

**IN THE HIGH COURT AT CALCUTTA**  
**Constitutional Writ Jurisdiction**  
***Appellate Side***

**PRESENT:**

**The Hon'ble Mr. Justice Rajarshi Bharadwaj**

**W.P. 7865 (W) of 2019**

**Menka Gambhir Vs Union of India & Ors.**

**With**

**W.P. 7489 (W) of 2019**

**Rujira Naroola Vs. Union of India & Ors.**

Mr. S.N. Mookherjee, Sr. Adv.  
Mr. Arijit Chakraborty  
Mr. Amit Kumar Nag  
Mr. Sanjay Basu  
Mr. Samik Chakraborty  
Mr. Piyush Agrawal  
Mr. Prabir Bera

....For the Petitioner in W.P. No. 7489 (W) of 2019.

Mr. Sujit Ghosh  
Mr. Arijit Chakraborty  
Mr. Sanjay Basu  
Mr. Samik Chakraborty  
Mr. Piyush Agrawal

....For the Petitioner in W.P.No. 7865(W) of 2019.

Mr. Tapan Bhanja

....For the Union of India in W.P 7865 (W) of 2019.

Mr. Partha Chakraborty

.....For the Union of India in W.P 7489 (W) of 2019.

Mr. Aman Lekhi, Add. Solicitor General,  
Supreme Court of India  
Mr. K.K. Maiti  
Mr. Bhaskar Prasad Banerjee  
Mr. Amitabrata Roy

....For the Customs Authority.

Mr. Abhratosh Majumdar, Ld. Addl. Adv. General  
Mr. T.M. Siddiqui  
Mr. Avra Majumdar

....For the State.

Heard On: 22<sup>nd</sup> July, 2019, 31<sup>st</sup> July, 2019, 13<sup>th</sup> August, 2019  
and 20<sup>th</sup> August, 2019.

Judgement On: 17<sup>th</sup> June, 2020.

**Rajarshi Bharadwaj, J.:**

1. In the respective separate petitions, the petitioners pray:
  - A) for an order to cancel or rescind the summons dated 26<sup>th</sup> March, 2019 issued by the Joint Commissioner AIU NSCBI Airport Kolkata.
  - B) for an order prohibiting the customs authority for initiating enquiry under Section 108 of the Customs Act, 1962 against the petitioners in connection to offence covered under complaint dated 22<sup>nd</sup> March, 2019 filed by the Assistant Commissioner of Customs, AIU, NSCBI, Airport, Kolkata which was entered into the general Diary and numbered as NSCBI, Airport P.S. GDE No. 800 dated 22<sup>nd</sup> March, 2019.
2. The facts are substantially undisputed and may be stated as follows:

The Assistant Commissioner of Customs, AIU, NSCBI, Airport, Kolkata filed a complaint on 22<sup>nd</sup> March, 2019 at Airport Police Station and the complaint was entered into a general Diary and numbered as NSCBI, Airport P.S. GDE No. 800 dated 22<sup>nd</sup> March, 2019.

Extract copy of NSCBI, Airport Police Station GD Entry 800 dated 22<sup>nd</sup> March, 2019 at 23:15 hours is reproduced below:

“ 1. At the marginally noted time one Mr. S. K. Biswas, Assistant Commissioner of Customs, Air Intelligence Unit, NSCBI Airport, Kolkata - 700 052 called at the P.S. and submitted a written information alleging allegations under Section 186/503 of Indian Penal Code read with Section 133 of the Customs Act, 1962 which is reproduced as below.

“.....In the intervening night of 15/16<sup>th</sup> March 2019 at about 1:10 AM, two lady passengers, while passing through the green channel, having arrived at NSCBI Airport, Kolkata from Bangkok by Thai Airways Flight No. TG 313 dated 16.03.2019, were requested by Customs official to show their respective passports. Those two lady passengers named Ms. Rujira Naroola and Ms. Menka Gambhir were randomly selected, considering their movement, profile, the number and size of the baggage they were carrying. These two lady passengers declined to show their passport in spite of several requests which arose suspicion and accordingly, they were requested to put their baggage for scanning in the X-ray machine installed near the green channel, which they again declined. Ms. Menka Gambhir was carrying 3 (three) pieces of checked in baggage and Ms. Rujira Naroola was carrying 2(two) pieces of checked-in baggage and also one hand baggage each. After a lot of reluctance on the part of the two ladies, finally their baggages were X-rayed.

2. On scanning, the scanning officer noticed that out of seven baggages, three baggages contained Jewellery and thus the scanning officer requested these passengers to open those three suspected baggages for examination by a lady Customs officer. When the lady Customs officer requested them to open those three bags, the passengers started abusing the officers and

threatened them with dire consequences. The officers remained calm and requested and persuaded the passengers to open the said bags for examination of the jewellery and after long persuasion, only one bag was opened by the said passengers and it was found to contain two gold bangles. But they refused to show their passports and boarding passes to the concerned Customs officer even after repeated requests. Considering the huge flow of passenger through the green channel at that particular time, Shri S K Biswas, Assistant Commissioner directed the staff to take both the ladies to Counter No. 4 at the Red Channel for further checking of their baggage. Both the lady passengers initially declined to go to Counter No. 4, but ultimately they went. Shri Koshalesh Singh, Supdt. of Customs, (AIU) requested the ladies to open the second bag. One of the ladies told the Customs officers that probably they did not know her identity and power. She then informed about her location to somebody over the phone.

3. After sometime, some Police personnel from NACBI Airport Police Station under Bidhannagar Police Commissionerate arrived at the International Arrival Hall and informed that one of the lady passengers happened to be wife of M.P. Shri Abhishek Banerjee and made request to release these passengers immediately without any examination of their baggage. But their requests were not adhered to and they were informed that until and unless the examination of the baggages are over by the concerned officer, the passengers would not be released. One lady Police Constable came to the spot and informed the Customs officers that one of the lady passengers was the wife of the nephew of the Chief Minister of West Bengal. During this time, more Police officers came and asked the Customs officers to allow both the ladies to go immediately, without checking their baggage, otherwise they may face problems. However, despite this pressure, the second suspected bag was opened at Counter No. 4 in which two sets of Jewellery (Kundan) were found.

4. Enquiries revealed that Flight TG-313 had landed at 12:40 A.M. on 16.03.2019 and at about 01:50 A.M. on 16.03.2019, a phone call was received from O.C. Airport Police Station on the mobile phone of Shri Jitendra Prasad, APRO on duty(8789580789), after it was diverted from the land line of the PRO Customs (033-2511 8053), enquiring if Ms. Rujira Naroola, said to be wife of Shri Abhishek Banerjee, MP was detained by Customs and if so, she should be released immediately. The matter was communicated immediately both to the Batch D.C., Shri D. Roy and to A.C., A.I.U. Shri S. K. Biswas. Another phone call was received by the PRO Customs from the West Bengal Police Protocol Cell location at the Airport with the same request and the same disclosure of status of the said two lady passengers. The S.I. Airport P.S. along with one constable in uniform and one lady constable in civil dress were physically present during the Customs examination and also one A.S.I. in civil dress joined them and all of them were insisting repeatedly to release the said passenger and companion. They were interfering in the discharge of duty by the Customs Officers and pressuring them to release the passengers.

5. In the meantime, it was found that both the passengers namely Ms. Rujira Naroola said to be wife of MP. Sri Abhishek Banerjee and Ms.Menka Gambhir were having Thai passports bearing Nos. AA563757 and AA5263387 respectively. The two ladies finally left the Airport through the Green Channel around 02:15 AM.

6. After the two passengers had left the Airport, another team of police personnel came at around 03:00 A.M. and enquired about the names of the officers on duty who were involved in intercepting the lady passengers and examination of their baggage. The contingent of Police Officers kept on increasing until the morning. Presence of a large number of Police personnel was observed in around international Arrival Hall and

information was gathered that they had come to arrest the officers who had examined the baggage of the aforesaid lady passengers. The Assistant Commissioner of Customs briefed the Commissioner of Customs (Airport) Sri Manish Chandra about the incident around 7 a.m. in the morning.

7. At about 11:30 hours, a meeting was convened by the Police personnel at the Police Assistance Booth in between Airlines Ticket Counters of Air India and Vistara inside Gate No. 3C at the Departure Area of NACBI, Airport, Kolkata. The following Customs offices attended the meeting, as directed by the Commissioner of Customs (Airport), Kolkata which was communicated through Shri S. K. Biswas, Assistant Commissioner of Customs, in Charge of AIU and Admin:

1. Rajesh Kumar Tiwary, Supdt. of Customs, AIU
2. Akhilesh Kumar, Supdt. of Customs, AIU,
3. Rohit Kumar, Supdt. of Customs, AIU,
4. Gitesh Kumar, Supdt. of Customs, Batch-A (Uninformed officer)
5. Ranjan Bhattacharyya, Preventive Officer, Customs, Batch-A, (Uniformed officer)
6. Koshalesh Singh, Supdt. of Customs, AIU

The following Police Officers were present at the meeting:

- Shri Arup Roy Chowdhury (who was in White uniform)
- Shri Sudip Dey ( used to do protocol duties at Airport and was in civil dress)
- Shri Surajit Dey (ACP, who was in Khaki uniform)

8. Shri Arup Roy Chowdhury, one of the police personnel present in the meeting, informed that they were in receipt of one complaint against Customs Officials, from one lady who had arrived from Thailand in the early morning of 16.03.2019,

alleging misbehavior, harassment, undue detention and extortion of money for clearance of her luggage. He specifically enquired about three officers of Customs namely, Shri S.K. Biswas, Shri Koshalesh Singh and Smt. Pratibha Meena, who were on duty during the incident. They did not divulge the name of the complainant but made it clear that the complaint is related to the incident, for which they had intervened in the early morning of 16.03.2019.

9. The police personnel proposed preparation of a common SOP, which may include easy passage of their VIPs without any interception by Customs in the Green Channel. They added that if there would be any such complaint in future, that would be viewed seriously and severe action will be taken against the concerned Customs Officials, which may include arrest detention of the officer concerned. They wanted an SOP, where VIPs are not checked. The Police Officers were informed in the said meeting that Customs will follow all the Rules and Regulations they enforce and in case they want any exemption they may approach the competent authority through proper channel with such request. Thereafter, the police people stationed in large numbers at the Airport left the place.

10. In conspectus of the aforesaid facts, it is manifest without any iota of doubt that the aforesaid two passengers and the Police personnel voluntarily and intentionally obstructed the public servants (the officers of Customs) to discharge their public functions and to exercise their powers under the Customs Act, 1962, interfered and influenced the Customs officers on duty and criminally intimidated them from doing their public functions. Such obstruction, interference and criminal intimidation by the Police is without any authority of law and hence illegal, arbitrary and unlawful.

11. Now it is requested that a 'First Information Report' (FIR) may be registered against the aforesaid two passengers, the

Police Personnel and other unknown persons, who abused and resorted to criminal intimidation and voluntarily/intentionally obstructed the officers of Customs to exercise their power as conferred under the Customs Act, 1962 as per Section -186 and Section 503 of Indian Penal Code read with Section 133 of the Customs Act, 1962. It is also requested that a thorough investigation may be carried out and the culprits be proceeded in accordance with laws.

Kindly register the FIR for the offences mentioned above. We reserve our right to appeal an appropriate Court for taking cognizance of the non-cognizable offences. However, this would not be justification for you not to register the present FIR, while manifestly make out cognizable offence. This is also, without prejudice, of our right to pray for other relief regarding an impartial investigation before an appropriate judicial forum”.

On 23<sup>rd</sup> March, 2019, the jurisdictional police authorities made a prayer before the Ld. Additional Chief Judicial Magistrate, Barrackpore, North 24-Parganas for investigating into offences in respect of the complaint dated 22<sup>nd</sup> March, 2019. The Ld. Magistrate passed an order on 23<sup>rd</sup> March, 2019 permitting the police authorities to investigate the offence under Section 155 of the Code of Criminal Procedure. But no report in the form of complaint was filed by the police authorities before the learned Magistrate as investigation into the commission of non-cognizable offence could not be completed by the police authorities.

3. After filing complaint before the police, the Joint Commissioner of Customs, AIU, NSCBI, Airport, Kolkata being the respondent no. 3 in the instant application issued summons dated 26<sup>th</sup> March, 2019 to both the petitioners and the summons are reproduced below:

GOVERNMENT OF INDIA  
OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS (A&A)  
NSCBI AIRPORT, KOLKATA-700052

(SUMMONS UNDER SECTION 108 OF THE CUSTOMS ACT, 1962)

F. No. S. 32 (Misc)-15/2019 AP/4831

Dated- 26.03.2019

To,  
Ms. Rujira Naroola,  
Holder of OCI No. A2879448,  
30/B, Harish Chatterjee Street,  
Kolkata- 700 026.

Sub: Issuance of Summons under Section 108 of the Customs Act, 1962.

I have been directed to issue summons to you under Section 108 of the Customs Act, 1962, to appear before the Additional /Joint Commissioner of Customs on 08<sup>th</sup> April, 2019 at 12:00 hours at the office chamber of the Additional Commissioner of Customs (Airport & Administration), Custom House, 15/1, Strand Road, Kolkata in person, in connection to the offence under Section 133 of the Customs Act, 1962 on your arrival at NSCBI Airport, Kolkata on 15/16.03.2019 by Thai Airway flight No. TG-313.

Your presence is required for giving evidence thereto and or produce documents of things (in your possession) related to the said matter.

Non-compliance of this summons is an offence under Section 174 & 175 of the Indian Penal Code, 1860.

Please note that giving false evidence in these proceeding is an offence punishable under Section 193 of the Indian Penal Code, 1860.

Place: Kolkata.

Date : 26.03.2019

Joint Commisisoner  
AIU, NSCBI, Airport, Kolkata

GOVERNMENT OF INDIA  
OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS (A&A)  
NSCBI AIRPORT, KOLKATA-700052

(SUMMONS UNDER SECTION 108 OF THE CUSTOMS ACT, 1962)

F. No. S. 32 (Misc)-15/2019 AP/4832

Dated- 26.03.2019

To,

Ms. Menka Gambhir,  
Holder of OCI No. A1779808,  
F13 B, Rajouri Garden,  
New Delhi 110 027.

Sub: Issuance of Summons under Section 108 of the Customs Act, 1962.

I have been directed to issue summons to you under Section 108 of the Customs Act, 1962, to appear before the Additional /Joint Commissioner of Customs on 08<sup>th</sup> April, 2019 at 12:30 hours at the office chamber of the Additional Commissioner of Customs (Airport & Administration), Custom House, 15/1, Strand Road, Kolkata in person, in connection to the offence under Section 133 of the Customs Act, 1962 on your arrival at NSCBI Airport, Kolkata on 15/16.03.2019 by Thai Airway flight No. TG-313.

Your presence is required for giving evidence thereto and or produce documents of things (in your possession) related to the said matter.

Non-compliance of this summons is an offence under Section 174 & 175 of the Indian Penal Code, 1860.

Please note that giving false evidence in these proceeding is an offence punishable under Section 193 of the Indian Penal Code, 1860.

Place: Kolkata.

Date : 26.03.2019

Joint Commissioner  
AIU, NSCBI, Airport, Kolkata

4. Mr. Majumdar Ld. Additional Advocate General, appearing for the state narrated the undisputed facts that the Customs

lodged a written information to the jurisdictional police station on March 22, 2019. The written information discloses commission of non-cognizable offences under Section 133 of the Customs Act, 1962 read with Section 186 and 503 IPC. The said written information was entered into the General Diary and numbered as NSCBI Airport PS G.D.E No. 800 dated 22/3/2019 (P.33). On March 23, 2019 and the jurisdictional police authorities made a prayer before the Ld. Magistrate for investigating into offences. The Ld. Magistrate passed an order permitting the police authorities to investigate into the offence and the investigation is in progress. Statements of several witnesses u/s. 161 of Cr. P.C have been recorded. CCTV footage has been obtained from the airport authorities but suddenly on March 26, 2019, the Customs authorities issued summons u/s. 108 of the Customs Act to the petitioner in connection with the offence under Section 133 of the Customs Act, 1962.

Ld. Additional Advocate General further submits that the explanation to the definition of “complaint” contained in Section 2 (d) of Cr. P.C provides that a *report made by a police officer in a case* which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant. Section 2(r) of Cr. P.C. defines *police report* to mean a report forwarded by a police officer to a Magistrate under sub-section (2) of Section 173 of Cr. P. C. Section 155(2) of Cr. P.C. provides that in cases, involving non-cognisable offence(s), the police authorities cannot investigate without the order of a Magistrate having power to try such case or commit the case for trial. Once the police officer obtains an order of the Magistrate u/s 155(2), he is vested with the same powers in respect of the investigation (except the power to arrest without warrant) as an officer-in-charge of a police station may exercise in a cognizable case [Section 155 (3)]. Upon completion of investigation the police

officer would file a report in the final form u/s. 173 (2) of Cr. P.C. Having regard to the explanation to Section 2(d), the said report shall be deemed to be complaint. The Magistrate would then take cognizance of the offence u/s. 190 and the consequences would follow. Since, in the facts of the case, the Ld. Magistrate has passed an order permitting the police authorities to investigate into the offence, the writ petitioner stands in the character of accused. Hence, the Customs committed a jurisdictional error by issuing summons u/s. 108 of the Customs Act to the petitioner, who is a person accused of an offence.

According to the Ld. Additional Advocate General the entire exercise of recording statement of the petitioners, who stands in the character of an accused, would be in vain. Though a Customs Officers is vested with certain powers of police officer, still he is not statutorily empowered to conclude the investigation and file a report in final form u/s. 173(2) of Cr. P.C. The Customs authorities have opted for lodging written information with the police authorities; and in view of the order passed by the Ld. Magistrate, the police authorities are investigating into the offence. The Customs authorities cannot, thereafter, take recourse to Section 137 of the Customs Act, 1962 read with the provisions contained in Chapter XV of the Cr. P.C. The combined operation of Sections 4(2) and Section 26(b) of Code is that the offence complained of should be investigated or inquired into or tried according to the provisions of the Code where the enactment which creates the offence indicates no special procedure. Since the police authorities are vested with the jurisdiction to investigate in view of the order passed by the Ld. Magistrate, the Customs authorities are denuded of their authority to make enquiry in connection with the offence under Section 133 of the Customs Act, 1962.

5. Mr. Sujit Ghosh, Ld. Counsel appears for the petitioner Menka Gambhir in W. P. No. 7865(W) of 2019 and Mr. S.N.

Mukherjee, Ld. Senior Counsel appears for the petitioner Rujira Naroola in W. P. No. 7489 (W) of 2019.

6. Mr. S.N. Mukherjee, Ld. Senior Counsel for the petitioner, Rujira Naroola raises two questions namely:

- a) The summons issued under Section 108 of Customs Act, 1962 was beyond jurisdiction and contrary to the Act; and
- b) The respondent Customs had no power to conduct any inquiry and/or investigation after filing the complaint dated 22<sup>nd</sup> March, 2019 before the police.

Customs cannot Investigate the Petitioner after having filed the Information/Complaint on 22<sup>nd</sup> March, 2019 and after the police has acted upon the same by taking approval of the Magistrate under Section 155(3) Code of Criminal Procedure, 1973 (hereinafter referred to as "CrPC"). The customs cannot investigate any further for the following reasons: (a) they have formed their mind by conducting an internal enquiry and have come to the conclusion that the police must investigate and there is nothing further to be investigated by them; (b) even if they had the power to investigate they have abdicated that power by approaching the police.

From a perusal of the police information/complaint and the internal documents of the customs, the customs have made it unequivocally clear that the only offence that the petitioner and her sister are purportedly guilty of is under Section 133 of Customs Act (hereinafter referred to as the Act) and for no other offence under the Customs Act, 1962. There are admissions in these documents that: (i) all bags were checked and no contraband was found; (ii) petitioner and her sister were "allowed to leave" through the "green channel" (iii) clearance of the petitioner and her sister was made "peacefully".

After exchange of multiple incident reports, superior officers of customs were of the opinion that a police information/complaint should be filed and the allegations should be investigated by the police. Further, this also demonstrates that no internal enquiry was pending and the customs was unequivocal about its opinion that the petitioner was guilty of offences under Section 133 of the Act, and Sections 186 and 503 of the IPC. It is only thereafter that the commissioner of customs had sanctioned filing of the information with the police which was to and would require Magisterial intervention under Section 155(2) of the Cr.P.C. Immediately upon filing the information on 22<sup>nd</sup> March, 2019, the police authorities have on 23<sup>rd</sup> March, 2019, acted on the same by filing a GD being GD Entry No. 800 dated 22.03.2019, and have obtained an order of the Magistrate. In this regard nothing more remains to be done by the Customs. The customs, while such police investigation is pending, cannot cause the magistrate to take cognisance of the offence under Section 133 by filing a complaint under Section 200 Cr.P.C. and as such the proceeding shall be required to be stayed till such time as the investigation is being conducted by the police. Further, it is not the case of the Customs in the affidavit-in-opposition that they contemplate filing a complaint under Section 200 Cr.P.C. in addition to the report filed before the police. In fact at paragraph 6 of the affidavit in opposition, it is admitted that the investigation against the petitioner and her sister is confined to Section 133 of the Act for deciding on penalty under Section 117 of the Customs Act, 1962. Therefore, by their acts and deeds the customs has abdicated the power to investigate to the police. Hence, the customs cannot file a separate complaint under Section 200 of the CrPC. To bolster this argument the petitioner relies upon Section 2(r) and Explanation to Section 2(d) of the CrPC.

Section 2 (r) of Cr. P.C. defines police report as “In this Code, unless the context otherwise requires ‘a report forwarded

by a police officer to a Magistrate under sub-section (2) of Section 173”.

Section 2(d) of Cr. P.C. defines complaint as “In this Code, unless the context otherwise requires ‘ any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report”’. The explanation to S. 2(d) of the Cr. P.C. provides that a report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant. Therefore, once the information is received by the police and permission obtained by the Magistrate under Section 155(2) of the Cr. P.C. in case of a non-cognizable offence, investigation is undertaken by the police. Upon completion of investigation the report is prepared in final form which is deemed to be the complaint and the police deemed to be the complainant. Therefore, the report that is filed by the police in respect of the cognizable offences under Section 173(2) of the Cr. P.C. is a police report and is treated as the charge-sheet. However, in the instant case, if after investigation, the police authorities file a report which discloses commission of a non-cognizable offence, i.e. Section 133 of the Customs Act, 1962, and Sections 186 and 503 of the Indian Penal Code, 1860, this report shall be treated to be a ‘complaint’ and the police authorities a ‘complainant’. There is hence no question of the custom authorities becoming the complainant. The investigation which takes place is in respect of the offence and not who is the offender. Under Cr. P.C., Magistrate is not required to take cognisance in any chapter other than Chapter XV. Customs was not precluded from approaching the magistrate under Section 200. However, they chose not to exercise that option and instead approached the police.

According to Mr. Mukherjee, Ld. Senior Counsel, under the Customs Act, the customs cannot impose any penalty for violation of Section 133, as Section 133 of the Customs Act is the only punishable under Chapter XVI of the Act, unlike other offences under Chapter XVI of the Act. The argument regarding Section 117 of the Act has been added for the first time in the affidavit-in-opposition. Section 117 provides for penalty when no other penalty (fine) is provided for. Section 133 contemplates both imprisonment and a monetary fine. The term “fine”, “penalty” and “civil penalty” are all one and the same. “Penalty” means punishment imposed for breach of a law, rule, or contract. Further, and in any event, there cannot be two monetary penalties for same offence. Therefore, Section 133 by itself imposes a penalty for contravention and Section 117 cannot be attracted for contravention of Section 133. Section 117 deals with contravention of any provision or failure to comply with any provision. Section 133 is a penal provision which cannot be contravened. Contravention can only happen when there is a “duty cast” or an “obligation”. However, the language of Section 133 does not prescribe any such obligation/duty nor can there be any contravention of the provision. It is applicable only where no penalty is prescribed in such provision of the Act.

Assuming without admitting that in addition to Section 133, customs can impose a penalty under Section 117, even then such a levy of penalty could take place only when there has been an adjudication of whether the offence under Section 133 has been committed.

Mr. Mukherjee, Ld. Senior Counsel refers to Section 108 of the Customs Act, which is as follows:

*“108. Power to summon persons to give evidence and produce documents –*

*(1) Any gazetted officer of customs duly empowered by the Central Government in this behalf, 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.]...*”

Thus the necessary elements of a valid summons under Section 108 are: (a) a gazetted officer must conduct the inquiry himself; (b) the same officer must consider the attendance of the summoned necessary; and (c) the attendance must be before the same officer.

From a bare perusal of the summons dated 26<sup>th</sup> March, 2019, it would unequivocally appear that (a) the persons issuing the summons has been directed to issue the summons and the summons is not issued because the said person is himself conducting the purported investigation; (b) the person issuing the summons has not formed an opinion himself that it is necessary for the petitioner to attend the summons (c) the attendance of the petitioner is required before another officer and not the person issuing the summons. According to the Ld. Senior Counsel, the Customs has had no cogent answer apart from; (a) compliance of Section 108 is an administrative act and therefore statute need not be strictly followed and (b) Section 5(2) of the Customs Act purportedly empowers senior officer to usurp the role of the junior officer. The aforesaid arguments are incorrect and are mere red-herrings. Firstly, Section 5(2) of the Act has no applicability to the instant case, since it is not the case of the petitioner that a senior officer (for example the commissioner of customs) could not have issued the summons. It is the petitioner’s case that 3 different officers could not be involved in the issuance of the summons, i.e. (i) Manish Chandra (Commissioner of Customs) who has formed an opinion and considers its necessary to summon the petitioner; (ii) Rahul Mahato (Joint Commissioner of Customs) who has issued the summons; and (iii) Additional Commissioner of Customs (Airport & Admin), Customs House before whom the petitioner has been summoned. Even assuming that a senior

officer takes up the responsibility to issue such summons he has to perform all acts himself as contemplated under Section 108 and such a senior cannot partly exercise certain aspects of 108 leaving the rest upon other officer. In other words, such summons could have been issued by an officer who was superior in rank to Manish Chandra. Further, Section 108 (4) clearly mandates that proceedings under this Section are judicial in nature and therefore no question arises of issuance of summons being a mere administrative act that need not comply with statute. Issuance of summons is not merely an administrative act and is a quasi-judicial act by itself.

Mr. Mukherjee, Ld. Senior Counsel further submits that in order to bolster their case that the Summons is concerning penalty under Section 117 of the Act, the Customs has falsely relied on Section 26 of the General Clauses Act. This reliance is completely misplaced and illegal. Section 26 of General Clauses Act states that when the act constitutes an offence under two or more enactments, then it can be proceeded with simultaneously. However, Sections 117 and 133 are of the same Act and therefore such argument hold no water. Similarly, the customs has erroneously relied on Section 4(2) of the Cr. P.C. There is no doubt that the customs has the authority to investigate offences under the Act. However, in the instant case they have already investigated and thereafter have abdicated their right to further investigate and complain to the magistrate in favour of the police. In any event, as mentioned above, the customs Act (special law) provides that the adjudication of the offence will be in accordance with the Cr.P.C. After the filing of the police information/complaint the petitioner has become an "accused" and is granted protection of Article 20(3) of the Constitution of India to not give evidence against herself. This protection is available to the petitioner since a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution.

The petitioner has a duty under Section 108 of the Act to speak the truth. Any evidence provided by the petitioner is admissible as evidence in Court. Customs will compel evidence, which will be used to incriminate the petitioner before the pending complaint with police. It would be a situation where the accuser compels the accused to provide testimony that shall be used against the accused.

Learned Senior Counsel concludes by submitting that the applicability of Sections 127 and 122 of the Customs Act, which are under Chapter XIV of the Act and deals with “Confiscation of Goods and Conveyances and Imposition of Penalties”. It is an admitted fact that no contraband was found and no goods which were improperly imported were confiscated. Thus, these sections do not apply and the arguments of the customs regarding summons being “in connection with” cannot be sustained. The entire case of the Customs is contravention of Section 133 of the Customs Act and the use of the term “*in connection with*” cannot be used to improve upon the case initially made out. The police information/complaint and the internal documents of the customs also unequivocally state the same.

7. Mr. Aman Lekhi, Ld. Additional Solicitor General, appearing for the Customs Department submits that the present Writ Petition could not have been filed without responding to the summons and urging the very points raised in the writ petition before the authorities issuing the summons. This is particularly so because no case has been made out to show that the summons dated 26<sup>th</sup> March, 2019 are non-est in law or wholly without jurisdiction. In any event, a writ of Mandamus and a consequential relief of Certiorari and Prohibition will lie only to enforce an established right and not to establish the right. There being two contested and irreconcilable version of an event (as apparent in the information to the Police given both by the Petitioner and Respondent herein). The very indeterminate nature

of the case shows that even for this reason, the proceedings before Hon'ble Court are wholly premature and are quite clearly an attempt to pre-empt the outcome of one case and/or foreclose the other.

According to the Ld. Additional Solicitor General, issuance of summons is purely an administrative act and is neither quasi-legislative nor quasi-judicial. The summons, by themselves even while "affecting" the person summoned do not "decide" any issue and are merely investigatory in nature to take another administrative action. The satisfaction is subjective as long as there are prima facie grounds satisfying the need to issue summons. The involvement of senior custom officers in the process of invocation of Section 108 of the Customs Act, 1962 to assume in themselves the jurisdiction and proceeded to complete what had been interrupted at the Airport cannot much be justified. In other words, there being reasonable grounds for thinking that issuance of summons are necessary, the justification and adequacy of the same cannot be made subject of judicial review. Section 5(2) of The Customs Act, 1962 has to be read with Section 108 and any Gazetted Officer could resume the inquiry conducted by a subordinate officer of customs and issue summons to any person, he considers necessary. Similar exercise of power has been approved by the Hon'ble Supreme Court in ***R.P. Kapur and Others vs. Sardar Pratap Singh Kairon and Others (1961) 2 SCR 143***. The power under Section 5(2) is not in anyway curtailed by Section 108 of The Customs Act, 1962 as a superior officer of the Customs can exercise the powers and discharge the duties of his subordinate customs officers. The said superior officer could as well issue summons under Section 108 of The Customs Act, 1962 on his own and it becomes immaterial and irrelevant that he does it at the instance or on the direction of another superior officer. The exercise of powers by a superior officer by virtue of Section 5(2) of The Customs Act, 1962 could have been faulted only by the proof of mala fides. The facts however show that the factum of obstruction and consequent intimidation of junior customs officers was being brought to the notice of the Commissioner of Customs

and he directed the Joint Commissioner of Customs. In other words, the superior officer assumed responsibility of the case for a justifiable cause as the subordinate officers were being suborned and intimidated and the circumstances of the case warranted that further action may be taken under the Customs Act for which the senior officers took charge. It is in situations like these that Section 5(2) of The Customs Act, 1962 must apply. In any event, mandamus is not a writ of right and before granting the writ, the Courts should see the larger public interest and also give due regard to the consequences which the issue of the writ will result in.

Mr. Lekhi further submits that involvement of the Police in the instant case infringes the principle of cooperative federalism and issuing a writ in the facts of this case will not only injure the purpose of governance but entail judicial endorsement of provincial behaviour working at cross purposes with the National Government instead of being complimentary part of a single governmental mechanism which the co-existence of the Customs Act (Central Enactment) and policing (in the realm of State Government) entail. Moreover, law takes no notice of ranks and status and mere proximity with those in position of authority cannot vests privileges unavailable to the ordinary men and women of this country far less being approved by a Judicial order. Reliance has been placed on ***State (NCT of Delhi) vs. Union of India and Another (2018) 8 SCC 501 @ Pg. 592.***

The summons were issued in relation to Section 133 of The Customs Act, 1962. The expression should be understood in contradistinction to “into”. “In connection to”, shows that it may include matters both prior to as well as subsequent to or consequent upon as long as they relate to the principal thing. The obstruction having aborted the inquiry, the same was initiated under the summons and merely because it was subsequent to the obstruction would not make it in any way unconnected to the same so as to attract any legal inhibition about the process. The

expression 'in connection with' merely requires some "nexus" or "link" and where such nexus or link, no matter how loose exist, everything ancillary and incidental to that 'in connection with' which the summon is issued would be covered by it. Obstruction of an officer on duty is punishable both under the IPC, 1860 and The Customs Act. Prosecution is distinct from adjudication and Section 127 of The Customs Act, 1962 itself shows that the award of confiscation and penalty under the Act would not prevent infliction of punishment under Chapter XVI of the Customs Act, 1962 or under any other law. Consequently, it is open to the Customs Authorities to adjudicate on confiscation and penalty, and resort to adjudication would not in any way affect prosecution under the Customs Act, 1962 or under any other law. The summons in question are preliminary to the issue of adjudication and may also enable the Customs Authorities to decide whether prosecution under any other provision of Chapter XVI (like Section 135 of The Customs Act, 1962) may be necessary. Merely because the information is furnished with regard to obstruction will not affect the right in Customs Authorities to commence adjudication or decide upon prosecution under Chapter XVI. The said prosecution, moreover would not be under the general law but in terms of Section 137 of the Customs Act, 1962 which would require a complaint with a previous sanction of the Principal Commissioner of Customs or Commissioner of Customs. (I) Adjudication proceedings and criminal proceedings can be launched simultaneously; (ii) Decision in adjudication proceedings is not necessary before initiating criminal prosecution; (iii) Adjudication proceedings and criminal proceedings are independent of each other and (iv) Adjudication proceedings by the Customs is not prosecution by a competent Court of law to attract the provisions of Article 20(2) of the Constitution of India or Section 300 of the Criminal Procedure Code, 1973. A bare look at the information filed by the Customs shows that it reveals offences other than Section 133 of the Customs Act, 1962 and also shows combination of other persons along with the Petitioner in the commission of the offence. It is clearly conspiratorial act which like

Sections 186, 503, 419 and 471 of the IPC, 1860 are not offences under Customs Act and therefore cannot be subject matter of proceedings before the Collector of Customs. It is irrational to presume that having itself initiated criminal proceedings (under general law) and correctly referring only the said offences under the general law to investigation by the Police, the Customs Authorities themselves issued the summons to make an inquiry into the very same offences themselves. The summons, obviously being issued "in connection with" would refer to other matters ancillary and incidental to the obstruction and hence relate to matters of penalty and also offence which under the Customs Act may be attracted to the incident. Moreover, a mere reference to Section 133 of the Customs Act, 1962 in the information would not mean that the police would investigate the same due to the reason that an offence under Section 133 of the Customs Act, 1962 can only culminate into a complaint under Section 137 of the Customs Act, 1962 in which the police has no role. In making the submission aforesaid, the argument does not travel beyond the summons and is on the contrary relatable directly to it and arises from the very terms in which the same has been issued.

Reliance on Article 20(2) of The Constitution of India by the petitioners are also utterly misconceived as the Customs Authorities are not Judicial Tribunals and adjudging of confiscation, increased rate of duty or penalty do not constitute a judgment or order of a Court of a Judicial Tribunal necessary for the purpose of supporting a plea of double jeopardy. To invoke Article 20(2), there must be prosecution and punishment before a Court of law or a tribunal which, admittedly the Customs Authorities are not. In any event, admittedly there has been no completed adjudication, as to require confiscation or penalty and the stage is only on the issuance of the summons which is a preliminary step and precursory to anything which may or may not follow, including adjudication and prosecution under the Customs Act, 1962.

8. Mr. S. Ghosh, Ld. Counsel appearing for the petitioner Menka Gambhir submits that the officer issuing summons must be conducting inquiry. From a bare perusal of the summons it would unequivocally appear that, the entire process involved in issuance of the summons is contrary to the strict drill prescribed under Section 108 in as much as:

- (a) the person issuing the summons has been directed to issue the summons (by his superior officer i.e. the Commissioner).
- (b) the summons has not been issued owing to the person (who issued the summons) himself conducting the purported investigation; instead the investigation was being sought to be carried out by his superior officer.
- (c) the person issuing the summons has not formed an opinion himself that it is necessary for the petitioner to attend the summons.
- (d) instead such opinion appears to be that of the superior officer ( i.e. the Commissioner).
- (e) the attendance of the petitioner is required before another officer and not the person issuing the summons or even the person that had directed that the summons be issued (i.e. the Commissioner).

In response, the Customs has had no cogent answer apart from stating that : (a) compliance of Section 108 is an administrative act and therefore statute need not be strictly followed; and (b) Section 5(2) of the Customs Act purportedly empowers senior officers to usurp the role of the junior officer. The aforesaid arguments are incorrect and are mere red herrings for the following reasoning:

- a) Sections 5(2) of the Act has no applicability to the instant case, since it is not the case of the petitioner that a senior officer (for example the Commissioner of customs) could not have issued the summons. It is the petitioner's case that 3 different officers could not be involved in the issuance of the summons, i.e. (i) Manish Chandra (Commissioner of Customs) who has formed an opinion and considers its necessary to summon the petitioner; (ii) Rahul Mahato (Joint Commissioner of Customs) who has issued the summons under dictation/direction; and (iii) Additional Commissioner of Customs (Airport & Admin), Customs House before whom the petitioner has been summoned.
- b) Even if a senior officer takes up the responsibility to issue such summons, he has to perform all acts himself as contemplated under Section 108 and such a senior cannot partly exercise certain aspects of 108 leaving the rest upon other officers.
- c) Section 5(2) does not allow an officer, who having taken over the powers of his subordinate (to issue summons), thereafter, abdicates or delegates such power to a third officer. In the instant case, the superior officer had taken over the power to issue summons, having formed the necessary opinion to carry out investigation, then he could not have delegated the investigation per se to a third person who is a subordinate officer.
- d) It is trite in law that when a Statute provides that power must be exercised in a certain manner, then such power has to be wielded in the same manner and none other

e) Section 5(2) of the Customs Act deals with legitimate usurpation of power for administrative exigencies in a situation when a subordinate officer is not available, in order that his absence does not prevent the process from being hampered. However, once power has been assumed pursuant to Section 5(2), the exercise of such power (by the legitimate usurper) has to follow the statutory provisions, which conferred the power on the subordinate in the first place (i.e. Section 108 in the present case), whose power is being legitimately usurped. Further, in any event Section 5(2) is specifically restricted to powers and duties which have been conferred or imposed on an officer and cannot be adopted in case of Section 108. This is for the reason that Section 108 of the Customs Act does not confer power on any particular officer (as can be found in other provisions of the Customs Act viz Section 17(2) which confers power on a “proper officer”, Section 22(1) which confers power on a Deputy Commissioner/ Assistant Commissioner). Contra to these examples, Section 108 does not confer power to any one given officer, instead it confers power only to such person, who satisfies qualitative ingredients such as that officer is one that is Gazetted, he must consider it necessary to call a person before him, in relation to an inquiry that he is carrying out. Therefore, Section 5(2) power could not have been mechanically applied in the present case, without satisfying these vital preconditions of Section 108.

It is also well settled that a mechanical approach cannot be followed while issuing summons as has been done in the present case. Section 108 being a provision which restricts the liberty of a person under investigation, must be followed in strict compliance and not in a mechanical manner. Further, Section 108 (4) clearly

mandates that proceedings under this Section are judicial in nature and therefore no question arises of issuance of summons as an administrative act thereby obviating the need to comply with the strict drill of Section 108. In any case it is as established principle of law that issuance of Summons is a quasi-judicial act by itself and therefore, it would be wholly erroneous to contend that the entire process of summoning is a mere administrative act. It is also an established principle of law that in matters and proceedings that are quasi-judicial in nature, subordinate authority cannot act as per dictation of their superiors, unlike what has been sought to be done illegally in the present case.

Mr. Ghosh while arguing his second question submits that customs must “cease and desist” from making any parallel enquiry once they have filed the information/complaint on 22<sup>nd</sup> March, 2019 and after the police has acted upon the same by taking magisterial approval under section 155(3) code of criminal procedure, 1973. The Customs cannot investigate any further for the reasons that, after having formed their opinion (by conducting an internal enquiry) and having come to a conclusion that there is “no iota of doubt” that the petitioner has violated the provisions of Section 133, they have approached the police by filing a written information. Once that process has been commenced and approval of the Magistrate obtained, then by virtue of Section 138 of the Customs Act, the Customs Authorities must now cease and desist from making a parallel enquiry. From a perusal of the police information/complaint and the internal documents of the customs, the complainant Customs Officer have made it unequivocally clear that the offence that the petitioner and her sister are purportedly guilty of is under Section 133 of the Act and nothing else. There are admissions in these documents that: (i) all bags were checked and no contraband was found; (ii) petitioner and her sister were “allowed to leave” through the “green channel” (iii) clearance of the petitioner and her sister was made “peacefully”. After exchange of multiple incident reports superior officers of customs were of the opinion that a police

information/complaint should be filed and the allegations should be investigated by the police. This is evident from the police information/complaint. Further, the complaint also demonstrates that no internal enquiry was pending, and the customs was unequivocal about its opinion that the petitioners were guilty of offences under Section 133 of the Act, and Sections 186 and 503 of the IPC. This is in complete contradiction to the argument of the customs, while making submissions, that the investigation is incomplete. The complaint filed by the Customs Department is only after the Commissioner of Customs had sanctioned Magisterial intervention. Section 137 of the Act states that no court can take cognisance of an offence under Section 133 of the Act without the previous sanction of either the Principal Commissioner of Customs or Commissioner of Customs. From the conduct of the customs and the documents annexed to their affidavit in opposition it is unequivocally clear that prior to filing the police information/complaint the commissioner of customs had provided his sanction to seek magisterial intervention by approaching the police and therefore the Customs had already taken steps under Section 133 of the Act. No doubt, the information filed before the Police by the Customs was not a Complaint as understood under Section 200 of the Cr. P. C. However, that per se does not mean, that unless a complaint under Section 200 of the Cr. P. C., Magisterial intervention cannot be sought. In fact for non-cognizable offences Section 155(2) of Cr.P.C. contemplates Magisterial intervention, setting the investigation process into motion. There is no further requirement of a further complaint under Section 200 of the Cr. P. C. To put it differently, by filing an information/complaint with the police, the Customs they have already exercised the option of magisterial intervention, for the following reasons:

- (a) Section 138 of the Act states that an offence under Section 133 must be adjudicated by the Magistrate.

- (b) Section 137 of the Act states that no court can take cognizance of an offence under Section 133 of the Act without the previous sanction of either the Principal Commissioner of Customs or Commissioner of Customs. From the conduct of the customs and the documents annexed to their affidavit in opposition it is unequivocally clear that prior to filing the police information/complaint the commissioner of customs had provided his sanction to seek magisterial intervention by approaching the police and therefore the Customs had already taken steps under Section 133 of the Act.
- (c) Section 108 of the Act contemplates inquiry by the customs by collecting evidence from the summoned, thereafter, an opinion is formed by the customs and thereafter prosecution is launched. In the present case, the very fact that the sanction from the Commissioner of Customs was obtained before the Customs approached the Police, goes to show that the very act of approaching the police was for the purpose of launching the prosecution, since the sole purpose of obtaining such approval of the Commissioner of Customs was to meet the requirement of Section 137, which provides that no court can take cognizance of an offence unless previous sanction of the Commissioner or Customs has been obtained.
- (d) The offences complained off in the police information/complaint being non-cognizable offences the police was required to take permission of the magistrate under Section 155(2) of the Cr. P.C. Once the police has started its investigation and the adjudication of the offences will necessarily have to be by a magistrate, the customs has no role to play.

They must therefore, “Cease and Desist”, from carrying any parallel investigation by virtue of Section 138 of the Customs Act.

Mr. Ghosh further submits that from a bare perusal of the Summons it is evident that the sole purpose of issuance of the summons was to enquire into alleged violation of Section 133 of the Customs Act and no other provisions are quoted in the Summons. The customs is now seeking to make out a case under Section 117 of the Act. The argument regarding Section 117 of the Act has been added for the first time in the affidavit-in-opposition and does not find mention in the body of the Summons. Therefore, such an improvement, cannot be made in a public documents or through subsequent affidavits. In any case, Section 117 provides for penalty when no other penalty (fine) is provided for and cannot be applied in the present case on merits. This is because, Section 133 itself contemplates both imprisonment or a monetary fine or both. The term “fine’ is the same as penalty as essentially it is nothing but deprivation of personal property.

Judicial meaning of the two terms i.e. Fine and Penalty are one and the same. In fact, Black’s Law Dictionary defines the term

- (a) “Fine’ to be a pecuniary criminal punishment or civil penalty payable to the public treasury and
- (b) “Penalty’ to mean a Punishment imposed on a wrong doer usually in the form of imprisonment or fine.

Under such a situation, there can be no question of invoking Section 117 as that is a residuary provision, which applies only where penalty has not been imposed under any other provision of the Customs Act, whereas once Section 133 has been involved, penalty provisions contained therein applies on the petitioner and therefore, Section 117 cannot be applied.

In any event Section 117 is not applicable for the following reasons:

- i. Section 117 deals with contravention of any provision or failure to comply with any provision. Section 133 is a penal provision which cannot be contravened. Contravention can only happen when there is a “duty cast’ or an “obligation”. However, Section 133 language does not prescribe any such obligation/duty nor can there be any contravention of the provision. It is applicable only where no penalty is prescribed in such provision of the Act.
- ii. The authority was never precluded from initially writing other provisions of law and alleging such contravention by the petitioner. However, no such allegation of Section 117 exists. The summon issued under Section 108 for an offence under Section 133, cannot be expanded for making roving enquiry. Roving enquires in case of summons etc. are impermissible in law .

In order to bolster their case that the summons issued pertained to imposition of penalty under Section 117 of the Act, Customs has erroneously relied on Section 26 of the General Clauses Act. Section 26 of General Clauses Act states that when the act constitutes an offence under two or more enactments then it can be proceeded with simultaneously. However, Sections 117 and 133 are of the same Act and therefore such argument hold no water. Similarly, the customs have erroneously relied on Section 4(2) of the Cr.P.C. for the above purposes. Admittedly the said provision of the CrPC provides that provisions of the special law would apply. However, on application of the special law (i.e. the Customs Act), the customs would be forced to revert back to the Magistrate by virtue of operation of Section 137 and Section 138 of the said Special Law quo violation of Section 133 and cannot carry on parallel investigation once Magisterial intervention has been

sought in accordance with the said Section 137 and 138 of the Customs Act.

Mr. Ghosh Ld. Counsel further submits that Article 20(3) of the Constitution clearly provides that no person accused of any offence shall be compelled to be a witness against himself. Accordingly, by requiring the Petitioner to appear before the summoning authority, this vital provision of the Constitution would be violated and therefore such an infraction of the Constitutional guarantee cannot be permitted. No sooner than the information was filed by the Customs before the Police, in which allegations and accusations were made against the Petitioner with regard to violation of Section 133 of the Customs Act and other provisions of the IPC, the Petitioner had become an accused. Once the petitioner became an accused, thereafter, the Customs Authority cannot direct the petitioner to appear before them in respect of the same allegation (i.e. violation of Section 133 of the Customs Act.) The protection available under Article 20(3) of the Constitution of India to not give evidence against herself is a prima article of the Constitution of India. This protection is available to the petitioner since a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution.

A formal accusation, according to the Supreme Court in **Balkishan A Devidayal vs. State of Maharashtra reported in (1980) 4 SCC 600** can be made :

- (a) *in an FIR, or*
- (b) *a formal Complaint, or*
- (c) *any other formal document which ordinarily results in his prosecution in court;*
- or*
- (d) *notices served on that person, which ordinarily results in his prosecution in court;*

In the present case, situation (c) above has been met, in as much as a formal documentation i.e. information has been filed by

the Customs with the Police, who by virtue of Section 155(2) of the CRPC has obtained magisterial permission to initiate investigation and on completion of the entire procedure, it may lead to prosecution in court.

Further, as held by the Supreme Court, in the case of **Superintendent of Police, CBI & Ors. Vs. Tapan Kumar Singh reported in (2003) 6 SCC 175**, even a GD entry can also be treated as an FIR if cognisable offence is present. Therefore, this in itself goes to establish that if GD entry is good enough a document to be treated as an FIR and an FIR makes a person accused, then the route adopted in the present case i.e. filing of information under Section 155 (i.e. through GD entry) can also make a person an accused, regardless of the fact that the complaints/allegations made therein are non-cognisable in nature. According to the learned, summons can only be issued to a person with respect to an ongoing inquiry being conducted under Customs Act. However, in the instant case it is an admitted fact that on conclusion of their enquiry and on finding that there is no iota of doubt that the petitioner had violated provision of Section 133 of the Customs Act, the Customs had approached the Police. This is evident from the police information/complaint. Further, this also demonstrates that no internal enquiry was pending, and the customs was unequivocal about its opinion that the petitioner was guilty of offences under Section 133 of the Act, and Sections 186 and 503 of the IPC. During the course of their arguments, Respondents had once again tried to improve their case and arguing beyond its pleadings as also the express words used in the Summon to state that they wish to enquire into violation of any of Section 127 and 122 of the Customs Act. However, it is submitted that such an attempt to improve their case cannot be permitted in accordance with law laid down by the Supreme Court and alluded in detail in the earlier part of this written submission. In any case, the very foundation of such an argument is erroneous in as much as Sections 127 and 122 of the Act deals with “Confiscation of Goods and Conveyances and Imposition of Penalties, which cannot

be applied in the present case, given that it is an admitted fact that no contraband was found and no goods which were improperly imported were confiscated and the Petitioners were allowed to leave through the green channel and such exit was peaceful. Thus, these sections do not apply in the present case.

The respondent authorities cannot be permitted to improve upon their case and pleadings, even on merits, such an argument is fallacious. Specifically, the phrase “in connection with” has been interpreted by the Supreme Court as also various High Courts to mean, “intrinsically related with the main aspect”, “ancillary, incidental or has relevance to or link with the object”. Therefore, the said phrase cannot be read to mean, conferment of wide power to expand the scope of examination to matters and provisions beyond the main aspect of Section 133 violation. Hence, the argument regarding “in connection with” being of a wide amplitude cannot be sustained to widen the scope of enquiry.

It is an established principle of law that error in exercise of jurisdiction is ground enough and by which intervention of the High Court can be sought. Since in the present case it is a submission of the petitioner that the preconditions of Section 108 have not been satisfied, summons has been issued in contravention of the express drill prescribed therein, the very action of the respondent customs is wholly without jurisdiction. The illegal assumption of jurisdiction is also hit large by the fact that parallel investigation which is sought to be initiated contrary to express provision of Section 108 of the Customs Act and also in contravention of Article 20(3) of the Constitution of India.

9. Heard all the parties. Perused of the writ petition, affidavit-in-opposition and affidavit-in-reply.

10. The Commissioner of Customs on 26<sup>th</sup> March, 2019 prima facie formed his opinion to enquire and seek presence of the petitioners in connection to an incident that occurred on the night

of 15/16<sup>th</sup> March, 2019 and sought aid in enquiry directing Joint/Additional Commissioner of Customs, AIU, NSCBI, Airport, Kolkata to issue summons to the petitioners and the petitioners were directed to appear before Additional Commissioner of Customs (Airport Administration) on 8<sup>th</sup> April, 2019 for giving evidence and/or produces documents or things in relation to the incident which occurred on 15<sup>th</sup> /16<sup>th</sup> March, 2019.

11. Two contested and irreconcilable version of an event was placed before me which occurred on the night of 15<sup>th</sup> / 16<sup>th</sup> March, 2019 and has to be inquired into by a competent authority.

The two contested and irreconcilable versions are as follows:

- a) Two lady passengers, the petitioners herein, while passing through the green channel having arrived at NSCBI Airport, Kolkata, refused to show their passports and refused to subject themselves to the procedures as laid down in customs Act.
- b) The lady passengers/ writ petitioners exited the green channel without any hindrance.

12. A separate issue that some unknown police officers entered the international arrival hall of NSCBI Airport, Kolkata and assisted the writ petitioners to exit the gate of customs and such incident was informed to the jurisdictional police station by the Assistant Commissioner of Customs by filing a complaint on 22<sup>nd</sup> March, 2019. The said complaint was not only against the writ petitioners but also against some unknown police officers who assisted the writ petitioners. The complaint was filed on 22<sup>nd</sup> March, 2019 is a undisputed fact. Learned Additional Advocate General has categorically submitted before this court that the written information lodged by the Customs to the jurisdictional police authorities was entered into a General Diary and numbered as NSCBI Airport PS G.D.E No 800 dated 22/3/2019 (P.33). On March 23, 2019, the jurisdictional police authorities made a prayer before the Ld. Magistrate for investigating into offences. The Ld.

Magistrate passed an order permitting the police authorities to investigate into the offence and the investigation is in progress. Statements of several witness u/s. 161 of Cr. P.C have been recorded and CCTV footage has been obtained from the airport authorities. The customs authorities had filed the complaint on 22<sup>nd</sup> March, 2019 and after the complaint was filed, the police has acted upon the same by taking magisterial approval under section 155 of the Code of Criminal Procedure. Thus, the customs lost its jurisdiction to inquire any further in respect of the complaint and is restrained from making parallel inquiry.

13. But the first incidence, where two contested and irreconcilable version of an event that occurred on the night of 15<sup>th</sup> /16<sup>th</sup> March, 2019 i.e. two lady passengers, the writ petitioners herein, while passing through the green channel having arrived at NSCBI Airport, Kolkata, refused to show their passports and refused to subject themselves to the procedures as laid down in customs Act inside the “customs airport” has lead to an inquiry by the customs authorities.

The customs authorities are free to inquire into the two contested and irreconcilable version of an event as presented before me for any violation of the customs Act by the writ petitioners effecting loss of government revenue that occurred on the night of 15<sup>th</sup> / 16<sup>th</sup> March, 2019, but to the extent which occurred inside the “Customs Airport” as defined in section 2 of the Customs Act.

14. However, Section 108 of the Customs Act clearly mandates that proceedings under section 108 is quasi judicial in nature. The person issuing summons has to satisfy qualitative ingredients as prescribed in Section 108 of the Customs Act. In this case, the Additional Commissioner, AIU NSCBI Airport, Kolkata who has issued the summons dated 26<sup>th</sup> March, 2019 to the petitioners is not the inquiry officer and he has not formed any opinion regarding attendance of the petitioners and he has only

directed the petitioners to appear before another Additional Commissioner (Airport Administration) Customs, who is also not the inquiry officer. But when a statute provides that the power under Section 108 of the Customs Act must be exercised in a certain manner, then such power has to be wielded in the same manner and none other. For the above reasons the summons dated 26<sup>th</sup> March 2019 issued to the petitioners are quashed and set aside.

15. With the above observations the Writ Petition being Nos. W.P. 7865 (W) of 2019 and W.P. 7489 (W) of 2019 are disposed of.

No order as to cost.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

**(Rajarshi Bharadwaj, J.)**