dated 29th May 1956 was received from the Certificate Officer and Additional District Magistrate, 24 Parganas, Calcutta and from the Income Tax Authorities prohibiting release of any jewelry or other articles seized from the original Defendant no. 6. It is the case of the present answering Defendant no. 1 – 4 that the original Defendant no. 6 was the owner of the articles who adopted dilatory tactics for obstructing the finalization of the adjudication proceeding. So far as the articles mentioned in Schedule 'A', 'B' and 'C' are concerned. The original Defendant no. 6 did not adduce any evidence to establish legal importation of the articles in question. On or about 5th October 1956, 21st January 1957, 1st May 1957, 8th July 1957 and 25th July 1957, the original Defendant no. 6 was called upon to present himself in the Customs House with keys of the safe and the seal to enable the officers of the answering Defendants to open the same for the purpose of making an inventory of the seized articles. The safe was provided by the original Defendant no.

6 and sealed by him. The original Defendant no. 6 neglected and failed to do the same. The present answering Defendants denied all other allegations.

The original Defendant no. 5, an Income Tax Authority filed a separate written statement, denying all the allegations, clarifying that this answering Defendant no. 5 had no knowledge on the statements made in Para 1-4 of the plaint. The positive case is that there was arrear of income tax to the tune of Rs.70,00,000/- payable by the original Defendant no. 6. Appropriate proceeding for recovery of the amount was initiated. On receipt of information that the customs department had seized and taken into possession of the articles, the then Income Tax Officer, District I (1) Calcutta sent intimation to the Certificate Officer and Additional District Magistrate, Calcutta to issue prohibitory order against the customs authorities restraining them from releasing the articles so seized. Objections were lodged with the Certificate Officer and Additional District Magistrate, 24 Parganas, Calcutta against the order of attachment but such objections were overruled, and subsequently upheld by the higher authorities. The original Defendant no. 5 denied and refuted other allegations.

The original Defendant no. 6 filed a separate written statement, supporting the plaint case. The case of the original Defendant no. 6 was that search and seizure was made without any prior notice or intimation. The search warrant was invalid and unenforceable at law. During search the original Defendant no. 1 & 2 and their men, servants and agents interfered into privacy of the ladies. It is further stated that there was no determination of the amount payable as income tax. The articles mentioned in Schedule 'A', 'B' and 'C' of the plaint belonged to the original Plaintiffs absolutely and that decree, as prayed for in the plaint, might be passed against the original Defendant no. 1 – 5.

On the basis of the rival pleadings of the parties and after hearing the Counsels the following issues were framed:

1(a) Are the Plaintiff no. 1, 2 and 3 are the owners of the goods set out respectively in Schedule 'A', 'B' and 'C' of the plaint?

(b) Were the goods in possession of the Plaintiff no. 1 and the Plaintiff no. 2 at the time of seizure in suit?

2. Were the proceedings for search and seizure contrary to (a) law (b) procedure applicable thereto?

3(a) Did the Plaintiff no. 1 or Plaintiff no. 2 protest against any (i) alleged trespass or (ii) seizure or (iii) carrying of the goods as alleged in the plaint?

(b)(i) Were the goods belonging to Plaintiff no. 3 kept for safe custody with Plaintiff no. 1?

(ii) Did the Plaintiff no. 1 protest in respect of such goods?

4. Did the Defendant no. 3 maliciously or wrongfully fail or refuse to release the goods in Schedule D of the plaint?

5. Have the Plaintiffs been wrongfully deprived of their goods and effects?

6(a) Is it estimated aggregate value of the articles enumerated in Schedule 'A', 'B' and 'C' as Rs. 311425/-, Rs. 10,000/- and Rs. 7000/- respectively?

(b) If not, what are the respective values?

7. *Have the Plaintiffs suffered any damages?*
8. *Was the notice under Section 80 of C.P.C. was a)valid
b)sufficient?*
9. *Is the suit maintainable in view of the provisions of the Sea Customs Act?*
10. *Is the suit maintainable against the Defendant no. 2 and 4?*
11. *Is the prohibitory order made by the Defendant valid and legal?*
12. *Is the suit barred by the provisions of Section 37 of the Bengal Public Demand Recovery Act and Section 67 of the Indian Income Tax Act?*
13. *To what reliefs, if any, are the Plaintiffs entitled to?*

Oral and documentary evidences were adduced on behalf of both the parties. Documents were exhibited and marked.

The suit came up for hearing. The Hon'ble Justice Padma Khastagir, in terms of the judgment dated 10th may 1978, dismissed the suit with cost.

Appeal was preferred against the judgment passed by the Single Judge dated 10th may 1978. The Division Bench allowed the appeal setting aside the judgment and decree passed by the Single Bench and referred back the matter, in terms of the judgment dated 24th June 1987. It was directed that the Trial Judge shall first of all consider the question involved in Issue no. 1 and if it is negative that is against the Plaintiffs then he need not go into any other point. If it is in favor of the Plaintiffs

then the Single Judge shall consider the other issues if in the opinion of the Trial Judge the said issues still remained to be considered independently.

During pendency of the suit the original Plaintiffs and the Defendant no. 6 expired. Their legal heirs were substituted.

Mr. Roy, the Learned Counsel appearing for the Plaintiffs submitted at the outset that although the Division Bench had ordered that the Issue no. 1(a) and 1(b) should be considered and decided first of all, the Issue no. 9 as well as the Issue no. 12 which goes to the maintainability of the suit and touches upon the authority of this Court to decide all the issues should be addressed first.

In view of the decision of the Division Bench and keeping in mind judicial propriety, Issue no. 1(a) and 1(b) may be considered along with the Issue no. 9 as well as the Issue no. 12.

Issue no. 9 is whether the suit is maintainable under the Sea Customs Act, 1878. Mr. Roy argued that the instant suit was filed for declaration of title along with other reliefs. Authorities under the Sea Customs Act, 1878 is not bestowed with the power to adjudicate title of the properties. That adjudication can be made only by a Civil Court. Referring to the decision of a connected suit ***Manton & Company Limited vs. Union of India [(1984) 18 ELT 753]*** Mr. Roy submitted that in that suit the Single Bench held that neither under the Sea Customs Act nor under the Income Tax Act title of the properties can be decided. In that suit the Single Bench of this Court held that Civil Court has the jurisdiction to decide on and pass declaratory decree on the ownership of the properties.

Per contra, the Learned Counsel for the Defendant no. 1 – 5 argued that decision of Manton & Company Limited (supra) has no application in this case in view of a recent judgment of the ***Hon’ble Supreme Court of India in Additional Director General of Central Excise Vs. Kiran Machines [2015 (325) E.L.T. 469 (SC)]*** where the Apex Court held that jurisdiction of the Civil Court is barred where an enactment contains machinery and provisions of adjudication and further appeals. More so the facts of Manton’s case were different and that suit was decided on the facts and circumstances specific to that.

I have heard rival submissions.

Sea Customs Act, 1878 enacted with a specific object. The preamble of the Act says: “whereas it expedient to consolidate and amend the law relating to the levy of Sea Custom duties”. In fact, all the provisions of the Act were incorporated to achieve this end. Section 167 gives a long list of offences but it is to be seen that with exception of certain offences all others are to be dealt with by the Customs Officers in view of Section 182. The Custom Officers are given power to confiscate to fix duty and to impose penalties which can be in certain cases be of enormous amounts in the scheme of the Act. The Custom Officers are primarily concerned with detection and punishment of crime committed by a person but is mainly interested in the detection and prevention of smuggling of goods and safeguarding the recovery of the customs duty. The Customs Officers are not clothed with authority and power to decide on and declare the title of the properties of any kind.

Section 9 of the Code of Civil Procedure 1908 clothes a Civil Court with the authority and jurisdiction to try all suits of a civil nature excepting those suits of which cognizance is either expressly or by necessary implication barred. Section 9 of

the Code of Civil Procedure, 1908 embodies the principle *ubi jus ibi remedium*. A party can approach the civil court by instituting a suit and enforce his rights unless taking cognizance is barred either expressly or by necessary implications. The issue of jurisdiction of civil court vis-à-vis other statutes were considered from time to time by the Hon'ble Supreme Court of India. In ***Dhulabhai vs State of Madhya Pradesh (AIR 1969 SC 78)*** the Supreme Court of India was confronted with the question whether Section 17 of Madhya Bharat Sales Tax Act 1950 barred civil suits. The Supreme Court considered the principle of law expounded in ***Wolverhampton New Waterworks Co. v. Hawkesford [(1859) 6 CB (NS) 336]***:

“One is where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The remedy provided by the statute must be followed and it is not competent to the party to pursue the course applicable to cases of the second class.”

Referring to judicial precedents, point of law was summed up as follows:

“35. Neither of the two cases of *Firm of Illuri Subayya* or *Kamla Mills* can be said to run counter to the series of cases earlier noticed. The result of this inquiry into the diverse views expressed in this Court may be stated as follows:

- (1) Where the statute gives a finality to the orders of the special Tribunals the civil courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory Tribunal has not acted in conformity with the fundamental principles of judicial procedure.
- (2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the Tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

- (3) Challenge to the provisions of the particular Act as *ultra vires* cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.

- (4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.
- (5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegality collected a suit lies.
- (6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.
- (7) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply.”

In a subsequent case before the three Judges’ Bench of the Supreme Court of India in ***Rajasthan State Road Transport Corporation & Anr. Vs. Bal Mukund Bairwa [(2009) 4 SCC 299]***, the question arose was jurisdiction of labour court vis-à-vis civil court in adjudication of employer-employee disputes. Resolving the apparent conflict between Krishna Kant’s case [(1995) 5 SCC 75] and Khadarmal’s case [(2006) 1 SCC 54] it was held that jurisdiction of the Civil Court is not completely ousted. The Apex Court decided that it is well-settled that there is a presumption that a civil court will have a jurisdiction and the ouster of civil court’s jurisdiction is not to be readily inferred. A person taking a plea contra must establish the same. Even in a case where the jurisdiction of civil court is sought to be barred under a statute, the civil court can exercise jurisdiction in respect of some matters particularly when the statutory authority or tribunal acts without

jurisdiction. The Bench relied upon the ratio of **Dhulabhai's case**. In ***Additional Director General, Director General of Central Excise Vs. Kiran Machines [(2016) 16 SCC 580]*** the Supreme Court of India followed the same ratio of Dhulabhai's case and held that the Central Excise Act provide complete machinery for adjudication of show-cause notice. In that factual sceneries it was held that jurisdiction of Civil Court is barred. In ***Manton and Co. Ltd. v. Union of India, [1978 SCC OnLine Cal 559]***, it was held by a Co-ordinate Bench of this Court in a connected suit:

“**20.** One of the questions in this suit is whether the same is maintainable or not. In my opinion, the suit as framed, is maintainable. Neither under the Sea Customs Act nor under the Income-tax Act, can title of a property be determined. In this suit the plaintiff has sought a declaration as against the defendants that it is the owner of the disputed articles. This question can only be determined in a suit. The fact that the Customs authorities may ultimately confiscate the articles seized is of little importance. In any event no order of confiscation has been made up till now. It cannot be said that the question of ownership is immaterial or irrelevant as the articles if not confiscated must be returned to the plaintiff. The decisions cited on this aspect have no application as in none of the suits the question of the title was involved. Pendency of proceedings under the Customs Act cannot bar the jurisdiction of the Civil Court to determine a title to the goods.”

In the instant case decision on the Issue no. 1(a) and 1(b) hinges on the ownership and proprietary title. The authorities under the Sea Customs Act 1878 are not vested with jurisdiction to decide on this issue or pass declaratory order as to the title or ownership of the confiscated goods. The Plaintiffs were the third parties to whom show-cause notices were not issued. The articles were seized assuming that the Defendant no. 6 illegally imported these articles from foreign countries infringing the provisions of the Sea Customs Act 1878. Neither is there any provision nor is there any machinery under the Act to decide upon the issues. In Manton's case (supra) Single Judge decided accordingly that title of the property can be decided in a suit only. Therefore, so far as deciding the Issue no. 1(a) and 1(b) is concerned, and passing or considering passing of declaratory decree with consequential reliefs are concerned, as prayed for here, this Court has jurisdiction to decide on the same.

The same considerations apply in cases of Bengal Public Demand Recovery Act and Income Tax Act. Although both the statutes are special statutes providing with machineries for enforcement of special provisions consideration and adjudication of declaration of title is not barred by any of the statutes, as above.

Therefore, these issues are decided in favour of the Plaintiffs.

Issue no. 1A is whether the original Plaintiffs were the owner of the articles and goods set out respectively in Schedule 'A', 'B' and 'C' of the plaint and Issue no. 1(b) is whether the goods wherein possession of Plaintiff no. 1 and the Plaintiff no. 2 at the time of seizure.

The original Plaintiffs who claimed the ownership of the articles must prove the same. Burden of proof is on the person who desires a court to give judgment as to their legal rights (Section 101 of the Indian Evidence Act).

Mr. Roy, the Learned Counsel for the Plaintiff argued that it is a trite law that even in an absence of documentary evidence showing title, the person who is in possession is deemed to be the owner of the goods. He referred to the decision of the Supreme Court of India in ***Shiv Shankara & Anr. –VS- HP Vedavasa Char [(2023) SCC Online SC 358]*** referring to the original evidences of the original Plaintiff no. 1 and original Plaintiff no. 3. He submitted that original evidences of these two witnesses consistently identified the ornaments and jewelries as referred to the Schedule 'A', 'B' and 'C'. It is stated in the evidence by the original Plaintiff no. 1 and Plaintiff no. 3 how the articles and jewelries were obtained by them. Other two witnesses, namely, Chinmoy Mallick and Madanlal Bajoria also stated in their depositions the respective original Plaintiffs became owners of the jewelries and ornaments in question. Mr. Roy also referred to the statement of DW 1 and DW 2. According to him, the original Plaintiffs were able to discharge their burden of proof by consistent and convincing oral testimonies. According to him, it is well-established that the original Plaintiffs were the owners of the articles mentioned in Schedule 'A', 'B' and 'C' of the plaint.

The Learned Counsel for the Defendant no. 1 – 5, on the contrary argued, that Mr. Ramnath Bajoria, the original Defendant no. 6 signed the seizure list as the owner of the articles. Although in the written statement filed by the original Defendant no. 6 Late Ramnath Bajoria admitted that the original Plaintiffs were the owners of the scheduled articles but he never deposed before this Court. Therefore, according to him, his statement cannot be relied upon. It is further argued by the

Learned Counsel for the Defendant no. 1 – 5 that on 10th July, 1956 a show-cause notice was issued in respect of the goods seized as to why they should not be confiscated under Section 167 (8) of the Sea Customs Act, 1878. The original Defendant no. 6 avoided adjudication of the said proceeding and time and again took recourse to adjournment which clearly established that the Defendant no. 6 had no document to substantiate the ownership of the seized articles. Another limb of argument is that the original Plaintiffs failed to provide any documentary evidence or corroborative evidence to prove that they are the owners of the seized articles. In absence of any cogent evidence, according to the Learned Counsel, it cannot be concluded that the articles were owned by the original Plaintiffs. A further point was canvassed that the original Plaintiffs as well as the original Defendant no. 6 failed to substantiate by proper evidence and/or by documentary evidence that the scheduled articles were ancestral family properties. Rather late Ramnath Bajoria, the original Defendant no. 6, in presence of his own lawyer and two witnesses signed search list as the owner of the goods. In nutshell, the Learned Counsel argued that exiguous evidences do not establish that the original Plaintiffs were the owners of the scheduled articles.

Law is well-settled. Section 101 of the Indian Evidence Act provides for burden of proof and on whom such burden of proof lies. Section 102 states that burden of proof should in a proceeding lies on that person who will fail if no evidence is at all given on either side. Section 106 is also relevant to consider in this context. According to the Section 106 when any fact is specially within the knowledge of any person burden of proof of that fact is upon him. The statute never states that any specific or particular kind of evidence is to be tendered to discharge burden of proof. Evidence can be either documentary or oral; even if there is

absence of any documentary evidence but only oral evidences are adduced it cannot be said that burden of proof is not discharged. However, that may be relevant while considering the weight of the evidence, its probative value, cogency or reliability.

PW 1, the original Plaintiff no. 1 deposed before this Court that some of the ornaments belonged to her, some to Manton & Company, some to the original Plaintiff no. 2 and certain articles to the original Plaintiff no.3. She identified that the loose stones in boxes marked as “J & K Company”. Ext. 11 & 12 were presented to the original Plaintiff no. 1 at the time of her marriage. The broach being item no. 52 of the inventory list dated 8th September, 1964 belonged to the one of the Plaintiff no. 1. The imitation *pokhranj* lying makes up with other stones in boxes “J & K” were purchased by the original Plaintiff no. 1, as was deposed before this Court. According to her diamonds were taken out from various ornaments; frames of bangles, ring necklace, earrings with note and earrings without any note were produced before Commissioner and tenders were exhibited. She also stated that twenty eight pieces of diamonds mentioned in 31 of Schedule ‘A’ belonged to her. Item no. 4 of Schedule ‘A’, namely, two owners were purchased by her. In her deposition she stated how different items were owned differently by the Plaintiffs. The original Plaintiff no. 3 also stated before this Court that she had kept some of her ornaments with her daughter, the original Plaintiff no. 1 which she described. The claims of original Plaintiff no.3 are in respect of property mentioned in Schedule ‘C’. She was not cross-examined. Late Madanlal Bajoria who deposed in this case stated that the original Plaintiff no. 1 was presented with ornaments, this made of gold and other valuable jewelries as well as gifts in cash and kind at the time of birth of her three daughters and sons. He identified Ext. G, H, I, J and K and deposed that those belonged to the original Plaintiff no. 1. He stated that loose

stones, Ext. J and Ext. K were used by the female members of her family; in our change the design of the ornaments and the stones were taken out.

Plaintiffs' witnesses identified by oral evidence identified the articles. Their testimonies were not vague or sweeping in nature. Their depositions were very specific articular. There evidences were corroborative and cogent. Cross-examine could not yield any different or inconsistent version.

Once the burden of proof is discharged by the Plaintiffs to adduce evidence to substantiate their claims, onus of proof shifts on the Defendants. DW1 Shankar Ghosh stated in evidence that diamond, watches and gold ornaments were suspected to be smuggled and were in the possession of late Ramnath Bajoria. DW 1 was a member of a search party recovery were made from safe key kept in the bedroom of the original Defendant no. 6. DW 1 further deposed that he believed that the items were smuggled because of information receipt that the original Defendant no. 6 smuggled those articles; the said original Defendant no. 6 were the owners of the jewelries, he was connected with steamship line and that he could not give satisfactory reply of acquisition and possession of the articles. In course of cross-examination DW 1 stated that gold, diamonds, some jewelries and watches were smuggled into the residence of the original Defendant no. 6. He could not remember whether the information was oral or written statement. He stated that information was received by Mr. Srivastava, one of the officers of the Department. DW 1 could not tell whether there was any record of receiving information by the department; he did not states who verified information so received. He admitted that remarks signature in the search list was penned through. When asked whether any investigation was made to ascertain the ownership of the articles, the only answer was that keys were brought by the original Defendant no. 6; at the time of

such possession aspect was also considered. He further stated that the diamonds appear to be new but he was not a jewelry expert; if one was with soap or proper chemicals, diamonds look like new one. He further stated that there were scratch marks on diamonds. He could not state whether the diamonds were of English card or Belgium card. Questions were so put to him whether the diamonds were imported during the restriction period or not; his answer was that at the time of seizure Mr. Bajoria, the original Defendant no. 6 could not explain why the diamonds were kept there. He failed to produce any documents to show that the original Defendant no. 6 was asked to explain the manner of acquisition of the articles in question.

DW 2 was an Additional Assistant Director of the direct taxes his deposition was in respect of Income Tax Demands.

Nothing is there in the evidence of DW. 1 to show that the articles in question whereof foreign origin. DW.1 stated in evidence that it was suspected that articles were smuggled and that it was believed that the articles were smuggled without indicating anything else or adducing any evidence that these articles were either imported or not available in the country. There is no concrete or cogent evidence adduced on behalf of the Defendants' witnessed to rebut the evidences so adduced by the Plaintiffs witnesses disproving their evidences. It is admitted that in the search list the remarks column were penned through. The original Defendant no. 6 in the written statement admitted that the articles belonged to the Plaintiffs. Although argued by the Learned Counsel for the Defendant that such statements cannot be relied upon as the original Defendant no.6 did not appear in the witness box to depose, such omission does not improve the case of the Defendant. Under Section 58 of the Indian Evidence Act admitted fact need not be proved. Once

admitted in the written statement that the articles belonged to the original Plaintiffs, it is redundant for the Defendant no. 6 to come and depose the same. In this connection it will be not irrelevant to consider observations of the Supreme Court of India in ***Collector of Customs Madras And Others Vs. D. Bhoormall [(1974) 2 SCC 544]*** it was observed by the Supreme Court India in this case:

“ 35. It cannot be disputed that in proceedings for imposing penalties under clause (8) of Section 167, to which Section 178-A does not apply, the burden of proving that the goods are smuggled goods, is on the Department. This is a fundamental rule relating to proof in all criminal or quasi-criminal proceedings, where there is no statutory provision to the contrary. But, in appreciating its scope and the nature of the onus cast by it, we must pay due regard to other kindred principles, no less fundamental, of universal application. One of them is that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable degree; for, in all human affairs absolute certainty is a myth, and — as Prof. Brett felicitously puts it — “all exactness is a fake”. El Dorado of absolute proof being unattainable, the law accepts for it probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus, legal proof is

not necessarily perfect proof; often it is nothing more than a prudent man's estimate as to the probabilities of the case.”

Testimony of Plaintiffs’ witnesses clearly established that the articles belonged to the Plaintiffs variously. Absence of documentary evidence is not fatal as because law does not demand a perfect prove. Law does not mandate production of documentary evidence when oral testimonies of witnesses are clear and unambiguous. DW 1 as discussed above failed to establish even prima facie that goods were smuggled or they were illicitly obtained. Even the DW 1 failed to explain whether the goods if imported were done prior to the restriction period. In absence of anything else and in absence of evidences to the contrary, testimony of the Plaintiffs’ witnesses as well as evidences adduced by the original Plaintiffs stands un-rebutted. Suspensions, presumptions and assumptions cannot substitute evidence or be used as evidence. Mere suspicion cannot take the place of evidence. It can safely be concluded that articles mentioned in Schedule ‘A’, ‘B’ and ‘C’ belonged to the original Plaintiff no. 1, 2 and 3 respectively.

So far as Issue no. 1(b) is concerned it was deposed by the original Plaintiff no. 1 the jewelries which are the subject matter of the suit were found from a Godrej Iron Safe kept in an almirah in the bedroom of the original Plaintiff no. 1. Evidence of DW 1 and other Plaintiffs witnesses corroborate the evidence. DW 1 stated that original Plaintiff no. 1 and 2 were not present at time of search so they could not protest. It is not in dispute that the articles were found in the room used by the family and it was also in evidence that original Plaintiff no. 3 kept the articles with Plaintiff no. 1. Therefore, there is no room to doubt that goods were in possession of Plaintiff no. 1 and 2 at time of seizure.

Issue no. 1(a) and 1(b) as well as Issue no. 9 are decided in favour of the Plaintiff.

Issue no. 2 and Issue no. 11 hinge on propriety of search and seizure as well as prohibitory order in question. Sea Customs Act, 1878 as well as the Code of Criminal Procedure provides for search and seizure and procedure to be followed therein. Civil Court in exercise of ordinary jurisdiction cannot decide on the propriety of search and seizure; civil court in exercise of ordinary civil jurisdiction is neither authorized nor vested with such power. Similarly, the prohibitory order was passed in exercise of power conferred under the then existing Income Tax Act. Vires could have been challenged in appropriate forum. But exercising ordinary jurisdiction, this Court cannot decide on the same. Therefore, this Court desists from deciding on Issue no. 2 and 11.

Issue no. 3(a) and (b) is questions of fact. Although DW1 stated that the original Plaintiff no. 1 was a *pardanshin* lady and she did not enter into the rooms when search was going on, PW 1 the original Plaintiff no. 1 Tribeni Devi and another Plaintiff's witness Chinmoy Mallick deposed that Plaintiff no. 1 and 2 challenged and protested the seizure of ornaments on being present there. The original Plaintiff no. 1 deposed that ornaments of Plaintiff no. 3 were kept with her the original Plaintiff no. 3 also deposed that she kept her ornaments with the Plaintiff no. 1. There is no evidence to the contrary. Therefore, the said facts are established and issue no. 3(a) and (b) are decided in favor of the Plaintiff.

Issue no. 4 and 5 are whether the Defendant no. 3 maliciously or wrongfully failed or refused to release the goods in Schedule D of the plaint. **Issue No.7** may be considered together. The original Plaintiffs prayed for damages in this

case. Therefore, consideration of this issue becomes relevant. As appears from the evidence of DW 1 that on getting information and on suspicion, they made a raid in exercise of authority given under Sea Customs Act, 1878. The original Plaintiffs did not adduce any evidence to establish that there was malice on the part of the raiding parties or the authorities concerned or the Defendants. Question of malice or *mala fide* is definitely a question of fact. The Supreme Court of India, in ***State of A.P. vs. Goverdhanlal Pitti (2003) 4 SCC 739*** observed:

“12. The legal meaning of malice is “ill-will or spite towards a party and any indirect or improper motive in taking an action”. This is sometimes described as “malice in fact”. “Legal malice” or “malice in law” means “something done without lawful excuse”. In other words, “it is an act done wrongfully and willfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard of the rights of others”.

It was further explained that where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. If at all it is malice in legal sense, it can be described as an act which is taken with an oblique or indirect object. In ***E.P. Royappa vs. State of T.N. (1974) 4 SCC 3*** five Judges’ Bench of the Supreme Court of India held that that the burden of establishing *mala fides* is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility. In ***Ajit Kumar Nag vs. Indian Oil Corpn. Ltd. (2005) 7 SCC 764*** it was observed by the Supreme Court of India:

“It is well settled that the burden of proving *mala fide* is on the person making the allegations and the burden is “very heavy”. [vide *E.P. Royappa v. State of T.N.* [(1974) 4 SCC 3 : 1974 SCC (L&S) 165] There is every presumption in favour of the administration that the power has been exercised *bona fide* and in good faith. It is to be remembered that the allegations of *mala fide* are often more easily made than made out and the very seriousness of such allegations demands proof of a high degree of credibility. As Krishna Iyer, J. stated in *Gulam Mustafa v. State of Maharashtra* [(1976) 1 SCC 800] (SCC p. 802, para 2): “It (*mala fide*) is the last refuge of a losing litigant.”

In the case in hand, plaint contains a sweeping allegation of malice without substantiating the same by any particularity or details. There is no evidence of malice on the part of the Defendants. There is no evidence that any oblique motive goaded the original Defendants or that colorable exercise of authority was involved. No evidence is there that the very procedure of search and seizure was challenged or declared illegal. In absence of anything else there cannot be departure from the conclusion that the Defendant authorities exercised powers in good faith without any malice whatsoever. Therefore, issue no. 4, 5 and 7 are decided against the Plaintiffs.

As discussed above, there was neither malice on the part of the Defendants nor was *mala fide* exercise of power and authority. The Defendant authorities exercised powers in good faith in exercise of lawful authority. No evidence was adduced to establish that the original Plaintiffs suffered damages. Therefore, it cannot be concluded that the original Plaintiffs suffered any damages. Apart from this, it is not argued that right to sue for damages survive on death of the original

Plaintiffs. Therefore, it cannot be concluded that the original Plaintiffs suffered any damages. This issue is decided against the Plaintiffs.

Issue no. 6(a) and (b) are not pressed by the Learned Counsel for the Plaintiffs.

Issue No.8 (a) and (b) are concerned with service of notice under section 80 of the Code of Civil Procedure. In the written statements filed by the contesting defendants, there is vague and sweeping statements challenging the validity of the notice under section 80 of the Code of Civil Procedure, 1908. It is manifest from Exhibit B at Pages 390 to 404 of the Paper Book, being the Section 80 notices addressed to the Defendant nos. 1 to 5 and the acknowledgements in respect thereto that the said notices were all dated 7th May 1957 and were received by the Defendant nos. 1 to 5 from 9th May 1957 to 13th May 1957. The suit was filed on 16th July 1957, after expiry of two months from the services of the said notices under Section 80 of the Code of Civil Procedure. Accordingly, the notice under Section 80 of the Code of Civil Procedure was valid and sufficient.

Accordingly, Issue No. 8(a) and 8(b) are decided in favor of the Plaintiff.

In deciding Issue No.10, it is sufficient to say that since the acts of the Defendant no. 2, 3 and 4, which are in question in the suit, were done in exercise of official duty, there cannot be a personal liability of the original Defendant no. 2, 3, 4 and 5. The issue is decided accordingly.

In view of discussions made above and in view of decisions arrived at the Plaintiff is entitled to a decree as prayed for in prayer 1 & 2. In other words, the Plaintiffs are entitled to a declaratory decree in terms of prayer 1 of the plaint. The

Plaintiff is also entitled to a decree of mandatory injunction of delivery of items mentioned in Schedule 'A','B' and 'C' of the plaint in terms of prayer 2 of the plaint. The items shall be delivered to the legal heirs and successors of the respective Plaintiffs. Issue No. 13 is decided accordingly.

In nutshell, the instant suit succeeds.

Hence, it is ordered that the Plaintiff do get a decree of declaration that the original Plaintiff no. 1 to 3 were the owners of the articles mentioned in Schedule 'A', 'B' and 'C' respectively; Plaintiffs also do get a decree of mandatory injunction directing the Defendant no. 1 to 4 to hand over the possession those articles mentioned in Schedule 'A', 'B' and 'C' of the plaint to the respective legal heirs of the original Plaintiffs who are substituted herein within a period of thirty days from the date of the decree.

The instant suit is accordingly disposed of along with pending petitions, if any.

Let decree be drawn up.

(Sugato Majumdar, J.)