

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Customs Appeal No. 50069 of 2020 [DB]

[Arising out of Order-in-Appeal No. D-II/Prev/NGH/272/2019-20 dated 07.06.2019 passed by the Commissioner of Customs (Appeals), New Delhi]

Kamal Kant Kulthia
2737, Ajmer Khan Road,
Karol Bach, Delhi - 110005

...Appellant

VERSUS

**Principal Commissioner of Customs-
New Delhi (Prev.)**
New Customs House,
Near IGI Airport, New Delhi-110037

...Respondent

APPEARANCE:

Shri Navneet Panwar, Advocate for the Appellant
Shri Rakesh Kumar, Authorized Representative for the Respondent

CORAM:

HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING: 05.06.2024
DATE OF DECISION: **27.09.2024**

FINAL ORDER No. 58734/2024

DR. RACHNA GUPTA

The appeal has been filed to assail the Order-in-Appeal No. 272/2019-2020 dated 06.06.2019 vide which the order confiscating 10kg of gold (10 gold bars of one kg each) with the blue colour suitcase which was used to conceal the said gold along with cash amount of Rs.50,000/- and imposing penalties under Section 112 and 114 AA of the Customs Act, 1962 has been upheld.

1.1 The facts, in brief, relevant for the adjudication are as follows:

The Zonal Unit Delhi of Directorate of Revenue Intelligence (DRI) got a specific intelligence about a passenger namely, Shri Dharmender Kumar was likely to arrive at New Delhi from Kolkata at 7.40 Hrs by Indigo Flight No. 6E204. Acting on the said intelligence surveillance was mounted at domestic terminal of Indira Gandhi International (IGI) Airport, Delhi by the Officers of DRI. The team identified and intercepted Shri Dharmender Kumar at domestic terminal 1C of IGI Airport, New Delhi. There was already an intelligence that Shri Dharmender Kumar is an employee of M/s. ND Diamonds having a branch office and Bank Street, Karol Bagh. During the initial enquiry said Shri Dharmender Kumar admitted that he was carrying 10 gold bars of 1kg each having foreign markings. Accordingly, the notice of personal search under Section 102 of Customs Act, 1962 (the Act) was served upon him. The search was conducted in the presence of two independent purchasers. Vide the Panchnama dated 07.03.2014 following articles were recovered from Shri Dharmender Kumar:

(i) Boarding pass of Indigo flight in the name of Shri Dharmender Kumar

(ii) Baggage claim tag affixed on the back side of the body in the name of Shri Dharmender Kumar itself.

(iii) Stock transfer voucher issued by M/s. ND Diamonds, Kolkata dated 25.02.2014 for stock transfer of fine gold (.995 purity) from Kolkata to New Delhi having weight of 10255.640 gms.

(iv) Stock transfer voucher for gold weighing 10,000 gms dated 06.03.2014 of fine gold from Kolkata to New Delhi (.995 Purity) from Kolkata to New Delhi.

(v) E – Ticket from Kolkata to Delhi of Spice Jet in name of Shri Dharmender Kumar having travel date 26.02.2014.

1.2 Shri Dharmender Kumar was found to have a checked-in baggage i.e. a blue coloured samsonite make trolley which was found containing 10 bars of yellow coloured metal suspected to be gold bars being concealed as wrapped in the newspaper and then filled in socks. In addition Rs.50,000/- were also recovered along with two pillows supposedly meant to conceal the metal bars from the said bag. The yellow metal got assessed from Shri Anil Yadav, Jewellery Appraiser, IGI, New Delhi who affirmed the metal to gold of .995 purity. Vide his appraisal report (RUD-7) it is reported that out of 10 bars recovered from the appellant seven had engraved logo of VALCAMBI SUISSE and logo of PAMPESSAVUER FONDEUR however with tampered serial numbers. Three of the remaining bars were without any marking and engravings and were plain on both the sides. The value of the recovered gold was assessed at Rs.2,72,57,350/-. On being enquired Shri Dharmender Kumar had admitted that the said gold bars had been brought illegally into India. His employers have instructed him to tamper the serial number or either heat up the face of gold bars to make them plain without any engravings to avoid the deduction of smuggled nature of the said gold bars and to cover the illicit movement of the same under the issue voucher. Rs.50,000/- was admitted to be received from Shri Shankar Lal Soni as his remuneration for carrying the said smuggled gold bars from Kolkata to Delhi. The said admission was considered sufficient by DRI officers to have reasonable belief that the gold is smuggled one. Also that the gold is notified that they invoked Section 123 of the Customs Act, 1962 (hereinafter

referred as Act). According to this section, the burden to prove in such circumstance that the said gold bars were not smuggled nature lies on the person from whose possession the same is recovered or on the person who claims to be the owner thereof.

1.3 Shri Dharmender Kumar failed to produce any valid document evidencing legal acquisition/possession of the said gold bar except two stock transfer vouchers. However, he admitted the gold to be smuggled and the vouchers to be the manipulated documents to cover the illegal activity of smuggling. Accordingly, all 10 gold bars were seized under Panchnama dated 06.03.2014 in terms of Section 110 of the Act on a reasonable belief that the gold bars have been smuggled into India in violation of provisions of Customs Act and hence were liable for confiscation in terms of Section 119 of the Act. Thereafter searches were conducted at the premises of M/s. ND Diamond, Karol Bagh as well as at their Kolkata office on 07.03.2014 itself. The Kolkata Office was again searched on 10.03.2014. Searches were also conducted in following premises:

(i) Maa Ambay Jewellers, Kolkata in presence of its partner Shri Pradeep Gupta on 11.03.2014.

(ii) Ms. Anjali Gupta, Kolkata on 11.03.2014 in presence of its Director Shri Prabir Kumar Banik.

(iii) M/s. Magna Projects, Kolkata on 14.03.2014 in presence of its Director Shri Shashi Kant Shinde.

(iv) Premises of M/s. Ganesh Refinery on 13.03.2014 in presence of Shri Madhukar Sonama Bhagat who denied his personal search.

1.4 Statements of all of persons concerned were also recorded. Documents recovered during search of various premises including sales bills, stock registers, material issue vouchers, purchase bill of find gold and similar documents on the hard disk recovered at the time of search and keeping in view the statements recorded the department formed the opinion that in the given circumstances the burden of proving that the said seized 10 gold bars were not smuggled goods lied on Shri Manoj Kulthia, Shri Kamal Kant Kulthia the owners of M/s. ND Diamonds, Shri Kailash Kumar Agarwal, the Manager, Shri Shankar Lal Soni, the accountant and Shri Dharmender Kumar, the employee of M/s. ND Diamonds who have failed to prove the licit possession of 10 bars of gold with them. Further keeping in view the facts and circumstances under which the said 10 bars were brought by Shri Dharmender Kumar in concealed form without filing any documentation as required under Section 46 of the Act and without declaring the same before the customs authority department formed the opinion that the gold recovered appears to have been smuggled into India from non-specified routes in violation of Section 7(c) of the Act.

1.5 Based on these observations, vide Show Cause Notice No. 34/2014 dated 05.03.2015, the gold weighing 10,000 gms valued at Rs.2,72,57,350/- was proposed to be absolutely confiscated under Section 111(b) and 111(d) of the Act. The seized material including the Samsonite trolley, two pillows, old and used socks and old newspapers used for concealment of the said gold were also proposed to be confiscated under Section 119 of the Act. Rs.50,000/- was also proposed to be confiscated being the remuneration for carrying the smuggled gold, in terms of Section

121 of the Act. Shri Dharmender Kumar, Shri Kailash Kumar Agarwal, Shri Kamal Kant Kulthia, Shri Manoj Kulthia and Shri Shankar Lal Soni all were proposed to be imposed with the penalty under Section 112 and 114AA of the Act. The said proposals were initially confirmed vide the Order-in-Original No. 15/2016 dated 31.03.2017. Appeal against the said order has been rejected vide the impugned Order-in-Appeal. Being aggrieved the appellant is before this Tribunal.

2. We have heard Shri Navneet Panwar, learned counsel for the appellant and Shri Rakesh Kumar, learned Authorized Representative for the Department.

3. Learned counsel for the appellant has submitted that the appellant is engaged in business of trading of gold and diamond bullion and jewellery on the strength of valid trade license duly issued by the competent authority. The appellant Shri Kamal Kant Kulthia is looking after the business of the firm at Kolkata office and his brother Shri Manoj Kulthia is looking after the business of firm at Delhi office. The firm is also a holder of IEC certificate duly issued vide DGFT Authority on the strength of which the firm is a regular importer of gold ornaments into India. The firm is also mentioned to be registered with sales tax authorities. It is further mentioned that in normal course of business the appellant purchases bullion as well as old ornaments from different customers/traders. The old gold ornaments get melted through different job workers for being converted into gold bars for purpose of trades. These gold bars, whether purchased from the authorized dealers or obtained by melting jewellery are sold by the appellant in

the normal course of business. Stock of bullion is regularly being transferred between Delhi and Kolkata office of the firm through their authorized employees under duly issued stock transfers/vouchers/challan.

3.1 On 06.03.2014 Shri Dharmender Kumar, the employee of the appellant was carrying 10 gold bars in a normal course of business. Valid stock transfer voucher in this regard was also in his possession with an authority letter. The same was duly produced before the intercepting/investigating officers. The appellant himself telephonically connected to those officers who assured him that they were satisfied with the documents shown to them and they would allow Shri Dharmender Kumar to leave in few minutes. Shri Dharmender Kumar at around 6:30 informed the appellant that he is being allowed to leave. However thereafter he went missing. The appellant filed a missing person complaint dated 06.03.2014 with Karol Bagh Police Station. It is impressed upon that Shri Dharmender Kumar was illegally detained, beaten, threatened and humiliated by the DRI Officers on 06.03.2014. He was produced before the Duty Magistrate, Delhi on 07.03.2014. The order of MM dated 08.03.2014 has observed that Shri Dharmender Kumar was arrested in a predetermined and illegal manner. Shri Dharmender Kumar had retracted his statement before the said DutyMagistrate. Certain observations were made by the magistrate which inter alia included that the case appears to be that of illegal custody and of foul play byDRI officers. The ADG, DRI was directed to file a report and also directed to appear in person on 10.03.2014 by the Magistrate. DRI assailed the said order before Hon'bleHigh Court of Delhi, however theHon'ble High Court refused to expunge the said

observations, except, it directed the trial court/magistrate to reconsider the observations in the light of report submitted by ADG, DRI. However no plausible explanation was afforded in the report filed by ADG, DRI, rebutting the noticed conduct of the officers and the manner in which the investigation was conducted by them. In view thereof the Chief Metropolitan Magistrate vide order dated 13.08.2014 refused to expunge the observations of the duty magistrate against the DRI officers. It is further mentioned that nothing relevant could be recovered by the investigating team despite conducting raids at the several places including the premises of Shri Ganesh Refineries who admitted about melting and refining the gold jewellery of the appellant. Despite same and the documentary evidence regarding local purchase of the seized gold, the seized goods from Shri Dharmender Kumar were not released by DRI who rather foist a false case against the appellant. Showcause notice is alleged to have been based on perfunctory and biased investigation. The notices served upon the appellant had no cogent and legally admissible evidence to point out that the subject gold is the smuggled gold. The statements relied for substantiating the charge are alleged to be mutually contradictory and contrary to the documents on record. Hence the allegations are vague and are based on assumption and presumptions. The order under challenge based on such allegations is therefore liable to be satisfied.

3.2 Learned counsel further impressed upon that the allegations about seized gold since appear to be as smuggled into India to having foreign markings are also baseless. Hence Section 123 of the Act has wrongly been invoked. The onus was of the

department to prove the allegations of smuggling. The findings are liable to be set aside on the ground also. The adjudicating authority has ignored the submission that the certain wrong and baseless facts were got recorded in the statement of Shri Dharmender Kumar at the behest of DRI officers. Shri Dharmender Kumar has subsequently retracted the said statements. The emphasis on retracted statement to be an admission of smuggling is absolutely wrong and is liable to be set aside the plea that absence of serial number on gold bars is an indication of smuggling is also nothing but a mere presumption of the investigating team. The order of confiscation based on such presumption is liable to be set aside. Finally it is submitted that penalties under section 112B and 114 AA are wrongly been imposed upon the appellant and his employees despite that the impugned gold was purchased in local transaction and was duly accounted in the books of the appellant. The suppliers of the appellant have duly corroborated the same and thus the present is not the case of fraudulent export. The order imposing penalties is also prayed to be set aside. Learned counsel has relied **upon following decisions:**

(i) RIB Tapes (India) Pvt Ltd. & Anr. Vs. Union of India and Ors reported as 1986 (26) ELT 193 (SC)

(ii) Bosch Chassis Esystems India Ltd. Vs. Commr. of Cus., New Delhi (ICD TKD) reported as 2015 (325) ELT 372 (Tri. Del.)

4. While rebutting these submissions it is submitted by learned Departmental Representative that the appellant did not have any document of licit possession of the impuned foreign origin gold bars

to prove that the gold was not smuggled one. His employee Shri Dharmender Kumar(the carrier) admitted, in his voluntary statement recorded under section 108 of the Act, that the gold bars were smuggled and that the same were not brought into India through any legal channel. In fact, he was cleared enough to disclose that defacing the serial number was a modus operandi of the appellant in order to get saved from enforcement agencies while illegally importing foreign marked gold bars and transferring them from Kolkata to Delhi under the manipulative stock transfer vouchers. Learned Departmental Representative has impressed upon that though Shri Dharmender Kumar had retracted his statement but still no documentary proof in support of the retraction was ever provided to the department. Otherwise also, it is the settled law that retraction from the statements tendered under section 108 of the Act, if any, has to be addressed to the same authority. In the present case, retraction was recorded at a subsequent stage before a different authority. Hence the same is not sufficient to affect the admissibility of Shri Dharmender Kumar admission recorded under section 108 of the Act.

4.1 Learned Departmental Representative also brought to the notice that there is another fact on record which corroborates the Modus Operandi narrated by Shri Dharmender Kumar as one of the another employee of appellant Shri Govind Agarwal was intercepted by DRI, Lucknow from whom was seized 4kg gold of foreign markings but appellant got him abducted. Such unscrupulous and covert activity resorted by the appellant coupled with the act of transfer of gold bars with defaced serial numbers on the pretext of just stock transfer vouchers instead of providing valid import

documents and tutoring his employee to erase the foreign markings to avoid the enforcement agencies clearly establishes the appellant's mala fide intent to commit illegal act of acquiring and disposing the smuggled gold. These activities were sufficient for the reasonable belief of the DRI officers for the impugned gold to be smuggle one. Hence Section 123 of the act has rightly been invoked by the investigating authorities and the adjudicating authorities have rightly held that the burden of proving that the impugned gold was not smuggled one was on the appellant being, the owner of said gold bars.

4.2 Since the appellant have failed to produce any document proving licit import of the recovered gold, there is no infirmity in the order confiscating the said gold along with material which was used to conceal the gold during transit from Kolkata to Delhi along with the money which admittedly was received by Shri Dharmender Kumar, the possessor of the impugned gold, as remuneration for such illegal transfer. Learned Departmental Representative has relied upon the following decisions:

(i) Om Prakash Bhatia Vs. Commr. of Customs, Delhi reported as 2003 (155) ELT 423 (SC)

(ii) Sheikh Mohd. Omer Vs. Collector of Customs, Calcutta and Ors. reported as 1983 (13) ELT 1439 (SC)

(iii) Indru Ramchand Bharvani Vs. Union of India reported as 1992 (59) ELT 201 (SC)

(iv) Sunny Kakkar Vs. Pr. Commissioner of Customs (Preventive) reported as 2023 5 Centax 261 (Tri.-Del)

With these submissions, it is impressed upon that there is no infirmity in the order under challenge, appeal is accordingly prayed to be dismissed.

5. Having heard the rival contentions and perusing the entire records, the following questions are opined to be adjudicated:

(i) Whether the department has rightly invoked Section 123 of the Customs Act, 1962?

(ii) Whether there is any evidence on a record proving that the order of confiscation is not sustainable?

6. Question no. 1

Foremost we need to look into Section 123 of the Act which reads as follows:

Section 123 - Burden of Proof in certain cases

(1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be -

(a) In a case where such seizure is made from the possession of any person,

(i). on the person from whose possession the goods were seized; and

(ii). If any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other person;

(b) In any other case, on the person if any, who claims to be the owner of the goods so seized.

(2) This section shall apply to gold [and manufactures thereof], watches and any other class of goods which the Central Government by notification in the Official Gazette specify.

6.1 Section 123 of the Customs Act 1962, enshrines the doctrine of Reverse Burden of Proof shifts the burden of proving that the goods like gold, watches and any other goods specified by the Central Government by notification on the person from whose possession the said goods were seized or on the person who claims to be the owner of such seized goods to prove the Customs Officers that the said goods are not smuggled goods and were procured through licit channels/means.

6.2 In order to attract the provisions of Section 123 of the Customs Act, 1962, it is essential that the intercepting/investigating officers got reasonable belief about goods to be the smuggled goods. The term smuggled goods means goods of foreign origin which have been brought to India through illicit channels/means without payment of applicable duties. Most commonly Foreign Marked Gold in large quantities is being smuggled into India through land, sea and air routes through illicit channels/means, viz; by making payments through Hawala Channels by the smugglers. During the course of such gold smuggling, the smugglers will erase the Foreign Markspurity content marks and country of origin marks, embossed on the gold bars and will cut them into pieces of asymmetrical sizes so that its original form/shape is lost. This makes the job of the Customs Officers difficult to prove that the gold is smuggled one. In this background concept of reverse burden of proof under Section 123 of the Customs Act, helps the Customs Officer to prove the guilt of the smugglers perfectly. The reverse burden of proof mandates issue of show cause notice to the person from whose possession the gold was seized/person claims to be the

owner of seized gold to discharge the burden of proving that it has been procured through licit channels/means.

6.3 The section required that the seizing officer either by his own observation or based on other materials produced before him, has to show satisfaction that there was ground for him to reasonably believe that the goods were smuggled goods, that is to say that the goods were imported into the country and imported at a time and place when they were restricted or prohibited from being imported. If the authority is not satisfied that the goods were seized on a reasonable belief section 123 of the Act cannot be invoked and in that event it would be for the customs authorities to prove that the goods were smuggled. If, therefore, section 123 is wrongly applied and the presumption there under is raised, without the condition precedent there under having been satisfied, the entire inquiry and the order passed therein would be vitiated. In *Collector of Customs v. Sampathu Chetty* reported as 1962 SCR (3) 762 SC 316 has dealt with Supreme Court under the old Sea Customs Act. Section 178-A of the old Customs Act of 1878 holding that when the concerned authority was satisfied that the seizure was made in reasonable belief that the goods seized were the goods that have been smuggled, that the rule of evidence (the doctrine of reverse burden) laid down by Section 178-A come into operation. The Hon'ble Court also clarified that the the object of Section 178-A was the prevention and eradication of gold smuggling. which was widely prevalent, and in view of the fact that without a law in that form and with that amplitude smuggling might not be possible of being effectively checked. Hence the restrictions imposed under

Section 178-A being in the interest of genera public cannot even be held violative of Article 19 (1) (f) & (g) of Constitution of India. Section 123 of the Customs ct, 1962 is para material of said Section 178-A of old customs Act the presumption of the goods being smuggled arises only when-the seizure is made by an officer entertaining a reasonable belief that the goods are smuggled, and in that sense the reasonable belief of the seizing officer is a pre-requisite.for the statutory onus to arise. It is also true that at the stage of adjudication the reasonableness of the belief of the officer effecting the seizure that the goods are smuggled would be the subject matter of investigation by the adjudicating officer. Nevertheless it is maifest that at the stage of the adjudication (when only the rule of evidence laid down by the section comes into operation) the very facts which led the seizing officer to effect the seizure, as distinguished from their significance as affording a reasonable belief for the seizing officer to hold that the goods are smuggled, are before the adjudicating officer. These facts which justified the seizing officer to reasonably believe that the goods were smuggled would certainly import a rational connection between the facts on which the presumption is raised and the fact to be proved, so that whatever other constitutional infirmity might attach to the impugned provision, the lack of rational connection is not one of them.

6.4 For invoking Section 123 of the Act, it would be necessary, therefore, before any person could be called upon to prove that the goods seized from him were not smuggled goods, that the customs officer making the seizure must proceed upon the foundation of a

reasonable belief inspired in him by some definite material by way of some definite information or otherwise so that he could be said to have seized the goods in a reasonable belief that they were smuggled goods as was held in (Bapalal v. Collector of Central Excise, Air 1965 Gujarat 135 (23)).

6.5 Reverting to the facts of the present case, we find that the following reasons have been given by the DRI officers in support of acquiring the reasonable belief as is required for invoking Section 123 of the Act.

(i) The Delhi Zonal Unit of DRI had the specific information about Shri Dharmendra Kumar travelling from Kolkata to Delhi via Indigo Flight carrying smuggled gold with him and that said information was duly communicated to Shri Dharmender Kumar.

(ii) On being searched personally as well as of the belongings of Shri Dharmendra Kumar. 10 metal bars of 1 kg each was found concealed in socks wrapped in paper two pillows in the suitcase were used to conceal those bars.

(iii) Seven bars had foreign markings with defaced serial numbers. Three bars were plain without any engraving or serial no.

(iv) The bars got assessed as made of gold.

(v) Except the self made stock vouchers, no document of legal import of foreign bars was found with Shri Dharmender Kumar.

(vi) Lastly Shri Dharmender Kumar admitted about M/s. N D Diamonds to have been involved in smuggling of gold with the Modus Operandi of defacing the serial numbers to avoid enforcement agencies.

(vii) He also admitted for the stock vouchers to be the manipulative documents to guise the Act of smuggling god.

The above noticed facts are sufficient for us to hold that there was reasonable belief with the DRI officers about the impugned gold to have been the smuggled one. However, since there were no foreign markings on three out of 10 seized gold bars and Shri Dharmender Kumar had stated about those to be melted out of old gold jewellery. We hold that very basis of 'reasonable belief' of smuggling i.e. the foreign origin of the 3 bars is missing. In the light of this discussion Hence, we do not find any infirmity when section 123 has been invoked by the investigation agencies. with respect of 7 gold bars having foreign markings for remaining three gold bars the burden was on the department to prove that those are also of foreign origin.

7. Question no. 2

7.1 This question can be adjudicated in light of, Section 111 which provides for confiscation of the goods which are improperly imported into country. Clause (b) and (d) of which reads as light follows:

Section 111- The following goods brought from a place outside India shall be liable to confiscation:-

(b) any goods imported by land or inland water through any route other than a route specified in a notification issued under clause (c) of section 7 for the import of such goods;

(d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force."

7.2 For proper application of the above quoted Section 111 of the Act, we also need to look into following concepts:

(i) Smuggling:

As per Section 2(39) "smuggling", in relation to any goods, means any act or omission which will render such goods liable to confiscation under section 111 or section 113. Therefore, if the gold bars in dispute are under the category of smuggled gold those shall be held liable for confiscation under Section 111.

(ii) Prohibited Goods:

In terms of the definition of 'prohibited goods in Section 2(33) even prohibited goods could be imported or exported, subject to compliance with the terms and conditions as prescribed but if import is not done lawfully as per the procedure prescribed under the Customs Act or any other law for the time being in force, in that event the said goods would fall under the definition of 'prohibited goods' The necessary corollary is that goods being imported if not subjected to check up at the customs on their arrival and are cleared without payment of customs duty are treated as 'smuggled goods.

In light of If the conditions for import of gold as per the notification issued by DGFT and the restrictions imposed by RBI 'gold' has to be treated as 'prohibited goods' under Section 2(33). If such 'Gold' imported or attempted to be imported contrary to any prohibition imposed by or under the Act or any other law for the time being in force, would be liable for confiscation. Consequently,

it would fall within the definition of 'smuggling under Section 2(39) which will render such goods liable to confiscation under Section 111 or Section 113 of the Act.

7.3 Having come to the conclusion that the gold seized of which the appellant claimed to be the owner if fails to prove by any valid documents of its purchase, gold has to be treated as 'prohibited goods' and gold falls under the category of 'dutiable goods' and if the liability to pay the customs duty is not discharged by necessary implication the seized gold becomes 'smuggled goods', are liable for confiscation under Section 111(d). Also absolute confiscation shall be justified where the trail of the events show that the possessor or owner of such gold is engaged in procuring gold of foreign origin in illegal. manner and the multiple stands taken by him on the face of it were false.

7.4 Hon'ble Supreme Court in the case of Om Prakash Bhatia Vs. Commissioner 2003 (155) ELT 423 (SC) enunciated the meaning to the term 'prohibited goods' as defined by Section 2(33) and the authority of the Customs department to confiscate the goods, observing as:

"10. From the aforesaid definition, it can be stated that (a) if there is any prohibition of import or export of goods under the Act or any other law for the time being in force, it would be considered to be prohibited goods; and (b) this would not include any such goods in respect of which the conditions, subject to which the goods are imported or exported, have been complied with. This would mean that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. This would also be clear from Section 11 which empowers the

Central Government to prohibit either 'absolutely' or 'subject to such conditions' to be fulfilled before or after clearance, as may be specified in the notification, the import or export of the goods of any specified description. The notification can be issued for the purposes specified in sub-section (2). Hence, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods."

7.5 This decision has been followed by Hon'ble Madras High Court in the case of **Malabar Diamond Gallery P. Ltd s. Additional Director General, Directorate of Revenue Intelligence, Chennai - 2016 (341) ELT 65 (Mad.)** and it is inter-alia observed:

"86. If there is a fraudulent evasion of the restrictions imposed, under the Customs Act, 1962 or any other law for the time being in force, then import of gold, in contravention of the above, is prohibited. For prohibitions and restrictions, Customs Act, 1962, provides for machinery, by means of search, seizure, confiscation and penalties. Act also provides for detection, prevention and punishment for sion of duty.

87. The expression, "subject to prohibition in the Act and any other law for the time being in force." in Son 2(33) of the Customs Act, has wide cannotation and meaning, and it should be interpreted, he context of the scheme of the Act, and not to be confined to a narrow meaning that gold is not enumerated prohibited goods to be imported into the country. If such narrow construction and meaning have to be given, then the object of the Customs Act, 1962, would be defeated."

7.6 Reverting to the facts of the present case, already under Issue No.1, the burden of proof with respect to 10 gold bars seized from Shri Dharmendra Kumar employee of the appellant has already been bifurcated. It has been held under Question No.1 that

with respect to 7 bars having foreign markings the burden of proof is upon the appellant in terms of section 123 of the Act to prove that 7 of those were not smuggled gold. Whereas for the remaining three bars since there was nothing except those were also found with 7 foreign marked bars, it has been held that there was no circumstance to reasonably believe that 3 gold bars were also the smuggled gold. The burden of proof rest upon the department itself to prove that 3 gold bars were also smuggled. Hence we record separate findings for both 7 gold bars of foreign marking and 3 gold bars of nothing engraved (each weighing 1 kg) as follows:

(i) Findings with respect to the 7 foreign marked bars:

This is an admitted fact that these bars were seized from possession of Shri Dharmender Kumar, the employee of the appellant being concealed in his checked-in baggage while he was travelling from Kolkata to New Delhi. On being enquired, the only document justifying his possession was a stock transfer voucher issued by M/s. N D Diamonds, Kolkata for M/s. N D Diamonds, Karol Bagh, Delhi. The perusal of the voucher reveals that it contains no details about the fine gold weighing 10 kgs to be in the form of bars (1 kg each). The document is absolutely silent to even reflect that 7 of them were of foreign origin. There is no denial of appellant also about foreign origin of the 7 bars i.e. the 7 bars were brought into India from the outside country. It has been specifically admitted that those have been illicitly brought into country. In such circumstances, in addition to the said voucher, since the burden was on the appellant to prove the licit possession, the appellant was

supposed to have the import documents for bringing those seven bars into Indian territory. But except the oral statement of appellant himself that he has been purchasing the foreign origin gold from various other jewelers, there is nothing on record. The statements of the proprietor/partner of such jewellers namely Maa Ambay, and Magma jewelers have been perused. Though they have acknowledged that they were in the trade of gold bullion including the foreign marked bullion but the entire sale is mentioned to be on the basis of invoice carrying all requisite details about markings, serial numbers and any other embossing of a particular foreign brand. There is a categorical statement that no gold bar of foreign origin has ever been sold by them to the appellant by defacing the bars/erasing the serial numbers thereof. Their invoices mention the specific serial numbers of the bars sold by them. The appellant has placed on record the invoices received from these jewellers, most of them have no details about the specifications of any of the gold bar. The invoices rather have been denied by the respective jewellers. Above all, none of them specifically corroborate the quantity seized in the impugned case.

7.7 Admission of possessor himself (Shri Dharmender Kumar) is on record where he has admitted that out of 10 gold bars recovered from him, 7 bars were having engraved foreign markings with tampered serial numbers. The said Gold Bars were smuggled illegally into India by the owners of M/s. N D Diamonds i.e Shri Kamal Kant Kulthia (the appellant) and Shri Manoj Kulthia.

7.8 He further admitted that the said tampering was done as per the instructions of both the said owners, so as to make their serial

number illegible. Their employers used to transfer smuggled gold from Kolkata to Delhi under the cover of stock transfer challans to hoodwink the probable detection of smuggled nature of these gold bars by the law enforcing agencies. The serial numbers of bars were erased/tampered so as to make it is impossible for the law enforcing agency to tally their serial numbers from the records of supply unit. After the delivery of gold bars to the buyers those stock transfer challans used to be destroyed by them.

7.9 Shri Dharmender Kumar further mentioned that such stock transfer challans used to be prepared by Shri Shankar Lal Soni, the accountant of the appellant at Kolkata office who also was aware about the smuggled nature of these bars and he was working on the instructions of the appellant. The appellant has failed to produce the said witness and to examine him to discharge his burden. The admissions are the best evidences and required no further proof. This admission of the possessor of seized gold when read with statement of the owners of M/s. Maa ambay, M/s. Magna and M/s. Anjani gold jewellers, it becomes clear that 7 gold bars of foreign origin were not purchased by the appellant from these jewellers. Since the invoices placed on record are denied by the jewellers named in the invoices, the stock transfer voucher is not at all a document to prove the licit possession of foreign gold. Appellant's own employee has admitted for the bars having foreign markings to be the smuggled gold and that These were illicitly brought from the outside country to Kolkata as per the continuous modus operandi of the appellant to transfer the smuggled gold along with the stock transfer of his old gold. In view of these observation, we hold that appellant has failed to discharge the

burden of proving licit possession of these 7 bars with Dharmender Kumar and that appellant is the licit owner thereof. The document would have been the import documents or at least the admission of person who would have validly imported the same. In absence thereof, burden of proof on the appellant stands undischarged. It stands established that the 7 gold bars of foreign markings were the smuggled gold bars. As already explained above that gold becomes the prohibited good, in such circumstance, the same is liable to confiscation in terms of section 111(d). Hence, we find no infirmity in the order under challenge wherein absolute confiscation of these 7 gold bars has been ordered.

7.10 Coming to the remaining 3 bars found along with the 7 foreign origin gold bars of 1kg each, we observe it to be the admitted fact that 3 of these bars have no markings nor even trace of any tampering/erasing. In view of the findings under Issue No. 1 above, it was for the department to prove that these 3 bars were also the smuggled bars. The order under challenge has relied upon the admission of Shri Dharmender Kumar/the possessor of these bars but we do not find any corroboration to that admission vis-à-vis these 3 gold bars as contrary in case of 7 foreign marked gold bars. We rather observe that Shri Madhukar, proprietor of M/s. Ganesh Refinery has corroborated the appellant's stand that 3 kg gold was the melted gold of old jewellery of appellant. Shri Madhukar has admitted refining the old jewellery weighing 4kg for M/s. N D diamonds. He also admitted that he normally used to melt old gold jewellery for the appellant. He admitted that 4kg of jewellery was converted into 3.5 kg bars. Though the adjudicating authority below has relied upon the Panchanama dated 13.03.2014

prepared at the time of search in premises of Shri Ganesh Refineries observing that there was no frame found for making 1kg bars. But the Panchanama itself clarifies that no frame even for one bar weighing 3.5 kg was recovered during that search. As already observe that whereas Shri Madhukar has admitted melting 4kg old Jewellery for the appellant.

7.11 The accountant of the appellant Shri Kailash Kumar Aggarwal has also corroborated that 3 pieces of gold of 1kg each were manufactured through job worker namely Ganesh Refinery, Kolkata. He further stated that Shri Dharmender Kumar is appellant's regular employee who used to carry Gold Bar and jewellery from Kolkata to Delhi and vice-versa. Thus we hold that there is sufficient corroboration to the appellant's testimony about 3 out of 10 gold bars were not procured from outside the country but got melted out of old jewellery with the appellants being in business of sale and purchase of gold ornaments as well. Department could not produce any evidence to falsify the said testimony on a record. No evidence has been produced by the department to show that 3 gold bars were also of foreign origin and the foreign markings as well as the serial numbers got defaced from these bars by the appellant. On the contrary appellant has successfully established that 3 gold bars were plain with no process of alleged tampering. In the show cause notice also no tampering has been alleged vis-à-vis 3 bars weighing 1000 gms each as apparent from the table given in the Para 2.1 of the showcase notice. Resultantly, we hold that department has failed to discharge their burden to prove these three bars to be smuggled gold. Thus, these 3 bars cannot be

called as smuggled gold. The order confiscating these 3 bars is therefore not sustainable. Same is hereby set aside.

8. Coming to the plea of penalty, since we upheld confiscation of 7 gold bars of foreign origin but set aside confiscation of 3 gold bars, we reduce the penalty imposed under Section 112 to Rs.7 Lakhs and penalty under Section 114AA to Rs.7 Lakhs. Consequent to entire above discussion, the order under challenge is modified by setting aside confiscation of 3 gold bars which has no foreign markings. The penalty is also reduced under Section 112 to Rs.7 Lakhs and also under Section 114AA to Rs.7 Lakhs. Rest of the impugned order, is hereby upheld. The department shall release the 3 gold bars within 15 days of receiving the present order. The appeal is partly allowed as above.

[Order pronounced in the open court on **27.09.2024**]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)