CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL ALLAHABAD.

REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 70437 of 2020

(Arising out of order in appeal No. 144 & 145-CUS/APPL/LKO/2020 dated 31.07.2020/ 19.08.2020 passed by the Commissioner (Appeals), Customs, GST & Central Excise, Lucknow).

Shri Sarvendra Kumar Mishra **Appellant**
@ Deepu Mishra
S/o Sri Ram Shankar Mishra
R/o 2N/3M, Bhawapur
Allahabad – 211016 (U.P.).

VERSUS

Commissioner of Customs **Respondent**
5th Floor, Kendriya Bhawan
Sector-H, Aliganj,
Lucknow (U.P.).

AND

Customs Appeal No. 70438 of 2020

(Arising out of order in appeal No. 144 & 145-CUS/APPL/LKO/2020 dated 31.07.2020/ 19.08.2020 passed by the Commissioner (Appeals), Customs, GST & Central Excise, Lucknow).

Shri Kishan Kumar Dhuria **Appellant**
R/o 242/313, Tulsipur P.S. Karaili
Allahabad.

VERSUS

Commissioner of Customs **Respondent**
5th Floor, Kendriya Bhawan
Sector-H, Aliganj,
Lucknow (U.P.).

APPEARANCE:

Shri Kartikeya Narain, Advocate for the appellants
Shri B. K. Jain, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER Nos. 70198-70199 / 2021

DATE OF HEARING: 04.08.2021
DATE OF DECISION: 06.09.2021

ANIL CHOUDHARY:

Brief facts of the case are that Shri Kishan Kumar Dhuria and Shri Ram Bol were travelling from Howrah to Allahabad on 16/17.01.2019 by Kalka Mail (in separate coaches); When the train reached Mugalsarai Station, in the morning of 17.01.2019, Shri Kishan Kumar Dhuria was intercepted by the officers of GRP; it was found that he was carrying gold; GRP Police Officers pulled him out of the train and seized gold weighing 1.9998 kg from his possession; However, as per the version of GRP, Shri Kishan Kumar Dhuria was intercepted at the foot over bridge of Platform No. 7 & 8; the GRP Officers called the Officers of Customs (P), Division Varanasi, at GRP Thana Mugalsarai, (now Pandit Deendayal Upadhyay Junction)on 17.01.2019 at about 16 hours; Shri Girdhar Gopal, Government approved valuer, on being called measured and valued the two pieces of gold bars 1999.810 gm (total wt.) to be valued at Rs. 65,59,377. Thereafter, the Customs Officers took the said Shri Kishan Kumar Dhuria with them alongwith the recovered two pieces of gold bars into their possession underSupratnama dated 17.01.2019, from GRP Police, and took him alongwith the recovered gold bars to the customs office at Varanasi for further action; the proceedings were witnessed by two independent witnesses.

2. Statement of Shri Kishan Kumar Dhuria was recorded under Section 108 of the Customs Act, 1962,on 18.01.2019 wherein he

inter-alia stated that he was working for Shri Deepu Mishra alias Shri Sarvendra Kumar Mishra (appellant) of Allahabad; he had departed from Allahabad on 15.01.2019 by Kalka Mail to Kolkata with Rs. 64.42 lakh, which was given by Shri Deepu Mishra, for purchasing and bringing of two gold bars totalling two kgs approximately; on reaching Kolkata, he stayed in Dropadi Dharamsala, where one person came to meet him; after speaking to Shri Deepu Mishra over his mobile phone, and on his direction he handed over the said amount of Rs. 64.42 lakh to that person; the said person gave him two pieces of gold bars (1 kg. each totally weighing 2 kg), not having any marking on the gold bars; no paper of gold bars was given to him at the time of delivery; as directed by Shri Deepu Mishra, he was going to Kanpur to deliver the gold to Mahendraji at Naya Ganj, Kanpur; he has earlier also visited Kolkata three times and had brought foreign origin gold bars for Shri Deepu Mishra of Allahabad; he does not know the name and address of the person who gave him the gold bar at Kolkata and he has never visited at the shop; as per his knowledge these gold bars are of foreign origin, which was brought through Bangladesh to Kolkata; at Kolkata the foreign marking of foreign gold bar is erased; Shri Deepu Mishra arranged for his travel on all occasions for bringing gold from Kolkata; in addition to the journey expenses he used to get Rs. 2,000/- for each trip from Shri Deepu Mishra. As it appeared that Shri Kishan Kumar Dhuria was a habitual offender; failed to provide the name and address of the person from whom he has received the gold recovered from him and failed to produce any documents for licit purchase of the gold, he was arrested on 18.01.2019 on the charge of smuggling of gold bars of foreign origin valued at Rs. 65, 59,377.

3. Call details of the Mobile number 7317374720 of Shri Kishan Kumar Dhuria for the period 01.11.2018 to 17.01.2019, indicated that Shri Kishan Kumar Dhuria has visited Kolkata sixteen times for bringing gold bars and that during his stay in Kolkata he was continuously in touch with the appellant - Shri Sarvendra Kumar Mishra on his mobile phone. In follow up search conducted on the business premises of Shri Mahendra ji at 49/62, 1st floor, Nayaganj, Kanpur on 19.01.2019, did not reveal anything and Shri Mahendra Omar stated that he was dealing in sarrafa / jewellery through his firm M/s Balmukud Mahendra Kumar Jewellers; he does not know any person in the name of Shri Kishan Kumar Dhuria or Shri Deepu Mishra; Enquiries conducted by Customs (P) Varanasi on 27.01.2019, indicated that Shri Sarvendra Kumar Mishra, was having business in the name of M/s Mishra Jewellers and dealing in gold and silver bullion, jewellery, etc; he has purchased two kg of gold of Indian origin from M/s Jallan Jewellers, 72, Manohar Das Street, Kolkata -700007, which is covered by proper GST invoice dated 15.01.2019; his employee Shri Kishan Kumar Dhuria was accompanied with Ram Bol another employee of his firm, and was carrying gold of Indian origin alongwith invoice for transit to Allahabad by Kalka Mail, Train No 12311. It appeared to the Revenue that only two kg of gold bars was purchased from M/s Jalan Jewellers, Kolkata vide GST invoice dated 15.01.2019; his other employee Shri Ram Bol was carrying the invoice and the gold bars; the said invoice revealed that M/s Jalan Jewellers sold 2000 gm

gold bar to M/s Mishra Jewellers; two pieces of gold bars (totally weighing 2 kg) seized from the possession of Shri Kishan Kumar Dhuria was in addition to the gold bar being carried by Shri Ram Bol; Shri Kishan Kumar Dhuria has reached Kolkata on 16.01.2019 and collected the gold bars, whereas the Invoice No. 01230 was issued on 15.01.2019 when Shri Kishan Kumar Dhuria was at Allahabad. Therefore, the gold recovered from the possession of Shri Dhuria is not the same gold as sold vide Invoice No. 01230 issued by M/s Jalan Jewellers; it appeared, three pieces of gold bars were being carried jointly by Shri Kishan Kumar Dhuria and Shri Ram Bol; neither Shri Mishra (the appellant) nor M/s Jalan Jewellers has clarified about the invoice number, mode of payment of the other gold bars being carried jointly by Shri Kishan Kumar Dhuria and Shri Ram Bol and the transactions in respect of earlier visits of sixteen times.

4. Further enquiry by Customs at Allahabad, revealed that the shop of M/s Mishra Jewellers, was lying closed on 24.01.2019; Krishna Kumar Verma (a resident nearby) stated that the premises of M/s Mishra Jewellers had been purchased by one Shri Sarvendra Kumar Mishra about six months back, and no shop is running in the said premises; the sign board of M/s Mishra Jewellers was fixed about 5-6 days earlier; the said locality is a residential area; it appeared that the appellant had affixed the sign board only in the name of M/s Mishra Jewellers to cover up for the transaction of gold bar; fabricated the documents in support of purchase of gold recovered from his employee, and avoided appearance before the enquiry officer. No body from M/s Jalan Jewellers, Kolkata turned up in response to

summons dated 24.01.2019; Shri Praveen Jalan brother of Prabhash Jalan (Prop. of Jalan Jewellers, Kolkata) appeared in the office of Customs on 04.02.2019 and stated that he is younger brother of the Proprietor of the firm M/s Jalan Jewellers; on request of Shri Prabhash Jalan, he came to attend the Customs Office at Varanasi. He further stated that he has no concern with M/s Jalan Jewellers. Shri Prabhash Jalan did not appear before the Customs to clarify the issue. It appeared that neither M/s Mishra Jewellers nor his employees have been able to give proper explanation as to the origin of gold bars; these gold bars it appeared, have been illegally imported through Bangladesh to India, pursuant to the sale/ purchase at Kolkata, were being carried to Allahabad/ Kanpur; foreign marking of the gold bars were erased in Kolkata in order to escape from the clutches of the law enforcing agencies.

5. Accordingly, the appellants, i.e. Shri Sarvendra Kumar Mishra and Shri Kishan Kumar Dhuria alias Lallu were issued show cause notice by the Additional Commissioner of Customs (Preventive), Lucknow as to why not the seized gold should not be confiscated and further penalty was also proposed on the appellants herein under Section 112(b) of the Act. Additional Commissioner, Vide order-in-original dated 22.11.2019, absolutely confiscated seized gold valued at Rs. 65,59,377/- under Section 111(b) and (d) of the Customs Act, 1962 and imposed penalty on the appellants under Section 112(b) of the Act. Appeals filed by the appellants were dismissed by Learned Commissioner (Appeals) vide common impugned order-in-appeal.

6. Commissioner (Appeals) held that as per the valuation report of the approved valuer, the purity of gold is 999.9%; Shri Kishan Kumar Dhuria was not having any documents for the licit procurement of gold; Shri Kishan Kumar Dhuria stated in his statement recorded under Section 108 of the Customs Act, 1962, that he had gone to Kolkata with cash of Rs. 64.42 lakhs to procure the gold and have also disclosed other trips in the recent past for procurement of gold, on payment of cash and have further stated that no invoice was given to him on delivery of gold under seizure, and further stated that the gold seized by GRP does not have foreign marking, as such markings are erased by the traders at Kolkata to conceal the foreign origin of such gold; on the basis of aforementioned premises, the Customs have formed reasonable belief that the gold was of smuggled nature; therefore, as per Section 123 of the Customs Act, 1962, the onus to prove licit source of gold have shifted on the appellant; had Shri Ram Bol been carrying the purchase document, he would have immediately joined the enquiry, which he did not do; Tribunal, in the case of **Nazir Ahmed vs. CC, Lucknow reported at 1998 (101) ELT 667**, held that gold bullion found to be high purity, and no documents produced to prove illicit purchase of gold, thus sufficient for reasonable belief to hold that the gold bullion are liable to confiscation under Section 110 of the Customs Act, 1962.

7. Shri Kartikeya Narain, Learned Advocate for the appellant urges that the whole storey of seizure by the GRP, that is of interception of Shri Kishan Kumar Dhuria at Mugarsarai Railway Station on foot over bridge is cooked and concocted. Actually, GRP official on

the finding that Shri Kishan Kumar Dhuria was carrying the gold in train, pulled him out and detained him. Thereafter, they have handed him over alongwith the gold to the Customs official, which fact is writ large on the face of the record. In this entire melee, the said Shri Kishan Kumar Dhuria had no opportunity to contact the said Shri Ram Bol, who was having the documents in support of gold. Admittedly, there is no foreign marking on the gold bars seized from Shri Kishan Kumar Dhuria. Admittedly, it is a case of town seizure and as such the onus was on Customs Officers to establish the allegation of smuggling which they have not done. As such the impugned order is fit to be set aside with consequential benefits. Learned Counsel further urges that the whole proceedings was orchestrated; customs officers, the GRP Police Station Mugalsarai and the valuer were already hand in glove; valuation report was tailor made and not independent; there was no independent Panch witnesses on the spot of seizure, drawl of Fard, nor at the time of handling over on the supurdginama to the customs; no sample of the Gold was drawn; the valuer had no mechanism whatsoever and howsoever to check the purity of the Gold Bullion, in carets and fineness, which could only have been done by drawing of sample, sending it to the laboratory and treating the same with some chemical compound which would give the exact purity of Gold and its fineness; the same cannot be checked using a touch stone; there is no averment or finding given in SCN, O-in-O or O-in-A, as to what process was adopted by the valuer to check the purity of Gold; appellants' had made several requests to the department for the test of Purity of Gold, by Government Laboratory.

8. Learned Advocate for the appellants submits that Panchnama was drawn at the office of the customs preventive Varanasi, wherein at Page no. 1 it was stated that Shri Girdhar Gopal approved valuer was called by the GRP Police, and in the supurdginama, the GRP inspector states that the approved valuer Shri Girdhar Gopal came along with customs officers; this contradiction surely creates an unpleasant situation; point to be noted is that Panch witnesses are Shri Shyam Kumar a labourer and Shri Rakesh Patel driver of the Customs department. He submits that in the case of Ramcharan Soni Vs. Commissioner of Customs (Prev.) Patna reported in 2001 (136) ELT 811 (Tri. Kolkata), this Tribunal held that as regards assay of the gold in question, it is noticed that the same was got done by Shri V.K. Barnwal, a Goldsmith, by touch stone method; Caratage of the gold indicated by him is only approximation and cannot be said to be a definite finding; in a matter where smuggled nature and foreign origin are attributed to the seized gold, it is expected of the Customs Officers to obtain an unassailable assay report from a competent and authoritative agency like Government Mint; it cannot be imagined that the Customs Officers are unaware of this requirement; Yet, they were rest content with the assay report of the local Goldsmith, who failed to express any categorical and definite opinion. He submits.

9. Learned Advocate further submits that the appellant requested the department many times for the cross-examination of the witnesses, but always it was denied by the department for no good reason. Hon’ble Madras High Court observed, in the case of Vijayaraj

Surana Vs. Commissioner of Customs, Chennai-III reported in 2016 (340) ELT 308 (Mad.),that

> *It has to be noted that each case has to be decided on its peculiar facts. Admittedly, statements have been recorded by the respondent from those three persons under Section 108 of the Customs Act, 1962 and the matter is at the threshold. Therefore, while adjudicating the show cause notices, if the respondent propose to relyon any of those statements, the petitioners should be given fair opportunity, because the show cause notices appear to be solely based upon the statements recorded from those three persons. Therefore, in my view, the facts of the present case would require opportunities to the petitioners to cross-examine those three persons, in the event the respondent proposes to rely upon their statements. If the respondent does not propose to rely upon those statements while adjudicating the show cause notices, then the question of affording an opportunity of cross-examination would not arise. However, for that reason, the petitioners should submit their reply to the show cause notices and at the time of adjudication, make a request to the authority for cross-examination, which shall be considered in accordance with law.*

10. Learned Advocate submits that the contention of the department is that the invoice issued by M/s Jalan Jewellers was related to 2 kg of one gold bar, which was brought by Shri Ram Bol, whereas, Shri kishan Kumar Dhuriya brought foreign origin 2 kg. (1 kg. x 2) gold bars in two pieces; in the invoice the weight of gold was mentioned not the number of Gold bars. M/s Jalan Jewellers issued

certificate that invoice no. GST/01230/18-19 dated 15.01.2019 issued by him was related to two pieces of gold bars 1000 gm each. The department had issued summons to the Proprietor of M/s. Jalan Jewellers to appear with all relevant papers i.e. sale register, purchase register, stock register, sales bill, ITR, Bank statement & AADHAR; all relevant papers were sent through his younger brother; however, the department denied to receive the same from his brother; they again sent all relevant papers by post; the entry of invoice No. GST/01230/18-19 dated 15.01.2019, is clearly mentioned in the register; even the details of payment through banking channel are also mentioned. He submits that Hon'ble Patna High Court, in the case of CCCE & S.T., Patna Vs. Gopal Prasad reported in 2020 (371) ELT 243 (Pat.) held that–

> *the Tribunal has given a categorical finding that the respondent No. 1 herein had produced retail invoices of M/s Bhawana International, in order to substantiate his claim that he had purchased two pieces of gold bars from Chandni Chowk, Delhi on 14.4.2014, and on his instructions his brother Chandreshwar Prasad Sah (respondent No. 3) had handed over the gold pieces to Sujeet Kumar (respondent No. 2) for carrying it to Patna to hand it over to Mahavir Prasad, to make gold ornaments in exchange of the said gold. It has also given a finding of fact that the proprietor of M/s. Bhawana International was shown only photograph of the seized gold when he denied that the said gold bars were not sold to respondent No. 1. The retail invoices of M/s. Bhawana International submitted by the respondent No. 1 containing VAT /TIN and PAN were never shown*

to its proprietor. It is not the case of the appellant that the bill and retail invoices are false and fabricated.

11. Learned Advocate also submits that the department's case is only based on the statement of Shri Kishan Kumar Dhuriya who stated that the Gold origin was from Bangladesh; there was no other corroborative evidence produced by the department that the Gold is of foreign Origin, was purely a figment of imagination.; the Gold bars seized don't have any foreign markings. Tribunal heldin the case of Principal Commissioner of Customs (Prev.), Delhi Vs. Ahamed Mujjaba Khaleefa reported in 2019 (366) ELT 337 (Tri.-Del.)

that it is seen that there is no foreign marking on the jewellery; Revenue has not placed any proof to substantiate that the jewellery was smuggled into India, other than the statement of the passenger; in the facts and circumstances of the case, I find no reason to interfere with the findings of the impugned order, which is sustained for the reason mentioned therein. In the result, Revenue appeal is rejected.

12. Learned Advocate further submits that according to the department burden of proof is on the appellant under Section 123 of the Customs Act, 1962, which has been discharged; but burden of proof could be shifted again on the appellant, only when customs officers have proper evidence to allege that the gold relates to foreign origin, and seizure was done by the custom officers. In the present case, both criteria were not fulfilled. Hon'ble Supreme Court, in the case of M/s Gian Chand &Ors Vs State of Punjab reported in 1983 (13) ELT 1365 held that-

The suggestion that the goods continued to be, at that stage, in the possession of the accused, does not embody a correct appreciation of the law as regards possession. A `seizure' under the authority of law does involve a deprivation of possession and not merely of custody, and so when the police officer seized the goods, the accused lost possession which vested in the police. When that possession is transferred, by virtue of the provisions contained in Section 180 to the Customs authorities, there is no fresh seizure under the Customs Act. It would, therefore, follow that, having regard to the circumstances in which the gold came into the possession of the Customs authorities, in the terms of Section 178A, which requires a seizure under the Act, were not satisfied and consequently that provision cannot be availed of to throw the burden of proving that the gold was not smuggled, on the accused.

13. Learned Authorised Representative Shri B. K. Jain appearing for the Revenue supports the impugned order.

14. Having considered the facts and circumstances, we find that admittedly this is a case of town seizure wherein, the impugned gold was intercepted, initially taken possession of by the officer of GRP and then handed over to the Customs. Admittedly, the gold did not have any tell-tale foreign markings and it was merely accused that the markings were removed to hoodwink investigation. The place where seizure took place is not Customs Area. Hon'ble Supreme Court in the case of Gian Chand & Ors(Supra), wherein in case of seizure by the Police and thereafter the possession was shifted to the Customs Officer

held that the pre-requisite of seizure is not satisfied. Accordingly, it is held that the circumstances as required under the Customs Act are not satisfied and consequentially the whole burden or onus to establish the smuggled nature of gold is on the Revenue.

15. Further, the only evidence relied upon by the Revenue is the statement of Shri Kishan Kumar Dhuria, wherein he stated that the gold may be of foreign origin, as according to his knowledge gold is smuggled through Bangladesh into India, which he received at Kolkata. We find that other than the statement of Shri Kishan Kumar Dhuria, no evidence is brought forth by Revenue to conclude that the impugned gold has been smuggled. We have perused the statement of Shri Dhuria and find that the information about the gold being smuggled from Bangladesh is very general in nature. We find that nowhere Shri Dhuria has confessed that the impugned Gold is smuggled from Bangladesh. It is not open for the department to draw conclusions from a general statement to particularise about the impugned goods. As admittedly, the gold having no foreign markings, the onus would be on department to prove the smuggled nature of the same. This onus was not discharged. Moreover, the provisions of Section 138B of the Customs Act have not been complied with and therefore, the sanctity of the statement recorded under section 108 has been lost and consequently, it cannot be conclusively relied upon.

16. The expert valuer has not subjected the gold to any analysis as to find out the purity of the Gold, which is also one of the determining factors. It is not clear as to how he has reported the purity

of the gold without testing. The original authority comes to the conclusion that the impugned gold is of foreign origin by alluding to a website which said that purity can be 995 onwards. Valuer is expected to arrive at the purity and value of the Gold in a scientifically established manner. If his services were required only to value the Gold, the same can be arrived on the basis of day to day Bullion rates announced by various exchanges. In addition to the above, fact remains that the Gold did not have any foreign markings; it has not been established that the same has been smuggled. The circumstances would certainly create reasons to believe that the impugned gold could be a smuggled one necessitating further probe. It does not constitute reasonable belief to seize the goods under Section 123 of the Customs Act, 1962. We find Tribunal in the case of Ram Nath Sah 2007 (219) ELT 546 (Tri – Kol)held that

> *I find that the seizure report does not indicate any foreign marking on the gold. The purity is also not of 999 generally found with the foreign origin gold. The seizure report also does not indicate the individual weight of the gold pieces. As such, this is a case where the benefit of doubt requires to be extended to the appellants as there is no conclusive proof that the gold is of foreign origin and smuggled*.

17. We further find that one of the appellants, Shri Sarvendra Kumar Mishra claimed the ownership of impugned gold by letter dated 22-1-2019 and submitted a GST invoice dated 15-01-2019 issued by M/s Jalan Jewellers, Kolkata, in support of licit purchase; payment of Rs 13,00,000 has been made; Rs 40,92,946 was adjusted by sale of Gold of 1293.190 gm to M/s Jalan Jewellers, Kolkata and balance of Rs 9,47,054 was paid on 12-02-2020. Such invoice produced has not been found to be untrue or false by the Revenue. The adjudicating

authority has given a finding that the Proprietor ofM/s Jalan Jewellers, Kolkata did not turn up on summons. We fail to understand as to what prevented the officers to search the premises of the same in Kolkata albeit by the officers of Customs in Kolkata. Having not done so, the department cannot wash off their hands just by saying that M/s Jalan Jewellers have not cooperated. We further find that the adjudicating authority finds that the Banking Transactions were not complete; the invoice did not have proper GSTN number and that GST returns were not filed. Staggered payments and adjustments are normal in the course of Trade. Revenue did not find anything to contradict the same. The issue before the authorities was to establish that the impugned Gold was smuggled nature and not to draw conclusions in an indirect manner by highlighting the violations under Income Tax or GST Law. Such an attempt would neither have the mandate of Law nor would establish the violations, if any, under the Customs Act, 1962.

18. We find that Hon'ble High Court of Bombay in the case of Union of India Vs Imtiaz Iqbal Pothiawala reported in 2019 (365) ELT 167 (Bom.), held as under:

> *(B)* ***Reg. Question (b) :-*** *(i)... (ii)....*
>
> *(iii). We are of the view that in the absence of evidence in the form of regular books of account, registration under the income-tax and Sales Tax, etc., cannot ispo facto lead to the conclusion that the seized gold bars, are smuggled gold bars. These may lead to proceedings for breaches of other Acts but it does not follow from it that the gold bars are smuggled goods. In fact, if a person in possession of the stolen gold is able to establish that it had come into*

> *India after a proper declaration and compliance of the Act, no confiscation under the Act, can arise. Proceedings under the Indian Penal Code may be initiated by the police for theft, but it would not by reason of theft become smuggled goods. Moreover, smuggling as defined under Section 2(39) of the Act, is an act or omission which will render goods liable to confiscation under Section 111 of the Act for import and 113 of the Act for exports. On reading of Sections 111 and 113 of the Act, not keeping proper books of account or not being registered with the income-tax and/or Sales Tax Authorities, is not an omission which renders the goods liable for confiscation i.e. smuggled goods.*

19. Further, we find that the adjudicating authority has come to the conclusion that the Gold seized is of 2Kg. evidence produced by the appellants pertained to one piece of gold, whereas Shri Dhuria was carrying 2 pieces totally weighing around 2kg; Shri Dhuria and Shri Ram Bol together were carrying more than two pieces. The appellant Shri Sarvendra Kumar Mishra, who claimed the ownership of impugned Gold, submitted vide letter dated 22.01.2019 that Shri Dhuria was accompanied by his another employee i.e. Shri Ram Bol and that while Shri Dhuria carried the Gold, Shri Ram Bol was having documents. Shri Ram Bol was not examined by the officers so as to contradict the claim of the appellants, claiming that he did not present himself before the officers. Considering the seriousness of the charge, it was incumbent upon the department to falsify the claim of the appellants. Shri Sarvendra Kumar Mishra was also not examined claiming that he did not turn up on summons. Examination of these two was crucial to the investigation. Under such circumstances the conclusions drawn by the

department are mere conjectures and an allegation of grave nature such as smuggling cannot be established on the basis of conclusions drawn on insufficient investigation.

20. We find that this Bench in the case of Mridul Agarwal Vs CC, Lucknow 2018 (362) E.L.T. 847 (Tri. - All.) held that-

> ***19.*** *Having considered the rival contentions and after going through the record, we find that Gold is not a prohibited item and can be imported upon payment of duty. Further, it is a case of town seizer and the customs officers have seized the Gold on the suspicion of smuggling, without there being any actual evidence of smuggling. We find that the whole case of revenue is based on the retracted statement(s) of appellant S.A. Khan and father of the other appellant Shri Mridul Agarwal. We further find that these persons are not examined in the adjudication proceedings and as such their statements are not admissible, as evidence under the provisions of Section 138B of Customs Act, which provides that - if an authority in any proceedings under the Act wants to rely upon the statement of any person (made during enquiry), such person is required to be examined as witness and if the adjudicating authority finds the evidence of the witness 'admissible', then such witness should be offered for cross-examination and only thereafter the evidence is admissible. In absence of compliance with the provision of Section 138B of the Act, the statements are not admissible as evidence and accordingly, the case of revenue against the appellants does not stand. We further find that the appellants namely Shri Mridul Agarwal and Shri Satish Kumar have categorically denied their connection with the seized Gold and in absence of any corroborative evidence the imposition of penalty on them is bad and fit to be set aside.*

21. We find that neither foreign origin of the gold nor the nature of the same being smuggled is conclusively established other than merely relying on the conclusions drawn from the statement of Shri Dhuria. We find that in the absence of action under Section 138B of Customs Act, 1962 by Revenue, statement of Shri Dhuria alone cannot be relied upon for sustaining the allegation of smuggling of gold, under the provisions of the Customs Act. We further find that no reasonable belief has been established that the impugned Gold is liable for confiscation. When good are not held to be liable for confiscation, no penalty can be imposed under Section 112 of Customs Act, 1962.

22. In view of our findings, as above, we allow both the appeals by setting aside the common impugned order-in-appeal with consequential benefits to the appellants. We further direct the respondent Commissioner to return the gold seized forthwith and/or if the gold has been disposed, to return the sale proceeds along with interest as per rules, within six weeks of the date of receipt or service of the copy of this order.

(Pronounced on-06.09.2021)

Sd/-

(Anil Choudhary)
Member (Judicial)

Sd/-
(P. Anjani Kumar)
Member (Technical)

Pant