IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL BANGALORE

REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 21533 of 2015

(Arising out of common Order-in-Original No. COC-CUSTM-000-COM-01-15-16 dated 13.04.2015 passed by the Commissioner of Customs, Custom House, Cochin – 682 009)

Shri P. P. Sunil Kumar **: Appellant**
Preventive Officer,
Commissioner of Customs, New Custom Quarter No. 126,
Willingdon Island, Cochin – 682 003

VERSUS

The Commissioner of Customs **: Respondent**
Custom House, Willingdon Island, Cochin – 682 009

WITH

Customs Appeal No. 21610 of 2015

(Arising out of common Order-in-Original No. COC-CUSTM-000-COM-01-15-16 dated 13.04.2015 passed by the Commissioner of Customs, Custom House, Cochin – 682 009)

Shri Shanavas M. **: Appellant**
Mukkath House, Padanilam (P.O.)
Kozhikode – 673 571

VERSUS

The Commissioner of Customs **: Respondent**
Custom House, Willingdon Island, Cochin – 682 009

WITH

Customs Appeal No. 21635 of 2015

(Arising out of common Order-in-Original No. COC-CUSTM-000-COM-01-15-16 dated 13.04.2015 passed by the Commissioner of Customs, Custom House, Cochin – 682 009)

Shri Subair Kallungal **: Appellant**
Bridge Town Apartment, Vandipetta,
Nadakavu, Calicut – 673 006

VERSUS

The Commissioner of Customs **: Respondent**
Custom House, Willingdon Island, Cochin – 682 009

WITH

Customs Appeal No. 21636 of 2015

(Arising out of common Order-in-Original No. COC-CUSTM-000-COM-01-15-16 dated 13.04.2015 passed by the Commissioner of Customs, Custom House, Cochin – 682 009)

Shri Ashruf Kallungal **: Appellant**
No. 59, M.C. River Side Enclave,
Kavumbagam, Thalassery, Kannur – 670 110

VERSUS

The Commissioner of Customs **: Respondent**
Custom House, Willingdon Island, Cochin – 682 009

WITH

Customs Appeal No. 21661 of 2015

(Arising out of common Order-in-Original No. COC-CUSTM-000-COM-01-15-16 dated 13.04.2015 passed by the Commissioner of Customs, Custom House, Cochin – 682 009)

Shri Thondandavida Kaniyan Kandi Faizal Faizas **: Appellant**
Faizas, Paral P.O., Kannur District – 670 671

VERSUS

The Commissioner of Customs **: Respondent**
Custom House, Willingdon Island, Cochin – 682 009

WITH

Customs Appeal No. 21662 of 2015

(Arising out of common Order-in-Original No. COC-CUSTM-000-COM-01-15-16 dated 13.04.2015 passed by the Commissioner of Customs, Custom House, Cochin – 682 009)

Shri Thondandavida Kaniyan Kandi Faiz Faizas **: Appellant**
Faizas, Paral P.O., Kannur District – 670 671

VERSUS

The Commissioner of Customs **: Respondent**
Custom House, Willingdon Island, Cochin – 682 009

AND

Customs Appeal No. 22296 of 2015

(Arising out of common Order-in-Original No. COC-CUSTM-000-COM-01-15-16 dated 13.04.2015 passed by the Commissioner of Customs, Custom House, Cochin – 682 009)

Smt. Hajira Koodakkara **Appellant**
W/o. Shri Abdul Latheef
Pulikkal, Koodakkara House, Mempad Post,
Naduvakkadu Malappuram District,
Kerala – 676 542

VERSUS

The Commissioner of Customs **Respondent**
Custom House, Willingdon Island, Cochin – 682 009

APPEARANCE:

Mr. B. Kumar, Senior Advocate
Mr. M.S. Sajeev Kumar, Advocate
Mr. Mohammed Zahir, Advocate
Mr. Swakenar, Advocate
Mr. B. Satish Sundar, Advocate
Mr. K. A. Sharafuddeen, Advocate

For the Appellants

Mr. P. Gopa Kumar, Addl. Commissioner(AR) and
Mr. P. Rama Holla, Superintendent(AR) For the Respondent

CORAM:

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

FINAL ORDER NOs. 20121 - 20127 / 2022

DATE OF HEARING: 07.01.2022

DATE OF DECISION: 29.03.2022

Per: P. Dinesha

1. Brief facts leading to the present dispute, as could be gathered from the Show Cause Notice dated 13.03.2014 and the impugned Order-in-

Original (O-I-O) are that the Revenue received intelligence that three passengers arriving by Emirates flight from Dubai to Cochin on 19.09.2013 were attempting to smuggle gold bars; that at around 03:45 A.M., two lady passengers accompanied by a girl child, were found waiting in the car park area along with their baggage outside airport, who were called back to the arrival hall; that thereupon, documents were verified; that upon questioning as to whether they were carrying any gold or other dutiable items, they answered in the negative; that one of the passengers namely Mrs. Arifa Haris stated that her husband was still in the arrival hall; that even the ladies were taken to the arrival hall where they were informed about the intelligence received regarding they carrying/smuggling gold bars; that a personal search was conducted which revealed that a black coloured jacket, worn by both the ladies, contained pouches where gold bars were hidden/wrapped in white packing tapes; that Mrs. Arifa is said to have stated that she had carried a 42" LG brand Television, which was handed over to an officer, who was wearing khaki uniform, after customs clearance; that the same was identified to have been brought from Dubai by her husband Mr. Haris Abdul Rahman, the co-passenger; and that they had not declared any import upon arrival at Cochin airport; that it was alleged that ten gold bars were recovered from each of the ladies, which the gold assayer certified to be of 1 kg each of 24 carat purity and the assessable value was arrived at INR 5,78,45,400/-, the market value of which was INR 6,38,03,476/-.

2. On reasonable belief, it was alleged that the said gold recovered was liable for confiscation under Section 111 of the Customs Act, 1962 and the same was seized under Section 110 ibid vide Mahazar drawn on 19.09.2013, along with the black coloured belt and the materials that were used for concealing/packing the above gold. The TV was also seized since the same was not declared, apart from other travel related documents.

3. Thereafter, the Revenue has recorded statements of various persons including the above three passengers who were apprehended on the eventful day of 19.09.2013. They include Mr. C.X. Francis, a havaldar attached to Customs House, Cochin, Mr. Sanjay Kumar Soni, Preventive Officer, Customs House Cochin, Mr. Joseph Jason, Mr. P.P. Sunil Kumar, Preventive Officer, Customs House, Cochin, Mr. T.Y. Alias, owner of Hotel Excellency. The statement of Mr. Umesh Raju, Operations Manager of Flora Airport Hotel was recorded on 20.09.2013.

4. Statement of Mrs. Arifa indicted one Mr. Abdulla of Dubai, who is the husband of Mrs. Asifa, the co-passenger and a friend of her husband Mr. Haris, as the person who gave her the gold bars to be smuggled into India; Mrs. Asifa had identified the person, who was addressed as 'Ikka' by her husband and who was also a friend of her husband Mr. Abdulla, who had placed 10 kgs of gold in her and Mrs. Arifa's bags, whose name she didn't know (paragraph 12, page 7 of the Order-in-Original). She appears to have even explained the *modus operandi*; that upon arrival at Cochin, they were to stay in a nearby hotel and hand over the gold to Mr. Haris, who would deliver the gold to the persons known to him. She has explained that on an earlier occasion, on 20.08.2013, she was accompanied by one Mr. Suhail; she didn't know much about him and he had arranged a room for stay at Hotel Flora, and that both of them had returned to Dubai on the same day. She has referred to her two more similar ventures on 27.08.2013 and 12.09.2013, when the same family of Mr. Haris accompanied her and on arrival at Cochin airport, they were received by a person, resembling the person who had handed them gold at Dubai, whose name she recalls as 'Faiz'.

5. Mr. T.K. Faiz was intercepted at the Indira Gandhi International Airport, New Delhi on 22.09.2013 while he was about to depart to Dubai by Emirates flight. His statement was also recorded under Section 108 ibid on the same date. Statement of one Mr. Naushad Ali was also recorded on 24.09.2013, apart from the statements of Mrs. Ayesha, Mr. C Madhavan, Deputy Commissioner of Customs on 03.10.2013, statements of Mr. Anil Kumar, Assistant Commissioner of Customs, Mr. M. Shanavas, owner of Ashida jewellery on 03.10.2013, statement of Mr. Abdul Rahim K.K. on 21.10.2013, and statements of Mr. Abdul Latheef and his wife Mrs. Hajira Koodakkara on 18.11.2013.

6. Based on the above investigation and statements recorded, it has been alleged by the Department that Mrs. Arifa Haris, Mrs. Asifa Veerappoyil and Mr. Haris Abdul Rahman have stated that the gold bars were handed over to them repeatedly by Mr. T.K. Faiz; that even the tickets for their travel were arranged by him and that he also arranged specially stitched jackets for the two of them. It is the further case that the three passengers had jointly schemed to smuggle 20 kgs of gold into India; that the above three passengers had failed to satisfy the requirement of six months stay abroad stipulated for the

import of gold as part of passenger baggage provided under Rule 3(1)(h) of the Foreign Trade (Exemption from Application of Rules in certain Cases) Order, 1993. By this, the confiscated gold bars having the assessable value of Rs. 5,78,45,400/- appeared to be liable for confiscation under Section 111(d) ibid, read with paragraph 2.20 of the Foreign Trade Policy 2009-14 and Sections 3(2), 3(3) and 11(1) of the Foreign Trade (Development and Regulation) Act, 1992.

7. It is further stated that the 42” LG brand television, which was brought by Mr. Haris from Dubai, was also seized on the reasonable belief that the same appeared to be liable for confiscation under Sections 111(j) and (l) ibid. Apart from the above, the three passengers were alleged to be liable for penalty under Sections 112(a) and (b) ibid; and Section 114AA ibid.

8. There is also an allegation that the two lady passengers had earlier smuggled into India 36 gold bars weighing 1 kg each which was by way of concealment and non-declaration on different earlier dates namely 27.08.2013 and 12.09.2013, which was also liable for confiscation under Sections 111(d), 111(i), 111(l) and 111(m) ibid. The total assessable value of the said 36 numbers

gold was worked out at Rs.10,49,63,840/-, based on which it was alleged that two lady passengers were liable to pay duty under Section 28 along with interest under Section 28(10) ibid.

9. It is also specifically averred that it was 'Faiz' who had masterminded the entire operation, had also maintained a close association with the officers namely Mr. P.P. Sunil Kumar, Preventive Officer, Mr. C Madhavan Deputy Commissioner and Mr. Anil Kumar, Assistant Commissioner, to ensure safe clearances of the three passengers who were alleged to be engaged in the smuggling of gold and that by this, the three officers had aided in the unhindered exit of the above passengers, by which act the above officers were liable for penalty under Sections 112(a) and 112(b) ibid.

10. A common Show Cause Notice dated 13.03.2014 was issued to 15 persons and a number of references have been made as relied documents, which include Mahazars and statements recorded under S. 108 ibid. Mrs. Arifa was called upon to show cause as to why apart from confiscation of 10 kg gold, penalty under Sections 112(a), 112(b) and 114AA ibid, not be imposed and duty equivalent to the value of the

gold smuggled on earlier occasions should not be demanded under Section 28(4) ibid.

11. Mrs. Asifa Veerappoyil was called upon to show cause as to why the 10 kg gold bars should not be confiscated, penalty under Sections 112(a), 112(b) and 114AA ibid. should not be imposed and duty equivalent to the gold smuggled on earlier occasions should not be demanded under Section 28(4), apart from penalty under Section 114A ibid.

12. Mr. Haris Abdul Rahman was called upon to show cause as to why the Television should not be confiscated under Sections 111(j), 111(l) and 111(m) ibid. apart from penalty under Sections 112(a), (b) and 114AA ibid.

13. Mr. Shanavas was directed to show cause as to why 6 pieces of gold seized from his shop not be confiscated under Sections 111(d) and 111(j) ibid. apart from confiscation of Rs. 3,42,700/- cash seized from M/s. Ashida Jewellery and penalty under section 112(a) and 112(b) ibid. should not be imposed.

14. Mrs. Hazira Koodakkara and Mr. Abdul Latheef were show-caused as to why the BMW car

bearing registration number KL–58B–5 should not be confiscated under Section 115(2) ibid. and penalty under Sections 112(a) and 112(b) ibid. should not be imposed.

15.1. Mr. T.K. Faiz, Mr. Ashraf K., Mr. Subair K., Mr. Abdulla K.K., Mr. Ahmed Suhail, Mr. T.K. Faizal, Mr. P.P. Sunil Kumar, Preventive Officer, Mr. C. Madhavan, Deputy Commissioner (Retd.) and Mr. Anil Kumar, Assistant Commissioner were also called upon to show cause as to why penalty under Sections 112(a) and (b) ibid. should not be imposed on them.

15.2. Mr. Sanjay Kumar Soni is the undisputed beneficiary of the Television set and one other officer namely, Dr. John Joseph, ADG, DRI is also named as the person who was known to Mr. T.K. Faiz, but however, they have not been put on any notice.

16. All the noticees have filed their written-replies seriously contesting the charge of smuggling of gold into India. They have also relied on the decisions of various judicial fora and also participated in the personal hearings offered to them on various dates.

17. The Adjudicating Authority namely, the Commissioner of Customs has, after considering objections and counters to the Show Cause

Notice, held in the impugned Order-in-Original as under:

(i) Gold bars of 20 kgs have been smuggled into India in flagrant violation of the provisions of the Customs Act, 1962, Baggage Rules and the Foreign Trade (Exemption on Application of Rules in certain cases) Order, 1993 and hence, the gold bars in question have assumed the character of prohibited goods as defined under Section 2(33) ibid. Consequently, the said gold bars are liable for absolute confiscation. Even with regard to the television set, he has held that same was also liable for confiscation.

(ii) With regard to the seizure of gold and currency from M/s. Ashida Jewellery, the adjudicating Commissioner has not accepted the Revenue's plea and consequently, has ordered the release of the same forthwith.

(iii) Regarding confiscation of the BMW car [Registration number KL–58B–5], the learned Commissioner has held that the same was covered by Section 115(2) ibid. whereby, any conveyance or even animal used as a means of transport in the smuggling of any goods shall be liable for confiscation unless the owner of the conveyance or the animal proves that it was so used without the knowledge or connivance of the owner. He has further recorded that the car in question was used by Mr. Faiz though it was registered in the name of Mrs. Hajira and that with the close relationship between Mr. Faiz and Mr. Abdul Latheef, the usage of car by Mr. Faiz could only be considered to have been done with the knowledge of Mrs. Hajira. Hence, the same was held liable for confiscation, as proposed in the show Cause Notice.

(iv) Regarding confiscation of 36 kg of foreign mark gold bars, the Adjudicating Authority has observed that none of the allegations against the three passengers have been repudiated; retraction was made later and the same would not invalidate their earlier statements made under Section 108 ibid. He has thus concluded that 36 kg gold had been smuggled through Cochin International Airport on three occasions, but the same were not available for confiscation and hence, he holds the two lady passengers liable to pay duty on the same under Section 28(4) ibid.

18. Mr. C. Madhavan and Mr. Anil Kumar, Officers, have been exonerated for want of evidence.

PENALTIES

19. **Mr. P. P. Sunil Kumar - Appeal No. C/21533/2015**

19.1. This appellant was alleged to be the Preventive Officer of Cochin Customs House and working in the Cochin International Airport. Allegation against him is that he had made arrangements for unhindered exit of passengers carrying the smuggled gold on three occasions. But however, this appellant had rebutted on the ground that he was working as SDO in the airport and his job involved Public Relations work as well; that Mr. Faiz was introduced by Mr. C. Madhavan, Deputy Commissioner. Further, he had only helped in speedy immigration/Customs clearance and that he did not have powers to bypass the metal detector frame, hand X-Ray, profiling, exit X-Ray and other procedures in place. The Commissioner, however, has brushed aside the counter filed by Mr. Sunil Kumar to hold that he did not demonstrate the amount of diligence required from him by acceding to requests repeatedly and going to the extent of requesting Mr. Faiz to send a TV set for a colleague, which act of omission amounted to abetting smuggling of gold bars which were liable for confiscation and hence, he had rendered himself liable for penalty under Section 112(a) ibid.

20. **Mr. M. Shanavas – Appeal No. C/21610/2015**

20.1. Allegations against him were that he had acquired possession of and sold the foreign marked smuggled gold bars from Mr. Ashraf and had made financial gains. Gold bars of foreign markings carry with them a special burden as per Section 123 ibid. The act having cast a liability on him to have arrived at a sustainable finding that the gold bars were validly imported and prior to handling the same, he was required to demonstrate such knowledge during the course of the instant proceedings. He, however, has failed to discharge this burden, and it logically follows that he had knowingly dealt with the smuggled gold. He was therefore held liable for a penalty under Section 112(b) ibid. It is a matter of record that no gold of foreign marking was seized, though.

21. **Mr. Subair Kallungal – Appeal No. C/21635/2015**

21.1 Show Cause Notice proposed imposition of penalty on this appellant under Sections 112(a) and (b) ibid. His role, as alleged, was that he was involved in transporting smuggled gold to the premises of Mr.

Shanavas and transporting the same to his brother Mr. Ashraf, the alleged financier. This appellant had also filed his detailed objections to the proposals made in the Show Cause Notice including questioning the jurisdiction, urging that the commissioner himself was involved in the investigation of this case and hence he should not adjudicate the proceedings. But the Commissioner has concluded that this appellant was involved in transporting the smuggled gold which was liable for confiscation under Section 111(a), which rendered him liable for imposition of penalty under Sections 112(a) and 112(b) ibid.

22. **Mr. Ashraf Kallungal – Appeal No. C/21636/2015**

22.1 Primary allegation against this appellant is that he is the person who financed the smuggling activities. The impugned Order-in-Original reveals the involvement of this appellant, but only through statements and apparently, the Revenue has no material piece of evidence as regards the involvement and exact role of this appellant in the alleged smuggling activity. This appellant had, in fact, questioned the very jurisdiction of the Commissioner in adjudicating the issue. The Commissioner, however, in the impugned order has held that the challenge to his jurisdiction as well as other objections were not sustainable. The Commissioner has thus concluded that this appellant had financed the smuggling operation, ordered and purchased gold bars, collected and sold them for a profit. This activity was held to amount to smuggling of gold which was liable for confiscation under Section 111 ibid. Therefore, this appellant was also held liable for penalty under Sections 112(a) and 112(b) ibid.

23. **Mr. T.K. Faizal – Appeal No. C/21661/2015**

23.1 The case against him was that he had collected the gold that was smuggled by Mrs. Arifa and Mrs. Asifa on the earlier occasions, i.e., on 27.08.2013 and 12.09.2013. But it is a matter of record that no such gold is found or seized. The further allegation is that he had transported the above ladies to Hotel Excellency. Reliance was placed on the CD containing the CCTV footage which was submitted by the owner of the hotel namely Shri T.Y. Alias; his photograph was also identified by the hotel staff; but however, he didn't appear in response to summons, rather filed his counter to the Show Cause Notice inter alia urging that he is having his own business set-up in Chennai; that he was never there in Cochin on the eventful day, nor did he go to the airport on any date; that statements of alleged gold carriers contained inconsistencies and were vague; that there was no corroborating evidence, and that he was falsely implicated without there being any evidence of his role. He has also contended that the revenue, having noted that he was in detention under COFEPOSA and released later, but never bothered to examine him under S. 108, to bring out the truth on record. It is a fact that he was detained under COFEPOSA and subsequently released by the Advisory Board. Only from the statements of other appellants, he is held to be involved in carrying and transportation of smuggled gold which was liable for confiscation under Section 111 ibid. and also liable for penalty under Section 112 (b) ibid.

24. **Mr. T.K. Faiz – Appeal No. C/21662/2015**

24.1 The charge against him for imposition of penalty under Section 112(a) ibid. was for his actions which amounted to abetting the smuggling of gold bars, which were liable for confiscation under section 111 ibid. Further, it is held that by organising the reception of the passengers carrying gold and the collection of smuggled gold through his brother Mr. T.K. Faizal on two occasions as well and by handing over gold meant for smuggling into India to the passenger, he had dealt with goods that he knew was liable for confiscation under Section 111 ibid., thus rendering himself liable for penalty under Section 112(b) ibid.

25. **Mrs. Hajira Koodakkara – Appeal No. C/22296/2015**

25.1 This appellant was put on notice for allowing Mr. Faiz to retain and use her BMW car [Registration No. KL-58-B-5] and that the use of the car by Mr. Faiz was within the knowledge of this lady, which thus rendered the said vehicle liable for confiscation under Section 115(2) ibid.

25.2 But however, the investigation did not bring any evidence to suggest the involvement of this appellant in the smuggling of gold or transportation thereof. Hence, the proposal for imposition of penalty on Mrs. Hajira was dropped.

26. **Mrs. Arifa Haris**

26.1 Customs duty was not paid by her on the previous occasions (based only on her visits as per visa entry in her passport) on account of deliberate mis-declaration of contents of a baggage by this lady and hence, she is liable for penalty under Section 114A ibid.

26.2 Her action in attempting smuggling of gold has rendered her liable for penalty under Section 112(a) ibid.

26.3 Her action in deliberately mis-declaring the contents of a baggage on 27.08.2013, 12.09.2013 and 19.09.2013 renders her liable for penalty under Section 114AA ibid.

26.4 Hence, based on above it was concluded that Mrs. Arifa Haris was liable for penalty under Sections 112(a), 114A and 114AA ibid.

27. **Mrs. Asifa Veeraoppoyil**

27.1 Customs duty was not paid by her on the previous occasions (based only on her visits as per visa entry in her passport) on account of deliberate mis-declaration of contents of a baggage by this lady and hence, she is liable for penalty under Section 114A ibid.

27.2 Her action in attempting smuggling of gold renders her liable for penalty under Section 112(a) ibid.

27.3 Her action in deliberately mis-declaring the contents of a baggage on 27.08.2013, 12.09.2013 and 19.09.2013 renders her liable for penalty under section 114AA ibid.

27.4 Based on the above it was concluded that Mrs. Asifa Veeraoppoyil was liable for penalty under Sections 112(a), 114A and 114AA ibid.

28. **Mr. Haris Abdul Rahman**

28.1 He was involved as an accomplice in smuggling of gold bars on 27.08.2013, 12.09.2013 and 19.09.2013(based only on her visits as per visa entry in her passport); had also vide his action rendered the 42" LG television set, which was seized on 19.09.2013, liable for confiscation under Section 111 ibid; and thereby had rendered himself liable for penalty under Sections 112(a) and 114AA ibid. Further, for his role as accomplice in facilitating the smuggling of gold on 27.08.2013, 12.09.2013 and the attempted smuggling of gold on 19.09.2013 which gold is liable for confiscation under Section 111 ibid, he is liable for penalty under section 112 (a) ibid.

29. **Mr. Abdul Latheef**

29.1 The proposal to impose penalty on this noticee was dropped for want of evidence even though he was alleged to have maintained close association with Mr. Faiz, which was held sufficient to order confiscation of BMW car which was in the name of his Wife Mrs.Hajira.

30. **Mr. K. K. Abdullah**

30.1 Show Cause Notice proposed imposition of penalty under Sections 112(a) and 112(b) ibid. for his alleged role in organising the passengers for smuggling gold at Dubai and allegedly assisting Mr. Faiz at Dubai airport by handing over gold to be smuggled, to lady passengers. It is observed in the impugned order that this appellant's role has been brought out in the statements of the two lady passengers, but however, he did not respond to any of the summons issued to him. The Commissioner proceeded to hold him liable for penalty under Sections 112(a) and (b) ibid. as proposed, based on the investigation / statements available on record.

31. **Mr. Ahmed Suhail**

31.1 He was also called upon as to why penalty under Sections 112(a) and (b) ibid. should not be imposed on the ground that he had accompanied Mrs. Asifa during her journey from Dubai to Kochi on 20.08.2013. The Commissioner in the impugned order has, after considering the statements of various other persons, held that by his actions, he had abetted in smuggling gold which was liable for confiscation and consequently, liable for penalty under Section 112(b) ibid.

32. **Mr. C. Madhavan, Dy. Commissioner (Retd.)**

32.1 Allegations against him in the Show Cause Notice were that he had maintained close acquaintance with Mr. Faiz and that he had facilitated unhindered clearance of passengers who are smuggling gold, for which he was gifted with 42" television set, apart from cash of Rs. 4 lakhs. He also has filed a detailed reply countering the allegations levelled against him, but the Commissioner, however, has held that neither Mr. Faiz nor Mr. Sunil Kumar have stated about the direct involvement of this noticee in the unhindered clearance of the passengers, except one statement of Mr. Faiz dated 22.09.2013 wherein Mr. Faiz was said to have been introduced by this noticee to Mr. Sunil Kumar. In the same breath, the Commissioner has observed that neither this person nor Mr. Sunil Kumar had the knowledge about the gold being smuggled. Interestingly, there is also a reference to the report sent by CBI about gifting a 42" LG television to this person and a cash of Rs. 4 Lakhs, which has been held to attract action under the provisions of Civil Service Conduct Rules and Prevention of Corruption Act, for which separate proceedings were already commenced by the CBI. On this excuse, the Commissioner has held that there was no evidence that was gathered during investigation against him and his involvement; that he was also held to be not the officer in charge when the alleged smuggling took place and that the act of introducing Mr. Faiz to Mr. Sunil Kumar could not be considered to be an act of omission or commission aimed at facilitating smuggling. Also, the investigation did not bring any evidence to this effect that the facilitation was done with the knowledge and approval of this noticee. The Commissioner has thus exonerated this noticee of the charges made against him and has held that the proposal of imposing penalty would not sustain.

33. **Mr. Anil Kumar, Assistant Commissioner**

33.1 Penalty under Sections 112(a) and 112(b) were proposed for his maintaining close association with Mr. Faiz, which had resulted in smuggling 36 kgs gold on three occasions for which, this person was alleged to have received Rs. 5 lakhs cash from Mr. Faiz, apart from a 42" LED television and a treadmill. After considering the detailed reply given by this noticee, the Commissioner has exonerated this noticee also of the charges levelled against him. The Adjudicating authority has accepted his plea that Rs. 5 lakhs received was not a gift but a loan and that there were no other evidences on record as to his involvement in facilitating unhindered clearance of passengers involved.

34. These appeals are therefore filed by:

i. Mr. P. P. Sunil Kumar
ii. Mr. Shanavas M.
iii. Mr. Subair Kallungal
iv. Mr. Ashraf Kallungal
v. Mr. T.K. Faizal
vi. Mr. T.K. Faiz and
vii. Mrs. Hajira Koodakkara

Wherein, the appellants have only questioned the penalty imposed under Sections 112(a), 112(b), 114A and 114AA ibid. and hence, we are constrained to examine whether the findings vis-à-vis allegations duly supported by evidences are sufficient, to justify/sustain levy of penalties.

Insofar as the relief extended by the Adjudicating authority to some of the notices and two officers is concerned, however, it seems that the revenue has accepted the same since there is no appeal filed by them.

35. Heard Mr. B. Kumar, Learned Senior Advocate, and Mr. M.S. Sajeev Kumar, Mr. Mohammed Zahir, Mr. Swakenar, Mr. B. Satish Sundar and Mr. K.A. Sharafuddeen, Learned Advocates for the appellants.

35.1. The contentions of the Ld. counsel for the appellants, inter alia, are multi-fold, that the penalties in question have been levied only based on the uncorroborated statements recorded under Section 108 ibid. and that there is no other documentary evidence brought on record by the Revenue in support. They would *inter alia* urge that the no opportunity to cross-examination was given to any of the appellants despite their repeated requests since statements relied upon by the Revenue are inconsistent, by virtue of which alone they are unreliable being uncorroborated; that the copy of the photographs shown to some of the persons are so smudged and beyond recognition that the identity based on such photographs was impossible; that what was expected under law was an identification parade or at least they should have showed many photographs and asked the persons to identify, but they were shown just one photocopy of photographs, that too which were so unclear, which is not a sufficient piece of evidence.

35.2. They would also contend *inter alia* that the Adjudicating Authority has chosen a part of the statements recorded under Section 108 ibid. to justify the penalty, when the other part carried serious allegations against some of the persons including the officers of the Department, who were exonerated; and hence, the impugned order is susceptible to serious suspicion, the same suffers from being biased and that the Adjudicating Authority has adopted double standards in weighing a single piece of evidence to suit his convenience. They would also urge that Thangal Rahim, who himself admitted to be a hawala operator has also been let of even though he and his role was identified by two persons, while it was expected that officers should have diligently brought the above information to the notice of the concerned govt. wing like CBI, or NIA, etc, but his statement has been accepted as gospel truth, without providing an opportunity to cross examine him.

35.3. It was also vehemently contended the revenue did not even issue SCN to Thangal Rahim, but still he chose to voluntarily appear before the authorities just to give statements, on 21.10.2013 and 23.10.2013, by which date Mr. Faiz's 2 statements wherein Mr. Rahim had already been indicted as the person accompanying Abdulla of Dubai and the person who offered share to Faiz as well. This, according to Ld. Counsel, is a serious matter since it was Rahim who was the actual mastermind and hence his omission was deliberate for which the revenue has to answer. It was further contended that in his voluntary statement dated 21.10.2013, Rahim himself has admitted that he was conducting hawala transaction from Saudi to Dubai from which he was earning commission, which fact also tallied with the statement Faiz, which the Commissioner has ignored for unknown reasons, but has chosen to accept retraction statement of Faiz alone while the retraction statements of alleged gold carriers have not been accepted alleging the same as an after-thought. It was therefore contended that Rahim was introduced only with an intention to nullify the earlier statements of Mr. Faiz which contained serious revelations, to safeguard the interest of officials who knew him very well.

35.4. It was further contended, without prejudice, that even the amount of penalty levied is also huge and disproportionate and the same is levied without clarifying who the actual importer was. It was seriously urged that when the revenue seized the letter under mahazar from Haris by M/s. A.U. Jewellery indicating that Haris had purchased the gold bars, why no further investigation was done so as to identify the buyer or the importer, but nothing was placed on record. They have vehemently contended that when revenue had so many leads, there should have been a fair and proper investigation into such a serious matter which would have brought actual facts on record and the culprits as well, but instead the OIO has simply relied on inconsistent and contradictory statements to penalise the appellants and that there is not even a single independent witness who has been examined by the revenue.

36. *Per contra*, Mr. P. Gopa Kumar, Learned Additional Commissioner(AR) and Mr. P.R. Holla, Learned Superintendent(AR), argued for the Revenue.

37. **Revenue's arguments:**

(i) Mr. Umesh Raju, Operations Manager vide his statement has identified that Mr. Suhail had stayed in his hotel on 20.08.2013; another person who was in the car tried to enter the room, to which he objected and that the visitor was identified after looking into the printout of the photograph shown by Revenue.

(ii) Mrs. Asifa, one of the alleged carriers of gold, also identified the other person who was in the car with Mr. Suhail as Mr. Ashraf. She was taken to Hotel Flora; that room rent was given by Mr. Ashraf; that it was Mr. Ashraf who quarrelled with Mr. Umesh Raju on being objected to; that this lady was also shown the printout of photograh which identified as Mr. Ashraf.

(iii) It is recorded from her that Mr. Ashraf indicated that he would go to her room to collect the gold, but since there was a quarrel, she handed over gold to Mr. Suhail who delivered the same to Mr. Ashraf.

(iv) Mr. Faiz is said to have stated that smuggled gold was collected by his brother Mr. Faizal on the earlier two occasions.

(v) Challenge to Jurisdiction has been well answered in the OIO.

(vi) There is no violation to Natural justice since it has been held by various courts that Cross examination is not a right and that statements could be relied upon.

(vii) When confession is available of all the appellants, then there is no need for any other evidence.

(viii) In the OIO the authority records that the CJM had brought on record that there was no internal or external injuries …… as noted by the doctor.

(ix) They rely on statement of Faiz dated 11.10.2013 urging that this one was not retracted and hence is to be accepted.

(x) Gold carriers had admitted to the role of Faiz.

(xi) Identification of photograph coupled with other corroborative evidences such as statements of third persons, etc are sufficient to implicate Faiz as an accomplice.

(xii) Regarding Ashraf, the other appellant namely Faiz had deposed that the gold was handed over to him by Ashraf, which was collected by himself or his men.

(xiii) Shanavas M had also deposed to have purchased smuggled gold bars from Ashraf and that there were regular telephone calls by Ashraf, and had also mentioned his phone No.9895005566.

(xiv) Umesh Raju's deposition is relied to support that Raju identified from the photograph as the person who had come with Suhail, with whom he had quarrelled.

(xv) Asifa has also stated that it was Ashraf who had come to pick up from airport on 20.8.2013 in a big black car when she came with Suhail.

(xvi) In his statement dated 11.10.2013, Faiz has stated that gold was collected by his brother Faizal on 2 occasions, which was not retracted.

(xvii) Investigation has brought on record submissions of various persons, well corroborated by certified photographs and other independent material like hotel records to establish presence of Ashraf in India during that time.

38. We have considered the rival contentions and gone through the documents placed on record meticulously. We have also gone through the decisions/orders of various courts relied on during the hearing. Neither the seizure has been challenged in these appeals nor any of the passengers from whom gold was seized have filed any appeals. The appellants in these appeals are those against whom penalty under Ss. 112(a)/112(b)/114A/114AA have been imposed. The issue before us therefore, is the challenge to levy of above penalties. In the impugned order, at page No.149, the Commissioner has summarised the penalties on various notices; insofar as Shri Ashruf Kullangal [appellant No.(iv)] and Shri T.K. Faiz [appellant No. (vi)], penalty has been imposed under Section 112(a) & (b). Section 112 can be invoked for imposing penalty on any person for violation specified under (a) 'or' (b) and it can never be for (a) '&' (b) because, there is a clear and disjunctive 'or' between the two limbs (a) & (b), which gives no room to read the same as 'and' since the breach defined in (a) is distinct and that in (b) is distinct. Therefore, the penalty imposed under Section 112(a) '&' (b) for alleged improper importation of goods etc. is unsustainable. For this reason alone, we are prima facie satisfied that the penalty levied at least on two of the appellants i.e., Shri Ashruf

Kullangal and Shri T.K. Faiz cannot be sustained and accordingly, the same is set aside.

39. Admittedly, the ladies, i.e., the alleged gold carriers had gone out of the airport and it is also mentioned in the Order-in-Original that they were waiting for their fellow passenger outside the airport. Secondly, there was a search on Mr. Haris, the male passenger accompanying the alleged gold carriers, which had resulted in the seizure of a letter by M/s. AU Jewellery, Dubai. These two vital facts are not only ignored before levying the penalty, but has never been discussed in the OIO. Hence it appears to us that there has been some confusion on the part of the Revenue and it appears that there is something which is not properly explained and brought out either in show-cause notice or Order-in-Original.

40. Admittedly, although the Customs authorities undertook massive investigation, yet no concrete evidence is place before us and the whole case appears to have been built on mere statements purportedly recorded under Section 108 *ibid*. While there is allegation of similar imports on the earlier occasions, but in connection with same no material or even the fate of gold allegedly smuggled, is brought on record. The entry/visa stampings in the passport alone in the

absence of some evidence, doesn’t lead us anywhere. Other than this, we do not see any other evidence on record except confessional statements of alleged carriers, that too, which have been retracted on a later date. The other piece of so-called evidence in the form of statements of Umesh Raju and Aliays are also not throwing any light as mere staying in the hotel cannot take us anywhere. Moreover, they haven’t stated as to witnessing any activity of loading or unloading of gold by their customers/visitors.

But we have examined and found that those statements are also inconsistent and hence reduced to be unreliable, and therefore, their evidentiary value would have to be very carefully examined before counting on them. Admittedly there are no independent eye witnesses who have been examined, nor any documentary evidence placed on record to corroborate statements recorded under Section 108 *ibid*. One piece of valid document was a letter by A.U. Jewellery which though seized under a mahazar, but nothing more is brought on record and seriously, we do not understand the purpose of its seizure. When a statement of one person implicates another, then it is most rudimentary that such another person should get a chance to cross examine the person who has stated against him, which, even the principles of natural justice also demand. So, such un-corroborated statement of one cannot become a conclusive proof to crucify another, without following the process of law. This becomes rather a necessity when only statements, that too which are inconsistent, are relied upon, like in the case on hand. Such statements therefore, could at best be a lead, requiring further investigation, by the concerned authorities. But to our dismay, apparently, there is no such move as could be seen from the OIO or the documents placed before us. Hence it is our responsibility to critically analyse, before applying such statements here.

41.1 **Regarding 36 Kgs of gold allegedly smuggled on the earlier occasions:** Admittedly, there is no direct evidence for this. The same is based on the statements of so-called carriers. No one has seen them loading/unloading the gold, other than the entries in the respective passports. It is a pure 'golden' castle in the air built on statements again. Though the narration of the whole story is attractively designed, but the law requires that the preponderance of probabilities be in favour of this version, and of course seizure of the whole or any part of the same, to declare a person guilty.

41.2. So far as the gold alleged to have been smuggled on the earlier occasions of 36 kgs, the Revenue has simply relied on the statements of alleged careers and nothing else. Other than this there is not even a single piece of evidence to corroborate that 36 kgs gold bars were smuggled on earlier occasions. It is a different matter if at least the alleged gold bars were available or at least its destination was known. No one has claimed responsibility nor ownership and not the source is also not identified. When the so-called carriers are said to have smuggled the gold, including the person to whom the same was delivered upon their arrival in India, no effort has ever been made to track that recipient, nor is there any follow-up action to ascertain its veracity. Hence, we totally disbelieve this part of the story and do not endorse levy of penalty insofar as it relates to 36 Kgs, against the appellants before us. To this extent therefore, appeals are allowed and penalties are set aside.

ANALYSIS OF STATEMENTS RECORDED – AS REPRODUCED IN O-I-O.

42.1. **Mrs. Arifa Haris :** It is recorded in her first statement dated 19.09.2013 that her husband Mr. Haris Abdul Rahman was engaged as a tourist guide in a desert safari at Dubai; that during personal search upon arrival at Cochin International airport on 19.09.2013, ten gold bars of one kg each were recovered, those gold bars were given to her by one Mr. Abdulla, a friend of her husband and husband of Mrs. Asifa at the Dubai airport; that she had smuggled gold of 8 kgs each on an earlier 2 occasions. The same was to be smuggled into India to be given to her husband's friend in India and they also had carried a TV set which was given to a person in khaki uniform. Second statement was recorded on 30.09.2013 wherein she has stated that the gold bars were handed over to them by a bald man whose photograph was shown to her and whose name was told by her husband as 'Faiz'; that she also identified Mr. Abdulla from the photograph shown to her and also identified two other persons whose photographs were shown, who were identified by her as Thangal Rahim and Jaleel. She however failed to identify the photograph of Mr. Suhail, but identified the person in the other photograph shown to her as the one who received them twice at the airport and took them to Hotel Excellency. Identity of only Faiz is highlighted while that of Rahim and Jaleel is not spoken about. Though the statements of Mr. Rahim and his brother Mr. Nushad were recorded, as contended by the learned Counsel, but they were not put to notice, for reasons best known to department.

42.2. **Mrs. Asifa :** It is recorded in her first statement dated 19.09.2013 that her husband Mr. Abdulla was also engaged as a tour guide in a desert safari at Dubai; that during personal search upon arrival at Cochin International airport on 19.09.2013, 10 gold bars of one kg each were recovered; that those gold bars were placed in her and Mrs. Arifa's bag at Dubai airport by a person known to Mr. Abdulla; that her husband who was addressing that person as 'Ikka', whose name and other details were not known to her; that she had smuggled gold bars of 4 kgs, 8 kgs and 8 kgs each on earlier 3 occasions. On 20.08.2013, she is said to have stated that at that time she came with one Mr. Suhail whom she didn't know; both of them checked-in to a room in Hotel Flora and that she returned to Dubai the same day. It is further recorded that on 27.08.2013 and 12.09.2013, Haris and family came with her; that on both these dates, she carried 8 kgs. of gold bars and on both these occasions she stayed with the same family in a hotel and gold bars were taken from her and handed over to a friend of Mr. Haris who came to their hotel room; that he resembled the person who handed over gold bars to them at Dubai and that it was Mr. Faiz. It is recorded in her next statement dated 30.09.2013 that she identified Mr. Suhail from the photograph shown to her; that she was introduced to Mr. Faiz by her husband; that Suhail went with her as directed by Mr. Faiz and carried 4 kgs of gold; that she identified Mr. Faiz from the printout of the photograph shown to her and also identified the photograph of her husband Mr. Abdulla; that both of them upon arrival did not declare gold but contacted the phone number given by Mr. Faiz, when a big black car came to pick them up, which was driven by one 'Ashraf', who was addressed as such by Mr. Suhail; that they went to Hotel Flora and hired a room for which payment was made by Mr. Ashraf, he could not enter their room who had an argument with the staff; that the gold was given to Mr. Suhail who delivered the same to Mr. Ashraf. She is alleged to have identified the photograph of Mr. Ashraf which was shown to her; that on the next occasion, she was taken to Hotel Excellency by a person who resembled Mr. Faiz, in a white car whose photograph she could identify.

42.3. Mr. Suhail's statement, as per paragraph 74.9 at page 49 of the Order-in-Original reveals that he was introduced to the 'lady' mentioned in the Show Cause Notice at the Dubai airport by lady's husband and since he was unable to accompany his wife as he did not get permission to travel to India, he requested Suhail to accompany her to India as she was pregnant and that upon arrival, her cousin would pick her up; that at the Cochin airport, the lady told him that her cousin had not come, but a friend of her cousin had come whom she didn't trust (she identifies this person who had come there); that thereafter, the lady requested him to accompany her to her house or hotel and thus both of them went to hotel where, the same person – friend of her cousin – came to their room to pick her up which was objected to by the hotel security; that he left her there and stayed in another hotel and later on he came to know that her cousin had picked her up and that he was unaware of her visit to Kerala. So, if Mr. Ashraf is the person who picked them up from airport, then Suhail would have definitely identified him whom Mrs. Asifa referred as her cousin's friend who had come to pick her up from airport and from hotel also, as per Suhail.

42.4. The stark contrast between statements of Mrs. Asifa and Mr. Suhail do not require a lens-eye: first of all, Mr. Suhail doesn't even know what Mrs. Asifa was up to, he does not even identify Mr. Ashraf, never says that they were picked up from airport by Mr. Asharf in a black car; that Mr. Ashraf paid for their room, etc. He has nowhere identified or even named Mr. Ashraf. Hence, whatever Asifa is said to have stated doesn't match with the say of Suhail despite the fact that both travel together and stayed together. Mr. Suhail has stated that the 'security' of the hotel obstructed when the other person tried to enter their room, while Mrs. Asifa has stated that it was a 'staff' who took objection and with whom 'Ashraf' had arguments. Also, Mrs. Asifa has nowhere mentioned about her cousin coming to pick her up from the airport but his friend came instead. Further, Mr. Umesh Raju's revelations, as extracted at paragraph 22, page

11 of the impugned order refers to 'in' and 'out' columns of the register, which were alleged to be wrongly written by the security; that those entries were corrected by the next security; that the other person who was in the car tried to enter the room which was objected to by him and who had quarrelled with him. Looks very simple and easy that a security could record 'wrong' timing as regards 'in' and 'out' are concerned which could be 'corrected' at the convenience of next security, but nothing is placed on record to indicate as to who was maintaining that register and who was recording 'in' and 'out'. To this extent therefore, statements of both the security should have been obtained, and the register could have been placed on record, to strengthen the case. Absence of these only doubles our suspicion as to the whole story based on the statements which suffer from serious contradictions. So, in the given facts and circumstances of this case and in the absence of primary evidence, placing reliance solely on the inconsistent statements to inculpate another person is not sustainable being opposed to the well-established golden principle that "ten guilty may escape, but a single innocent shall not suffer". If Mrs. Asifa's version is true, then it is only Mr. Suhail who knew Mr. Ashraf because she has stated that she had heard Suhail, who is stranger to her, calling the other person's name; but Mr. Umesh Raju was able to identify Mr.

Ashraf when Mr. Suhail himself has only said 'other person' and has not taken anywhere Mr. Ashraf's name.

43.1. **Mr. Haris Abdul Rahman :** In his first statement dated 19.09.2013, it is recorded that they were apprehended at the Cochin airport upon arrival wherein, gold bars were recovered from the personal search of his wife and Mrs. Asifa, a letter from M/s. A.U. Jewellery, UAE, from him regarding purchase of 20 Kgs gold; that it was Mr. Abdulla who had tempted him with the offer of Dirham 1000 per kg of gold smuggled into India; that on 27.08.2013, he had managed with his wife to smuggle 8 kgs of gold bars which was handed over to the recipients in Hotel Excellency; that they repeated on 12.09.2013 with both the ladies carrying 8 kgs of gold bars and waited outside the airport in the car park area as instructed by Mr. Faiz; that 2 persons came there and took them to Hotel Excellency where they handed over 16 kgs of gold bars to those persons who received them at the airport and returned to Dubai the very next day. They all came again on 19.09.2013, when the gold bars were seized. It is recorded that his further statement dated 30.09.2013 didn't yield anything to the Revenue.

43.2. This so-called carrier also didn't reveal anything about the involvement of any other person/s but specifically implicates Mr. Faiz as the person who had handed over the gold bars to be smuggled into India. Further, there is a mahazar drawn after search on him which exposed the letter of A.U. Jewellery, it was for the revenue to undertake further probe, to get into the bottom of the issue, to at least see if the purchaser was Haris or anyone else. The contrast is, Haris says Mr. Faiz handed over gold, but there is also a letter seized indicating that they purchased but nothing is brought on record as to what the truth is.

44.1. **Mr. Faiz:** Mr. Faiz has given 3 statements, all under Section 108 ibid. In his earlier two statements, Mr. Faiz has explained the *modus operandi* involving Mr. Abdulla and Mr. Thangal Raheem. He has also indicated his close association with all the officers involved. Revenue has not explained why Thangal Rahim – a hawala operator, was let off the hook without even Show Cause Notice but Mr. Abdulla is implicated and penalised, when both these names were part of the same statements, and even Mrs. Arifa had identified Thangal Rahim. We are not the authorities, however, to answer the question of Ld. counsel that whether the authorities tip other investigating agencies about the hawala operations of Rahim. Be that as it may, as we go deeper, we are sure to get many doubts which the Revenue has not tried to clarify, but our concern at the moment, is whether such inconsistent, unreliable and uncorroborated statements are sufficient, in the first place, to justify imposition of penalty under Sections 112(a), 112(b), 114A and 114AA ibid. But Revenue has nowhere made its stand clear as to the ownership of smuggled gold, but has demanded duty from the so-called carriers, who have nowhere admitted the ownership of the same.

44.2. He has stated in his third statement dated 11.10.2013 under Section 108 ibid. that the gold was handed over to him by Mr. Ashraf who had business in Dubai as well as India; that the smuggled gold was collected by Mr. Ashraf or his men; that on one occasion, Mr. Ashraf himself received the smuggled gold and that it was Mr. Ashraf who had ordered, purchased and sold the smuggled gold.

45.1. **Mr. P.P. Sunil Kumar:** Statement was recorded from Mr. Sunil Kumar, Preventive Officer of Customs, Cochin, on 19.09.2013. It is recorded in the Show Cause Notice that Mr. Sanjay Kumar Soni, Preventive Officer had requested him for a 42 inch LED television on payment, from abroad, for which he contacted Faiz at Dubai on his cell number; that Mr. Faiz informed him over phone that the television was being sent through Mr. Haris and family; that he had requested Mr. Sunil Kumar to facilitate their immigration clearance; that he in turn instructed

Jaison, a contingent staff at the airport to help the passengers; that he was on leave from 14th September to 19th September, 2013; that he was not present at the airport on the eventful day; that he came to the airport upon being called by the investigating team wherein he came to know of the seizure of 20 kgs of gold from the passengers; that he was not aware about them carrying gold with them; that Mr. Faiz was introduced to him by Mr. C. Madhavan, Deputy Commissioner of Customs; that he did not remember to have cleared Mr. Faiz earlier; that he did not know whether the passengers had smuggled gold on earlier occasions and that he had done the facilitation only for friendship and not for any consideration.

45.2. In the impugned order Commissioner has extracted Mr. Sunil Kumar's reply to the Show Cause Notice wherein said Sunil Kumar has categorically denied the allegations made against him. It is mentioned that he was posted as Air Customs officer at the Cochin Airport; that he was assigned with the duty of station duty officer; that he used to regularly receive request orders/instructions from superiors; that while he was posted in the airport, Mr. Madhavan, Deputy Commissioner, was in charge of the Customs formation at the Cochin International Airport; that the Deputy Commissioner had introduced him to Mr. Faiz as the one who would be travelling frequently to India for providing medical attention to his son; that he was instructed to extend facilities to him as and when he arrived in India; that later Mr. Anil Kumar, Assistant Commissioner also instructed him to introduce Mr. Faiz as Mr. Faiz was referred to Mr. Anil Kumar by Dr. John Joseph, ADG, DRI; that under a *bona fide* belief that his superior officers in rank would not mis-guide him and hence obeyed their instructions; that on the eventful day, when the passengers arrived at the airport, he was not on duty but Mr. Sanjay Kumar Soni was on duty and it was Mr. Sanjay Kumar Soni who helped the passengers for their speedy clearance as one of the lady passengers was pregnant and that he did not do any favour for any consideration and his request for a television was for Mr. Sanjay Kumar. We have noted the arguments of the Ld. Counsel that neither John Joseph, ADG, DGI nor Sanjay Kumar Soni were put on notice. At page 136 paragraph 97 of the impugned order, the Commissioner analyses the scope of involvement of Mr. Sunil Kumar, he however holds that Mr. Sunil Kumar was working at the Cochin International Airport when the smuggling was attempted. This is contrary to Sunil kumar's statement that he was on leave on that day and that he was summoned. Duty register should have been made available on record by the revenue as the same would be in their custody, but this has not been done. He also refers to the objections raised by Mr. Sunil Kumar to hold that he had admitted for having requested for a 42 inch LED television from abroad for his colleague Mr. Sanjay Kumar Soni; that he had maintained acquaintance close enough with Mr. Faiz to ask him for television set; that as a Customs Officer it was incorrect and improper on his part to have asked Mr. Faiz to send television set for his colleague; that he had made similar clearances for the same three passengers on three earlier occasions; that as a Customs officer he should have been diligent enough to seek reasons behind such frequent visits (treatment for his son, as informed by Mr. Madhavan ignored); that while it was admitted that Mr. Faiz was introduced by Mr. Madhavan, but Mr. Madhavan and Mr. Anil Kumar had only instructed for giving clearance to Mr. Faiz alone, giving fast clearance for the three passengers who were the gold carriers was never directed by any of the officers. We have to observe here that the duty register should have thrown some light on whether Sunil Kumar was on duty on that day as indicated in the OIO.

45.3. The fundamental question that again bothers us, is that when the same circumstantial evidence in the form of statements is held sufficient to penalise some, the same evidence in the form of statements is assumed insufficient, to exonerate some. The person whom everyone is talking about as having requested for a TV set walks free and there is no Show Cause Notice issued to him seeking his explanation; the person against whom CBI has filed a report for accepting cash is absolved for want of evidence and the person who accepts a 'costly gift' of cash termed as 'loan' from an alleged master mind is also freed. But the person who is said to have requested for a TV for someone and against whom there is not even an iota of evidence as having accepted either cash or anything in kind, is held liable. He is also condemned as having not exercised 'diligence' while requesting for TV, etc.

45.4. Interestingly, in respect of the defense of Mr. Sunil Kumar namely that he was not the officer who was doing passenger profiling for which he was not authorised; that as far as the duties of the appellant who was working as PR, he had no instruction to do passenger profiling since there were ample officers posted in the airport and that there was no allegation that he even helped in bypassing X-ray screening, scanning or other verifications, we do not find any attempts being made to answer or even rebut, in the Order-in-Original. Moreover, Mr. Sanjay Kumar Soni was on duty on that day, who wanted the television set has not at all been rebutted in the Order-in-Original. Mr. Madhavan is absolved also on the ground that he was not on duty on that day, but Sunil Kumar's leave is not discussed. Nothing is also brought on record to suggest as to what benefit Mr. Sunil Kumar got, for 'smooth' clearance of the passengers, which reminds us of the story of a monkey eating the curd rice and smearing curds on the mouth of the donkey to escape punishment.

45.5. We therefore find sufficient force in the unrebutted contentions of Mr. Sunil Kumar that he was not on duty on the eventful day, he was never the clearance officer or the officer who was doing passenger profiling. Secondly, there is nothing on record to suggest that, if at all Sunil Kumar had helped clearance of the passengers, he was not aware of the gold being smuggled by the said passengers in question, because this second point has been held to be sufficient to exonerate Mr. Madhavan. Hence, imposing penalty for his mere acquaintance, that too when he was on leave on the eventful day, is nothing but atrocious since same 'association' was held insufficient in the case of Madhavan and Anil Kumar, and the other person who was also knowing Mr. Faiz, namely Dr. John Joseph, is nowhere in the picture. Moreover, Knowledge is an essential ingredient of section 112(a) which the Revenue has not established, which also could be gathered from the statement of the alleged mastermind namely, Mr. Faiz who himself has stated that this appellant and Mr. Madhavan were unaware of the alleged smuggling activities. From the records as well as the impugned order, we do not see any investigation or any allegation about any investigation by the CBI against this appellant.

45.6. For the above reasons we are satisfied that the penalty levied on Mr. Sunil Kumar is unsustainable and therefore, the impugned order levying penalty under Section 112(a) ibid. is set aside and appeal is allowed to this extent.

46.1. **Mr. M. Shanavas – Proprietor of M/s. Ashida Jewellery:** A search was conducted on 03.10.2013 wherein, 6 pieces of gold weighing 1402.200 grams of gold was recovered, apart from cash of Rs.3,42,700/-; an invoice for purchase of a weighing machine, a non-taxable purchase bill for Rs.10,09,492.14/-, for 677.330 grams issued by Suman's Bombay Jewellers (Kerala) to Smt. Shabna and photocopy of a/c payee cheque issued in the name of Smt. Shabna T.M by Suman's Bombay Jewellers (Kerala) were found and seized from his shop. With this background, he was suddenly asked about seizure of 20 kg gold on 19.09.2013, to which it is recorded that he had made several dealings in 1 kg gold bars with Mr. Ashraf and that he didn't have any documents or accounts in respect of the 1402.200 grams seized. This prompted the Revenue to 'reasonably believe' that they were smuggled gold and the sale proceeds of smuggled gold and hence liable for confiscation. It is recorded in his statement that the above gold was sent to him by his regular supplier Mahindra @ Mama, a wholesale dealer; that he knew Mr. Ashraf of Thalasserry who was introduced by his relative Mr. P.C. Majeed of Koduvally; that Mr. Ashraf enquired with him if he could sell imported gold bars and hand over amount so collected to his brother Mr. Subair; that he identified the photograph of Mr. Ashraf which was shown to him; that during August – September, Mr. Ashraf had entrusted him with 3 gold bars each, on three or four occasions gold bars 'cut' by Mr. Ashraf were given to him by Mr. Subair, the sale proceeds of which were handed over to Mr. Subair; that just prior to 19.09.2013, Mr. Ashraf had called him to enquire if he could sell 20 kg of foreign gold bars, to which he had agreed, but the same could not go through and that he was unable to talk over phone to either Mr. Ashraf or his brother Mr. Subair; that only after the seizure of gold at the airport did he realize that Mr. Ashraf had given him smuggled gold and that the imported gold bars were cut as per the requirements of his clients.

46.2. From the above, what is intriguing us is the lack of minimum follow-up actions, like, when it was said it was Majeed who introduced him to Mr. Ashraf, Majeed could have been examined and his statement could also have been recorded. When Mr. Shanavas says that Mr.

Ashraf used to call him from a mobile number, then call history could have been obtained from the service provider. In addtion, request for cross examination is not entertained. But in any case, whatever was seized from Mr. Shanavas was ordered to be released for want of evidence against linking those items to the receipts from smuggling activities of Mr. Ashraf or Mr. Subair. This very much goes against the revenue's allegation of earlier smuggling activities and involvement of some of the appellants, since, this was the only allegation on which the smuggling of gold on the earlier dates was built.

46.3. In the findings, the Commissioner has satisfied himself with the explanation offered with documentary evidences as to the source of 1402.2 gms of gold which was later ordered to be released. He has also observed that there was no evidence on record to suggest that the cash seized was from smuggled goods and hence the same was ordered to be released. The requirements of Section 112(b) of the Customs Act, 1962 is acquiring the possession of or in any way concerned in carrying, removing, etc., or in any other manner dealing with any goods which are liable to confiscation under Section 111 ibid. Insofar as this appellant is concerned, the Adjudicating Authority has himself satisfied that the allegations levelled against him by the investigation team as well as in the Show Cause

Notice has not proved this appellant as acquiring possession or disposing of, in any manner, as prescribed under Section 112(b) ibid. and therefore, has ordered the release of both the gold and cash seized from his shop. By this finding, not only the case against Mr. Shanavas has become week, but also weekend the revenue’s case against some of the other appellant, like Ashraff and Subair, since revenue had alleged that the gold bars smuggled on the earlier dates were sold to Mr. Shanavas.

By this it is clear to us that Mr. Shanavas did not acquire or deal with in manner, for disposal, etc. of any goods that was liable for confiscation. Hence, it is held that the penalty imposed on this appellant is without any basis and the same cannot sustain. The impugned order to this extent, therefore, is set aside and the appeal is allowed.

46.4. Mr. Ashraf and Mr. Subair stand on the other side of the same coin, since the allegation against Mr. Shanavas was that these two appellants were supplying the smuggled gold to Mr. Shanavas. But when the alleged recipient is held nothing to do with the alleged smuggling activity, then the revenue’s case insofar as the alleged supplier/s cannot also stand since the same logic holds good.

47.1. **Mr. Subair Kallungal:** This appellant is visited with penalty for his alleged involvement on the earlier occasions of 36 KGs of gold bars. Only one person namely Mr. Shanavas has named this person but without attributing any specific role other than that he was Mr. Ashraf's brother, that he was seen at the GM Switches showroom; that he used to contact him from his personal phone number; that on 19.09.2013 his phone was switched off and that he had dealt with foreign gold bars under the belief that they were legally imported. But the Adjudicating Authority has disbelieved the allegations against Mr. Shanavas, has also accepted his explanation regarding the gold and the cash found at his shop. What was the role of this appellant then, for which he is penalized, has not been brought on record with supporting evidence. It is an admitted fact that the search at his house did not yield any incriminating material other than a photograph of Mr. Subair, and the same was seized and identified by both Mr. Subair's wife and Mr. Shanavas. It is the identity of the person per se, but nothing beyond that, nothing was allegedly seized which was subsequently liable for confiscation.

47.2. The penalty is leviable only if the conditions of Section 112(b) ibid. are satisfied and nothing less, nothing more. Association or relationship or a fruitless search would not lead us anywhere, because we have seen from the record that Mr. Thangal Rahim and some of the officers were also maintaining 'association' with Faiz. None of the ingredients of the relevant section is present here, against this appellant, and hence, the penalty appears to have been levied with a closed mind and on assumptions and presumptions. It appears that the Commissioner was influenced by the detention of this person under COFEPOSA but released later; but it is irrelevant insofar as the penalty under Section 112(b) ibid. is concerned. It is noted that even in the Show Cause Notice, the relevancy of detention under COFEPOSA vis-à-vis the alleged smuggling activities of 36 kgs gold bars is not highlighted. Moreover, when the person who ascribed a role is himself absolved and even the gold and cash seized from him were ordered to be released as having nothing to do with the earlier smuggling, penalty cannot be sustained on this appellant because he is not alleged to be involved in possessing or carrying out any of the activities that ultimately resulted in confiscation. It is the settled position of law that allegations how-so-ever strong or strongly worded, cannot take the place of proof, and hence, we are the opinion that the order levying penalty on Mr. Subair Kallungal cannot sustain since the same is without any basis, The penalty and the impugned order are therefore set aside. The appeal to this extent is allowed.

47.3. Mere statement against this appellant, alleged to be that of Mr. M. Shanavas is not sufficient to sustain for penalty on this appellant.

48.1. **Mr. Ashraf Kallungal:** The role of this appellant has come only in the third statement of Mr. Faiz and that of the Hawala Operator namely Mr. Thangal Rahim. At page 102 of the impugned order, the Adjudicating Authority has gone on to verify the objections of Mr. Faiz with that of the allegations levelled against him in the Show Cause Notice. The Commissioner has placed reliance on the third statement of Mr. Faiz recorded on 11.10.2013 alone, to confirm the involvement of Mr. Ashraf for which there is no reason given and no other supporting evidence whatsoever is placed on record. While concluding, the Commissioner observes that Mr. Faiz had maintained a close acquaintance with Customs officers working in the airport; that in his statement dated 11.10.2013, he had admitted the role of Mr. Ashraf as the person who gave him the gold to be sent to India; that by this, it emerged that Mr. Faiz had taken on himself the task of organising the carriers for sending gold through them; that by this, Mr. Faiz abetted the commission of an offence which had resulted in the smuggling of 56 kgs of gold into India. But it is a matter of record that only 20 kg was seized on 19.09.2013. It was thus held that he was liable for imposition of penalty under Section 112 ibid. for his action of abetting gold smuggling which was liable for confiscation under Section 111 ibid. The statements are believed to sufficiently hold that there were smuggling of gold even on the earlier two occasions.

48.2. The second statement of Mr. Faiz (dated 23.09.2013) as recorded, is extracted at paragraph 25 page 13 of the impugned order as per which, he is shown to have identified Mr. Thangal Rahim from the printout of colour photograph shown to him; that he even identified the CCTV clippings of Mrs. Arif, Mrs. Asifa and Mr. Haris arriving at the reception hall of a hotel; that it was his brother Mr. T.K. Faizal who brought them to that hotel and that the other photograph was that of Jaleel.

48.3. The third statement was made on 11.10.2013**,** wherein, it is recorded (paragraph 49 page 20 of the Order-in-Original) a changed version of Mr. Faiz by which he has completely absolved Mr. Thangal Rahim without giving any reason as to why he was doing so (or was it not recorded?) and introduces for the first time the name of Mr. Ashraf of Thalassery, as the person to whom the smuggled gold belonged; that it was at the instance of Mr. Ashraf that he mentioned the name of Rahim in his earlier statement; that he even identified the photograph of Mr. Ashraf which was shown to him; that the smuggled gold was collected from the airport either by Mr. Ashraf or his men and that it was Mr. Ashraf who ordered, purchased and sold the smuggled gold.

48.4. No explanation is recorded as having been offered by Mr. Faiz, as to why he was changing his version or what made him to change. But the other thing that still remains, is the significance of identity of the photographs, of Rahim first and then that of Mr. Ashraf, by Faiz. When retracted statements offered are being rejected as an after-thought, then none of his statements holds any significance. This assumes importance because, in his later statement, Mr. Faiz has only talked about implicating Mr. Ashraf and exonerating Rahim and this has been believed as gospel truth by the Revenue, the reasons for which are not spelt out for convenience, nor do we see any corroborative evidence as well, like the passport/visa stamping, call records, etc. and nor does the story of exculpating Rahim appears voluntary or justifiable since other than exculpating Mr. Rahim, no other fact or statement seems to be 'retracted' by him on 11.10.2013.

48.5. Let us examine from another angle now. In his reply dated 18.03.2014 to the SCN dated 13.03.2014, he has inter alia contended that none of his statements was voluntary; that he had not given any gifts to any of the officers involved; that he had denied his role in the alleged smuggling activity; that Latheef's driver Rafeeq was never questioned by the revenue; that his call to Latheef on 23.9.2013 was never made since he was detained on 22.9.2013 itself; that he had no business relation with Ashraf; that he never aided, abetted, or colluded with him in the alleged smuggling activity; that Raheem was wrong in saying that the gold belonged to him and Ashraf; that story of Asifa as having been taken in a black car to hotel Flora driven by 'Ashraf' was contrary to the statement of Adbul Jaleel that his driver Rafeeq appears to have told him that he drove persons from airport to Angamali and then to hotel; that the revenue has not explained the identical wordings in the statements of the 2 ladies; that he has denied having visited Bangalore before reaching Delhi, but no call records or hotel stay records have been placed on record; that he has mentioned about the threat and inducement under COFEPOSA which made him give statements and that by this he also sought for cross examination of persons who had named him as the person involved in the smuggling activity. But opportunity to cross examine was denied by the revenue.

48.6. Mr. Thangal Rahim is said to have appeared before the authorities for giving his voluntary statement on 21.10.2013, wherein we find that while clearly exculpating himself, he has inculpated others and that it is recorded that as per his information (source of which is not placed on record by the revenue before us), 20 kg of gold seized on 19.09.2013 belonged to Mr. Ashraf @ GM Ashraf and his friend Mr. Faiz; that he knew both of them; that on 19.09.13 he was called over phone to reach Bangalore; that on reaching, he was taken to a hotel by Mr. Ashraf where he stayed, name of which he didn't remember; that he was told that Mr. Faiz was also in Bangalore, at Hotel Taj, whom he met on the evening of 21.09.2013; that he was asked by Mr. Ashraf to carry his laptop back to Dubai which he did by returning to Dubai on 22.09.2013; that he was told that Mr. Faiz had come to Bangalore to sort out the problems consequent to seizure of 20 kg gold on 19.09.2013 and that he didn't know Mrs. Asifa, Mrs. Arifa, Mr. Haris, Mr. Abdulla, Mr. Faizal or Mr. Subair. First of all, the revenue has not explained why he was introduced at a later stage, without putting him on SCN despite his name and role specified by some of the co-noticees. There is also no explanation as to what was his interest in 'voluntarily' appearing before the authorities, just to give statements. Now the contradictions are that in his first statement, Faiz says that it was Abdulla and Thangal Rahim who lured him into the business of smuggling, with an offer to join their business; and now Rahim says that Mr. Faiz offered a share in his hotel business.

48.7. If this is to be accepted, then the statement of Mr. Faiz that Mr. Abdulla introduced this person to him may not be correct because, Mr. Rahim has pleaded that he didn't even know Mr. Abdulla.

48.8. In his second statement recorded on 23.10.2013, (Thangal Rahim is said to have met this appellant at Hotel Citadel) he is said to have deposed that it was Mr. Ashraf and Mr. Faiz who had planned, funded and operated the smuggling of gold through Nedumbassery airport on 19.09.2013 and on previous occasions also, which he understood when he met Mr. Ashraf in Bangalore on 20.09.2013; that Mr. Ashraf proceeded to Hotel Taj Gateway to meet Mr. Faiz to discuss about seizure of 20 kg gold and that he had met Mr. Faiz at Taj hotel on 21.09.2013 evening. It is surprising that Rahim had to wait till 21.10.2013, to voluntarily appear, to give his statement. Moreover, revenue has not brought any credit-worthiness of this person on record, to just to believe in whatever he says. Is he an eye-witness, is he an expert in any field, to take his say as gospel truth? The appellants certainly deserved a chance to cross-examine at least this person, to bring the truth on record, which has been denied by the authorities which surprises us.

48.9. Mr. Faiz in his statements dated 22.09.2013 and 23.09.2013, has never said anything about meeting Thangal Rahim in Bangalore; he has also not mentioned about this in his third statement dated 11.10.2013. He has also not mentioned in any of his three statements about even meeting Mr. Ashraf at Bangalore; it looks like Mr. Ashraf's name was introduced either for convenience or to show escape route for Mr. Thangal Rahim. It is quite strange that the meeting was remembered by Rahim, but not Mr. Faiz and not even by Mr. Ashraf.

48.10. Here in this case, admittedly the only material that the Revenue relied on is the seriously inconsistent statements of some persons/co-appellants, which are used to the advantage of some and to the disadvantage of some others. While a part of a person's statement is used as sufficient evidence to penalize some, without considering the whole statement and the quantum of penalty has also varied accordingly. In the 'findings' portion, the Commissioner considers it relevant to refer to the statement of Mr. Faiz dated 11.10.2013 and not his earlier statements; but no explanation for choosing this is forthcoming. As an Adjudicating Authority, it is expected of him to 'adjudicate' and not pick and choose; and nor has he justified as to why he chose this statement over other statements. We may ponder as to was it because the other two statements were seriously affecting the interests of the 'interested' persons, including some of the officers involved? For this reason alone, we are of the view that the order impugned is not free from inadequacies at least to the extent of coming to a conclusion on the basis of half-baked unreliable evidences, there too, in the form of statements. We are reminded of an adage that *"a blind man searching for a black cat in a dark room, which is not there"*. Though we have sympathy, but yet the requirement of law is paramount, the evidences in the form of inconsistent statements alone are not sufficient to levy penalty on appellants. Consequently, it is held that there are no sufficient evidences to implicate this appellant and to sustain the impugned penalty. Impugned order is set aside and the appeal is allowed.

48.11. The corroborative statement against this appellant, alleged to be that of Mr. M. Shanavas, cannot be held to be sufficient, to penalise this appellant, for the same reasons given earlier in this order.

49.1. **Mr. T.K. Faizal:** From the allegations levelled against this person in the Show Cause Notice, we find that he is alleged to have transported the alleged gold carriers to the Hotel on 27.08.2013 and 12.09.2013, but the alleged gold smuggled on those dates was never found, to be confiscated under Section 111 ibid. Nobody has witnessed the loading or unloading of gold in the remotest form into the car used for transporting the alleged gold carriers by this person. The preponderance of probability is heavily against the Revenue insofar as the allegation of smuggling activity on the earlier occasions is concerned since it is also not placed on record if this appellant transported the alleged gold carriers in a taxi as a driver or used a personal car. The only statement against this appellant is again that of Mr. Faiz, who has admittedly retracted his own statements, which drives us to ponder as to which of his statements is to be believed. This appellant, therefore, cannot be penalized when his role is not clearly established by the Revenue as the benefit of doubt should go in his favour with regard to the reliance placed on the statement/s.

49.2. We have the guidance of a recent ruling by the Learned Mumbai Bench of the CESTAT in the case of *Chandra Shekhar R. Shukla v. Commr. of Cus. (Imports), Nhava Sheva (supra)* wherein the Bench has considered the relevancy of vague statements to impose penalty under Section 112 ibid. In the said Order of the Bench (one of us i.e., Hon'ble Member (Technical), is the author) has *inter alia* held as under:

> *"4. Heard both the sides and perused the records of the cases. We find that penalty of*

*Rs.10,00,000/-, Rs. 20,00,000/- and Rs.10,00,000/- has imposed on the Appellant. In going through the Order in Original the role of Appellant was shown to be the main person behind the whole case and that is based on the statement of Shri Pansare who had claimed before the CHA that he has taken up with Shri C.R. Shukla and the statement of Shri Anwar saying that he had financial dealing with M/s. Gaylord Impex one of the importer and the fact that there are some call records showing conversation between the person involved, other than this no evidence has been brought to justify the imposition of penalty to Shri R. C. Shukla. It has not been brought out as to the exact role he played in rendering the case liable for confiscation in the Show Cause Notice nor the adjudication authority conclude that he would have been benefitted in any manner had the import been through. He *understandably the revenue cannot conclude with a clinical precision. However the case cannot be built on the basis of vague statement of the co-accused and more existence of call records. It has been considerably held by the tribunal that though the theory of preponderance of probability is hall mark in evasion cases of taxation than proof beyond doubt there should be some evidence, document to support scope for such preponderance of probability. We find that no such record is available. It is reinforced by the fact that no evidence of any sort has been found during the search of the Appellant residence. It is also not clear whether investigation could reach of the actual importer. In such situation imposition of penalty on the Appellant without properly establishing his*

> *role is not acceptable. We find that the ratio of the cases submitted by the Appellant reinforce the same."*

The above ratio squarely applies here also in respect of all the above appellants and hence, to this extent, impugned order is set aside insofar as the same relates to these appellants, and consequently, the respective appeals allowed.

50.1. **Mr. T.K. Faiz:** In the impugned order, it is averred that this person played a major role in the smuggling of gold bars and hence, an alert was issued to the immigration authorities; that he was intercepted at Indira Gandhi International airport on 22.09.2013 while he was about to deport to Dubai by Emirates flight. His first statement as per paragraph 24 pages 12-13, was recorded on the same date wherein he has given his brief activities, background, etc., and the important excerpts as recorded there are that he was using the black BMW car (Registration No. KL-58-B-5) (should have been ignored as the revenue has held that this statement is retracted) which belonged to his employer at Dubai (Mr. Abdul Latheef); that he used to visit Kerala frequently as caretaker of the property of his boss (Mr. Abdul Latheef) (which was denied by Mr. Latheef); that on 20th September he came to Calicut and then went to his house at Palloor, from where he went to Bangalore and from there to Delhi, from where he was apprehended. When he was asked about three passengers caught smuggling gold at Cochin airport, he is said to have revealed that he came to know about that and that his name was also revealed as the person who gave them the gold at Dubai, which was the reason for his leaving the country. It is mentioned that the three passengers were introduced by Mr. Abdulla, who was a tour guide, the husband of Mrs. Asifa; that apart from this, Mr. Abdulla had another business called 'Business Profit'; that about six months back he had come into contact with 'Thangal Rahim' of Koduvally who was doing Havala business, through Mr. Abdulla; that it was Mr. Abdulla who lured him into the business of bringing gold into India without payment of Customs duty; that he knew Mr. Sunil Kumar, Preventive Officer through Mr. C. Madhavan, Deputy Commissioner; that neither of the officers had any knowledge about the gold being brought; that the mobile phone which Mr. Haris (co-passenger) was using, was provided by Mr. Abdulla; that Mr. Abdulla and Thangal Rahim had offered him a share for aiding in smuggling and that he also revealed both the Indian and UAE phone numbers of Rahim; that Jaleel was a friend of Rahim and that his brother used to come to airport to ensure delivery of smuggled gold to Thangal Rahim's men.

50.2. The learned Commissioner has observed that it was this person, namely Mr. Faiz, who had arranged and supplied the gold bars to the passengers at Dubai and also responsible for facilitating them through customs at Cochin Airport; that he organised the collection of such gold bars through his brother and forwarded them to Mr. Ashraf; that he had good relations with Customs officials which was used by him to ensure their unhindered Customs clearance; and that these allegations are based on the statements of Mrs. Asifa, Mr. Haris Abdul and Mrs. Arifa. It is also observed by the Commissioner that Mr. Faiz had made statements on three occasions and he is said to have stated about his interactions and contacts he had with the officials. This was also supported by a note forwarded by CBI wherein it was revealed that this Mr. Faiz had maintained regular contacts over the phone with these officers, to whom he had even gifted a television, treadmill and an Apple iPhone, apart from the cash of Rs. 5 lakhs to Mr. Anil Kumar and Rs. 2 lakhs to Mr. C. Madhavan.

51. Insofar as this appellant is concerned, no doubt one of the alleged gold carriers has identified this person as the one who handed over the gold bars to be smuggled into India, some of which (20 kgs) were ultimately confiscated. The only other corroboration available on record are the statements of the very officers of Customs who have allegedly accepted cash or kind offered by this appellant for facilitating smooth Customs

clearance at the Cochin Airport. The fact that he handed over the gold bars at the Dubai Airport stands uncorroborated by two of the 3 passengers, with one of them even refusing to support the revenue. But he is neither treated as an importer nor as a purchaser. Moreover, his request for cross examination of the persons deposing against him has also been denied by the revenue, and hence we are of the opinion that the penalty though appears justified, but since we have already held at para 38 above that penalty both under Sections 112(a) and (b) cannot be sustained, we order the same to be set aside.

Apex court further concluded, inter alia, that there were a large number of discrepancies in the treatment and disposal of physical evidence; that there were contradictions in the statements of official witnesses; that although if individually examined, may not be fatal to the case of prosecution but if cumulative view of the scenario was taken, the prosecution's case must be held to be lacking in credibility.

52.1. In a later decision, in Duncan Agro Industries, the Apex court has held in clear terms that statement recorded under S. 108 ibid. is admissible in evidence the court has to test whether the inculpating portions were made voluntarily or whether it is vitiated on account of any of the premises envisaged in S. 24 of the Indian Evidence Act.

52.2. Duncan was referred in Vinod Solanki's case wherein the Apex court after considering its own earlier decisions, has held as under:

> *"…….34. A person accused of commission of an offence is not expected to prove to the hilt that confession had been obtained from him by any inducement, threat or promise by a person in authority. The burden is on the prosecution to show that the confession is voluntary in nature and not obtained as an outcome of threat, etc. if the same is to be relied upon solely for the purpose of securing a conviction.* ***With a view to arrive at a finding as regards the voluntary nature of statement or otherwise of a confession which has since been retracted, the Court must bear in mind the attending circumstances which would include the time of retraction, the nature thereof, the manner in which such retraction has been made and other relevant factors. Law does not say that the accused has to prove that retraction of confession made by him was because of threat, coercion, etc. but the requirement is that it may appear to the court as such.***
>
> *37. …… The Tribunal proceeded on the basis that issuance and services of a show cause notice subserves the requirements of law only because by reason thereof an opportunity was afforded to the proceedee to submit its explanation. The Tribunal ought to have based its decision on applying the correct principles of law.* ***…… . The Tribunal on its independent examination of the factual matrix placed before it did not arrive at any finding that the confession being free from any threat, inducement or force could not attract the provisions***

> ***of Section 24 of the Indian Evidence Act.***
>
> *…….”.*
>
> (Emphasised by us in bold)

52.3. In the case of Union of India Vs. Bal Mukund AIR 2009 SC (Supp) 1811, Apex court at paragraph 23 has observed as under:

> *23. We may notice that in State (NCT of Delhi) v. Navjot Sandhu Alias Afsan Guru [(2005) 11 SCC 600], this Court has laid down the law in the following terms:*
>
> *"…..*
>
> *39. The crucial expression used in Section 30 is "the Court may take into consideration such confession" (emphasis supplied). These words imply that the confession of a co-accused cannot be elevated to the status of substantive evidence which can form the basis of conviction of the co- accused. The import of this expression was succinctly explained by the Privy Council in Bhuboni Sahu v. R in the following words: (AIR p. 260) "[T]he court may take the confession into consideration and thereby, no doubt, makes its evidence on which the court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence…...*
>
> *35. In Mohtesham Mohd. Ismail v. Spl. Director, Enforcement Directorate and Another [(2007) 8 SCC 254], in a case*

involving the Foreign Exchange Regulation Act, this Court held:

"19. Apart therefrom the High Court was bound to take into consideration the factum of retraction of the confession by the appellant. It is now a well- settled principle of law that a confession of a co- accused person cannot be treated as substantive evidence and can be pressed into service only when the court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of the conclusion deducible therefrom..."

36. In Ravindran Alias John v. Superintendent of Customs [(2007) 6 SCC 410], this Court opined:

"19...The confessional statement of a co-accused could not be used as substantive evidence against the co-accused."

….."

52.4. In Ram Lal Mehta v. Director of Enforcement (decision dated 11th March 2014 in Crl. A. No. 241 of 2008), it was held by Hon'ble Delhi High Court as under:

"14. Therefore, for the statement by one notice under Section 40 FERA to be used as evidence against another co-noticee it must be shown that the said statement inculpates the person making it. Otherwise such statement has no value whatsoever. Shri Datta referred to the decision in K.I. Pavunny v. Assistant Collector (HQ), Central Excise Collectorate, Cochin (1997) 3 SCC 721 to point out that the statement made before the customs officials under Section 108 of the Customs Act is admissible evidence. While that proposition is unexceptionable, and would apply to statements made to the ED officials under

> *Section 40 FERA, the question really is how far such statements can be used as evidence against the co-noticee. The law as explained in Union of India v. Bal Mukund is very clear that unless the statement inculpates the maker of the statement, apart from the co-noticee, it cannot be used against the co-noticee."*

53. Mr. Rahim has exculpated himself and inculpated Mr. Faiz and Mr. Ashraf as the main culprits, and hence by the application of the above decision, Mr. Rahim's statements cannot be considered at all to be used against those who are inculpated by him.

54. With regard to the preponderance of probability and the benefit of doubt, Hon'ble Apex court has held categorically that the test of the same must be satisfied by the accusing authority, irrespective of a criminal accusation or a civil, or even in respect of departmental enquiries, in the following cases:

(1). M.V. Bijlani Vs. Union of India, (2006) 5 SCC 88,

(2). Moni Shankar v.Union of India ((2008) 3 SCC 484 PART I),

(3). M. Siddiq v. Suresh Das ((2020) 1 SCC 1 PART I. DECIDED ON 09.11.2019), a Constitution Bench of this Court has described the standard of ‘preponderance of probabilities’ in the following terms:

> *“720. The court in a civil trial applies a standard of proof governed by a preponderance of probabilities. This standard is also described sometimes as a balance of probability or the preponderance of the evidence. Phipson on Evidence formulates the standard succinctly: If therefore, the evidence is such that the court can say “we think it more probable than not”, the burden is discharged, but if the probabilities are equal, it is not. [Phipson on Evidence.] In Miller v. Ministerof Pensions [Miller v. Minister of Pensions, (1947) 2 All ER 372], Lord Denning, J. (as the Master of Rolls then was) defined the doctrine of the balance or preponderance of probabilities in the following terms: (All ER p. 373 H) “(1) … It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, “of course it is possible, but not in the least probable” the case is proved beyond reasonable doubt, but nothing short of that will suffice.” (emphasis supplied)*
>
> *721. The law recognises that within the standard of preponderance of probabilities, there could be different degrees of probability. This was succinctly summarised by Denning, L.J. in Bater v. Bater [Bater v. Bater, 1951 P 35 (CA)], where he formulated the principle thus: (p. 37) “… So also in civil cases, the case must be proved by a preponderance of probability, but there may be degrees of probability within that*

standard. The degree depends on the subject-matter." (emphasis supplied).." .

55. In view of the above decisions, it is clear that a statement, if found vitiated by any means is clearly unreliable, in the absence any other corroborative piece of evidence, so also the magnanimous confession of a co-appellant inculpating other/s while gracefully exculpating himself, cannot have any evidentiary value, which has been explained in so very clear terms in Bal Mukund (supra) and hence, the benefit of doubt cannot be denied to the appellants.

56. Now if we look at the quality of statements recorded by the revenue on which sole reliance is placed by the revenue, we have found that the same are unreliable because of inconsistencies and contradictions. The same cannot therefore be elevated to the standards of proof, much less any evidence, to sustain the impugned penalty. This is so because the fact of involvement in doing or omitting to do any act by appellants in relation to gold bars in question has not been established with any evidence. Though only a part of the alleged gold was confiscated, but nevertheless none of the appellants did claim ownership of any of the gold bars and in any case the same was not seized/confiscated from them. Hence, we are of the view that the requirement of Section 112 insofar as it relates to confiscation

from the passengers alone is satisfied, but not any of the limbs (a) or (b) of the said section. The links in the chain that resulted in confiscation of goods are not at all there which has thus left the chain incomplete in all respects.

57. Here in the case on hand, some of the officials are not even put on SCN, a few of the persons and some officials who were put on notice have been exonerated, crucial witnesses were not examined/questioned, nothing is forthcoming as to the fate of letter found and seized from Mr. Haris and hence, there are too many loose ends perhaps due to lack of proper investigation. There is also no cogent and corroborative evidence insofar as Rahim's statements are concerned since he has only inculpated others while clearly exculpated himself, which has thus clearly failed the test laid down by the Apex court supra and hence, his statement is to be ignored altogether for lack of credibility. Other than this, we do not see any other sustainable evidence against any of the appellants and hence, we have to hold that the revenue has not made out any case against them. Consequently, penalty levied against them cannot be sustained.

58. In the result,

i. Appeal No.C/21533/2015 filed by Shri P.P. Sunilkumar is allowed.

ii. Appeal No.C/21610/2015 filed by Shri Shanavas M. is allowed.

iii. Appeal No.C/21635/2015 filed by Shri Subair Kallungal is allowed.

iv. Appeal No.C/21636/2015 filed by Shri Ashruf Kallungal is allowed.

v. Appeal No.C/21661/2015 filed by Shri T.K. Faizal is allowed.

vi. Appeal No.C/21662/2015 filed by Shri T.K. Faiz is allowed.

vii. Appeal No. C/22286/2015 filed by Ms. Hajira Koodakkara is allowed.

(Order pronounced in the open

court on 29/03/2022)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

(P. DINESHA)
MEMBER (JUDICIAL)

Sdd/Raja