CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

CUSTOMS APPEAL NO. 42254 OF 2017

[Arising out of Order-in-Original No. 58251/2017 dated 31.08.2017 passed by the Commissioner, Customs-III, Chennai]

Manda Ramu ... **Appellant**

Versus

Commissioner of Customs-III ... **Respondent**
Chennai

APPEARANCE:
Shri B. Kumar, Sr. Advocate for the Appellant
Shri S. Balakumar, Authorised Representative for the Respondent

WITH
CUSTOMS APPEAL NO. 40644 OF 2018

[Arising out of Order-in-Original No. 58251/2017 dated 31.08.2017 passed by the Commissioner, Customs-III, Chennai]

V. Sathyanarayana ... **Appellant**

Versus

Commissioner of Customs-III ... **Respondent**
Chennai

APPEARANCE:
Shri B. Kumar, Sr. Advocate for the Appellant
Shri S. Balakumar, Authorised Representative for the Respondent

WITH
CUSTOMS MISCELLANEOUS APPLICATION NO. 40264 OF 2018 IN
CUSTOMS APPEAL NO. 40646 OF 2018

[Arising out of Order-in-Original No. 58251/2017 dated 31.08.2017 passed by the Commissioner, Customs-III, Chennai]

P. Balaji ... **Appellant**

Versus

Commissioner of Customs-III ... **Respondent**
Chennai

APPEARANCE:
Shri B. Satish Sundar, Advocate for the Appellant
Shri S. Balakumar, Authorised Representative for the Respondent

AND
CUSTOMS APPEAL NO. 40647 OF 2018

[Arising out of Order-in-Original No. 58251/2017 dated 31.08.2017 passed by the Commissioner, Customs-III, Chennai]

K. Srinivasulu ... **Appellant**

Versus

Commissioner of Customs-III ... **Respondent**
Chennai

APPEARANCE:
Shri B. Satish Sundar, Advocate for the Appellant
Shri S. Balakumar, Authorised Representative for the Respondent

CORAM:
HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING: August 16, 2021
DATE OF DECISION: December 14, 2021

FINAL ORDER NO. 42462-42465 / 2021

PER P.V. SUBBA RAO

These four appeals are filed assailing the same order-in-original[1] dated August 31, 2017 passed by the Commissioner of Customs, (Chennai-III) and hence are being disposed of together.

2. **Appeal No. 42254 of 2017** is filed by Shri Manda Ramu praying for setting aside the confiscation of 3.158 kg of gold and imposition of a penalty of Rupees Twenty lakhs imposed upon him.

3. **Appeal No. 40644 of 2018** is filed by Shri V. Sathyanarayana praying that the penalty imposed upon him in the impugned order may be set aside.

4. **Appeal No. 40646 of 2018** have been filed by Shri P. Balaji seeking setting aside the order of confiscation of deposit of

[1] Impugned order

Rupees Ninety lakhs available as fixed deposit of Bank of Baroda, T. Nagar Branch, Chennai and also setting aside the penalty imposed upon him. Application No. 40264 of 2018 in this appeal is filed seeking the Tribunal to direct the respondent/Revenue to not part with the amount deposited in the Bank of Baroda.

5. **Appeal No. 40647 of 2018** is filed by Shri K. Srinivasulu praying that the penalty imposed on him in the impugned order may be set aside.

6. We have heard both sides and perused the records. Facts of the case, after filtering out unnecessary details, are that the Directorate of Revenue, Intelligence[2], Chennai received information from the Railway Protection Force of Central Railway Station, Chennai that they had intercepted a passenger Shri V. Sathyanarayana while he was passing through the door frame metal detector at 9.20 AM on 9.5.2014 and he was found to carry pieces of gold in a jacket tied around his waist. On receiving this information, officers of DRI proceeded to the Railway Station and questioned Shri Sathyanarayana who said that he worked for Shri Manda Ramu of M/s Om Lakshmi Venkateshwara Jewellers, Rajahmundry and had come to Chennai with Rupees Thirty lakhs in cash the previous night, gave it to Shri Balaji of M/s SLN Securities & Forex Private Limited, Chennai and received the gold bars which he was carrying concealed in the jacket to take back and give it to Shri Manda Ramu. When asked, he said that he did not receive any invoice from Shri Balaji and had only received two paper chits Nos. 43 and 44, both dated 8.5.2014. As the Railway station was a

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[2] DRI

public place not suitable for examining the gold, officers brought Shri Sathyanarayana and the gold bars to office of DRI where they were examined. Of the eight pieces of gold, two pieces were cut pieces of gold bar and there were varying length and width with markings "FINE GOLD 999 NR" on the front and marking "NBR", "1996" and "1997" on the rear side. The gold was assayed by certified the Assayer who confirmed that the gold was of 24 carat 999 purity, weighing in all 3158 gm and is estimated to be of value Rs. 94,61,368/-. This weight tallied with the total weight mentioned in the two paper chits recovered from Shri Sathyanarayana. Since Shri Sathyanarayana did not have any document to show legal possession for import of the gold and hence the same were seized along with the jacket and the tickets of Shri Sathyanarayana.

7. Following ups the officers searched the premises of M/s SLN Securities & Forex Private Limited in the presence of Shri P. Balaji, Director and Shri Ravindran, Accountant. They found unsigned original and duplicate copies of Invoice No.202 dated 9.5.2014 issued in the name of M/s Om Lakshmi Venkateshwara Jewellers, Rajahmundry for sale of 3000 gm of old gold FT for Rs. 90,00,000/. They also found another Invoice No. GB/24 dated 9.5.2014 for the purchase of 2000 gm. of gold bullion bar of 99.5% purity for an amount of about Rupees Sixty lakhs. A perusal of the ledger showed the closing stock of gold as on 8.5.2014 night was only 1347.755 gm. of gold bars. On request of the officers, Shri Balaji opened his e-mail and provided prints of e-mails received on 9.5.2014 at 1.09 PM and 2.46 PM along with attachments. During

search, officers of DRI recovered 8 more cut pieces of gold bars with 3 foreign marked gold coins from a cupboard in the strong room of M/s SLN Securities & Forex Private Limited. These had markings "GOLD 9990" and "995.0" on two of them. On enquiry regarding the gold seized from Shri Sathyanarayana, Shri Balaji stated that he received 3.158 kg. of gold bars from M/s Surana Corporation without any bill, and these were of foreign origin and smuggled into the country and he handed them over to Shri Sathyanarayana. With the help of a Certified Assayer the purity of the cut pieces of gold and the gold coins were checked and the two gold coins were of 24 carat purity and one gold coin was of 22 carat purity and they were also seized along with some documents.

8. In his statement on 9.5.2014, Shri Sathyanarayana said that he collected Rupees Thirty lakhs from Shri Manda Ramu, brought it concealed in his jacket, handed it to Shri Balaji and received the gold pieces which he again concealed in the jacket and was stopped by RPF officers at the Railway station. The two kutcha paper chits No. 43 & 44 were already the newspaper packing of gold. He receives a monthly salary of Rs. 8000/- and that he would come to Chennai twice a week at the behest of Shri Manda Ramu to pay cash to Shri Balaji and take back gold to Shri Manda Ramu. He never receives any invoice or bill for the gold bars. For each trip, in addition to the expenses, Shri Manda Ramu paid him Rs. 200/-

9. Shri Balaji, Director of M/s SLN Securities & Forex Private Limited, in his statement dated 10.5.2014, explained that he and Shri Srinivasulu are the Directors of the Firm and Shri Srinivasulu was inactive and he has lost his mother and therefore, he (Shri

Balaji) has been running the business. He learnt about the 3.158 kg of gold seized from Shri Sathyanarayana; he would buy smuggled gold bar of 999 purity from firm such as M/s Surana Corporation, Chennai and sell it to Shri Manda Ramu who would pay partly in cash and partly through RTGS. For this service, he would get Rs. 2000/- per kg. He said that in the night of 8.5.2014 he went to M/s Surana Corporation received 3.158 kg. of smuggled gold bars without any bill and give them to Shri Sathyanarayana at 8.30 AM on 9.5.2014 who then left for the Railway Station immediately. He did not issue any invoice or bill for the gold. At 11.45 AM, he received a call from Shri Manda Ramu asking to him to prepare an invoice for sale of 3 kg. of gold bars and accordingly, he prepared invoice No. 202 dated 9.5.2014. Shri Manda Ramu told him that he would pay Rupees Ninety lakhs through RTGS into the account of M/s SLN Securities & Forex Pvt. Ltd. and he prepared the invoice accordingly. Rupees Ninety lakhs was transferred to account of M/s SLN Securities. Suspecting this amount to be the sale proceeds of the smuggled gold, DRI wrote to the Branch Manager, Axis Bank and requested not to allow withdrawal of the same. After recording the statements of few other people, a show cause notice was issued on 5.11.2014 proposing as follows:

> "38. Now, therefore, S/Shri Manda Ramu and Sathyanarayana as well as any other claimant, are hereby, jointly and/or severally, called upon to show cause to the Commissioner o Customs (Chennai-III), Customs House No. 60, Rajah Salai, Chennai-1 within 30 days of receipt of this notice, as to why:
>
> (i) the seized 3.158 kg of smuggled gold bars, valued at Rs. 94,61,368/- should not be confiscated under sections 111(a) & 111(d) or 111(d), 111(l) & 111(m), as the case may be and read with section 120 of the Customs Act, 1962;

(ii) the goods used for concealing the smuggled gold, with no commercial value, should not be confiscated under Section 119 of the Customs Act, 1962; and

(iii) Penalty should not be imposed on each of them under Section 112 of the Customs Act, 1962.

39. Now, therefore, S/Shri P. Balaji and K. Srinivasulu are hereby, jointly and/or severally, called upon to show cause to the Commissioner of Customs (Chennai-III), Custom House No. 60, Rajaji Salai, Chennai-1 within 30 days of receipt of this notice, as to why:

(i) the seized 173.400 gm of cut pieces of gold bars and 70.300 gm of foreign marked coins, totally valued at Rs. 7,29,053/-, should not be confiscated under Section 111(a), 111(d) or 111(d), 111(l) & 111(m), as the case may be, whether or not there is any change in their form, in terms of section 120 of the Customs Act, 1962 as may be applicable;

(ii) penalty should not be imposed on each of them under Section 112 of the Customs Act, 1962.

(iii) the amount of Rs. 90,00,000/-, presently deposited as fixed deposit in the Bank of Baroda, T. Nagar Branch, Chennai should not be confiscated under Section 121 of the Customs Act, 1962 and appropriated to Government Account.

40. S/Shri Vijayaraj Surana, J. Thiyagarajan and G. Venkatesh are hereby called upon to show cause to the Commissioner of Customs (Chennai-III), Custom House No. 60, Rajah Salai, Chennai-1 within 30 days of receipt of this notice, as to why penalty should not be imposed on them under Section 112 of the Customs Act, 1962 for having dealt with the seized gold in the manner elaborated in the preceding paragraphs and as admitted by the latter two individuals.

41. S/Shri Manda Ramu, V. Sathyanarayana, P. Balaji, K. Srinivasulu, Vijayaraj Surana, J. Thiyagarajan and G. Venkatesh are hereby directed to show cause to the Commissioner of Customs (Chennai-III), Custom House No. 60, Rajah Salai, Chennai-1 within 30 days of receipt of this notice as to why exemplary penalty, equal to the value of the gold bars, successfully received from various smugglers and carriers which is not available for confiscation as the same has been sold out in the local market, as discussed in paragraph 37 supra, should not be imposed on them under Section 112 of the Customs Act, 1962."

10. After following due process, learned Commissioner has passed the following order :

"(i) Confiscation of 3.158 kg of gold valued at Rs. 94,61,368/- under sections 111(a) & 111(d) read with Section 120 of the Customs Act, 1962;

(ii) Confiscation of goods used for concealment of the smuggled gold with no commercial value under Section 119 of the Customs Act, 1962.

(iii) Confiscation of 173.400 gm of cut pieces of gold bars and 70.300 gm of foreign marked coins, totally valued at Rs. 7,29,053/- under Section 111(a) & 111(d) of the Customs Act, 1962;

(iv) Confiscation of Rs. 90,00,000/-, presently deposited as fixed deposit in the Bank of Baroda, T. Nagar Branch, Chennai under section 121 of the Customs Act, 1962.

(v) Imposition of penalty of Rs. 10,00,000/- (Rupees Ten lakhs only) on Shri V. Sathyanarayana under Section 112(b) of the Customs Act, 1962.

(vi) Imposition of penalty of Rs. 20,00,000/- (Rupees Twenty lakhs only) on Shri Manda Ramu under Section 112(b) of the Customs Act, 1962.

(vii) Imposition of penalty of Rs. 20,00,000/- (Rupees Twenty lakhs only) on Shri P. Balaji under Section 112(b) of the Customs Act, 1962.

(viii) Imposition of penalty of Rs. 12,00,000/- (Rupees Twelve lakhs only) on Shri J. Thiyagarajan under Section 112(b) of the Customs Act, 1962.

(ix) Imposition of penalty of Rs. 12,00,000/- (Rupees Twelve lakhs only) on Shri G. Venkatesh under Section 112(b) of the Customs Act, 1962.

(x) Imposition of penalty of Rs. 5,00,000/- (Rupees Five lakhs only) on Shri K. Srinivasulu under Section 112(b) of the Customs Act, 1962.

(xi) Imposition of penalty of Rs. 45,00,000/- (Rupees Forth five lakhs only) on Shri Vijayaraj Surana under Section 112(b) of the Customs Act, 1962."

11. Aggrieved by the impugned order, these appeals have been filed. In his Appeal No. 42254 of 2017 Shri Manda Ramu submitted as follows:

(i) The seized gold bars do not have any foreign markings as can be seen from the order passed by Hon'ble Additional Chief Commissioner Metropolitan Magistrate (EOI) in Crl. M.P. No. 3501/2016, an application filed by DRI for taking inventory of the seized gold under Section 110(1B) of the Customs Act;

(ii) Payment for the gold bars was made through RTGS;

(iii) Statements recorded by the DRI were retracted. The outcome of the cross examination was in favour of the appellant.

(iv) Since there are no foreign markings, the gold bars are not liable for confiscation.

(v) Section 123 would apply only if there is a reasonable belief that the goods are smuggled and are seized in such belief;

(vi) Since there are no foreign markings of the gold bars, DRI officers had no such belief in the present case;

(vii) The penalty imposed under Section 112(b) needs to be set aside because the confiscation itself is not sustainable.

12. In his Appeal No. 40644 of 2018 Shri V. Sathyanarayana submitted as follows :

(i) The learned adjudicating authority failed to consider the submissions of the appellant and he was in no way concerned with any act or omission, which would render such goods liable for confiscation under Section 111(d) and (l) of the Customs Act.

(ii) DRI has extracted the statement from him.

(iii) He is working only on monthly salary.

(iv) Imposing such a huge penalty upon him is unsustainable.

(v) A penalty under Section 112(b) is applicable only if the goods are brought from place outside India. Therefore, he is not liable to penalty.

13. In his appeal No. 40646 of 2018 Shri P. Balaji submitted as follows:

(i) The adjudicating authority mechanically confirmed the confiscation without application of mind.

(ii) They had a ledger balance of 1374.755 gm. of gold lying in stock on 8.5.2014

(iii) They had further purchased 2 kg. of gold of 99.5% purity on payment through RTGS. Therefore, they had stock of 3374.755 kg. of gold of which 3.158 kg. was sold by them to Shri Manda Ramu and the remaining gold was seized from their premises by DRI.

(iv) The learned adjudicating authority has committed grave error in invoking Section 121 of the Customs Act, 1962 to confiscate deposit of Rupees Ninety lakhs because there was no foreign marking over the seized gold.

(v) M/s SLN Security is an authorized bullion trader and DRI had seized gold bars weighing 173.400 gm with foreign markings and they are not liable for confiscation.

(vi) The adjudicating authority has not produced any evidence to show that the appellant had knowledge or reason to believe that the goods are liable for confiscation under Section 111(a) and 111(d) of the Customs Act.

(vii) The appellant had sufficient balance for gold in its accounts and ledger books.

(viii) The gold was not seized in port or airport or border areas and therefore Section 111(a) and (d) would not apply.

(ix) The adjudicating authority failed to consider or appreciate any outcome of cross-examination.

(x) On cross examination, Shri Thiyagarajan and Shri J. Venkatesh they said that they do not know the appellant Shri Balaji nor have they seen him. They further confirmed that they have not sold any gold to Shri Balaji. Penalty under Section 112(b) is also not imposable upon them.

14. In his appeal C/40647 of 2018 Shri K. Srinivasulu submitted as follows:

(i) After the demise of his mother, he was not at all involved in the affairs of his business and this has been recorded categorically in paragraph 51 & 55 of the impugned order as follows :

> "51. It is seen from the case record that Shri K. Srinivasulu is partner of Shri P. Balaji in running SLN Securities & Forex Pvt. Ltd. I have seen his submissions along with Balaji and also individually through his Counsel vide letter dated 20.4.2017. It is also observed from the voluntary statement of Shri P. Balaji dated 10.5.2014 that at question No. 8 regarding role of Shri K. Srinivasulu, Shri P. Balaji stated that Shri K. Srinivasulu's mother expired one year ago and his father is a heart patient, recently he is not coming to office regularly; but he knew about the dealing of Shri Balaji with Shri Manda Ramu of Rajahmundry. Further scrutiny of the records of the case it has been noticed that no statement has been recorded from Shri K. Srinivasulu by investigating Agency although he was very much available for questioning as he only wrote the statement of Shri P. Balaji dated 10.5.2014 partly in his own hand writing.

> In these circumstances his actual role has not been established. In the SCN no specific charges about his role has been discussed or a case has been made against him except to the fact that he has been a partner in M/s SLN Balaji. From the above, I am of the opinion that Shri K. Srinivasulu was not actively associated and besides his being partner & Director of M/s SLN Securities & Forex Pvt. Ltd., his role had not come out anywhere in this case.
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> 55. The penalty for each of accused has to be decided based on their role, employee & employer relationship, active participation etc."

(ii) The learned adjudicating authority has gravely erred in imposing penalty upon him and he is not even visiting his office or doing any work for one year before the confiscation. Therefore, the same may be set aside.

15. The following issues fall for consideration in these appeals.

(i) Whether the confiscation of 3.158 kg. of gold seized from Shri Sathyanarayana under Section 111(a) and 111(d) read with Section 120 of the Customs Act, 1962 can be sustained in the facts and circumstances of the case.

(ii) Whether confiscation of the goods of no commercial value under Section 119 can be sustained. (although this is not specifically contested in any appeal).

(iii) Whether confiscation of 173.400 gm of cut pieces of gold bars and 70.300 gm of foreign marked gold coins seized from M/s SLN Securities valued at Rs. 7,29,053/- under Section 111(a) and (d) of the Customs Act can be sustained.

(iv) Whether the confiscation of Rupees Ninety lakhs deposited in Bank of Baroda, Chennai under Section 121 of the Customs Act can be sustained.

(v) Whether the imposition of penalty of Rupees Ten lakhs upon Shri Sathyanarayana under Section 112(b) of the Customs Act can be sustained.

(vi) Whether the imposition of penalty of Rupees Twenty lakhs upon Shri Manda Ramu under Section 112(b)of the Customs Act, 1962 can be sustained.

(vii) Whether the imposition of penalty of Rupees Twenty lakhs under Section 112(b) of Shri P. Balaji can be sustained.

(viii) Whether imposition of penalty of Rupees Five lakhs upon Shri K. Srinivasulu under Section 112(b) of the Customs Act can be sustained.

16. Although penalties were imposed on certain other persons they are not in appeal before us and hence such penalties are not the subject matter of these appeals. It is undisputed that the gold was found concealed in the jacket of Shri V. Sathyanarayana and was detected as he was passing through the door frame metal detector at the Railway Station. On receiving information from the Railway Protection Force officers, the officers of DRI intercepted and questioned him and he explained that he works for Shri Manda Ramu of M/s Om Lakshmi Venkateshwara Jewellers, Rajahmundry and had brought Rupees Thirty lakhs in cash, gave it to Shri Balaji of M/s SLN Securities, Chennai and received gold pieces as per instructions from Shri Manda Ramu and was carrying them back

concealed the same jacket when he was stopped by the RPF. He did not have any invoice or document for the purchase of gold. He only had two small kutcha slips along with the newspaper in which the gold was wrapped. The pieces of gold were assayed and they were found to be 99.9% purity which is the purity of smuggled gold usually found. It is true that they were no foreign markings on the pieces of gold. When questioned Shri Balaji of M/s SLN Security confirmed that he obtains smuggled gold from M/s Surana Corporation and sell it to Shri Manda Ramu and gets paid Rs. 2000 per kg. for this service. He had obtained the gold and had given it to Shri Sathyanarayana for carrying it to Shri Manda Ramu. He also explained that he did not issue any invoice at this stage. The two kutcha slips which were found along with the newspaper and which the gold was wrapped tallied in weight found by the expert assayer. These give a reasonable belief, to the officers that the gold pieces were smuggled gold because :

(a) The gold was of such purity as is normally found in foreign gold

(b) A precious metal like gold is not usually carried in such large quantities concealed in jacket/pouch specially made for the purpose.

(c) The payment for the gold was made in cash.

(d) Initial statement of Shri Sathyanarayana matched with that of Shri Balaji.

(e) As per Section 120 of Customs Act smuggled gold are liable for confiscation notwithstanding any change in their form.

(f) There were no receipts or documents to show that the gold was legally imported into India produced at any stage including before us.

17. DRI officers also found pieces of gold including with foreign markings at the place of M/s SLN Security. They also found an unsigned original and duplicate invoice issued by M/s SLN Security in favour of M/s Om Lakshmi Jewellers. Evidently, if an invoice is issued especially for a quantity like 3 kg of gold, the original copy of invoice will not be with the seller but it will go along with the goods to the buyer. It is also significant that neither of the copies of the invoice was signed and in his statement Shri Balaji explained that after Shri Sathyanarayana was apprehended Shri Manda Ramu called him and thereafter he prepared the invoice. The closing stock of the gold in the ledger of M/s SLN Security on as 8.5.2014 was only 1.347 kg. There is no way 3.158 kg. of gold could have been sold in the morning of 9.5.2014 with that stock. Shri Balaji got another invoice for purchase of 2000 gm of gold and tried to explain that the two add up to substantiate the sale of 3.158 kg of gold to Shri Manda Ramu.

18. However, invoice for 2 kg. of gold issued by M/s Khazanchi Jewellers issued in favour of M/s SLN Security was for gold of 99.5% purity. It is impossible for this purity to have instantly increased 99.9% which was the purity of the gold which was seized as per the report of the assayer and the weight tallied exactly with that in the katcha slips. Therefore, this invoice cannot support the appellant that the seized gold was purchased from M/s Khazanchi Jewellers. Further, Shri Balaji could not submit any evidence for

purchase of or legal import of 243.7 gm. of gold including foreign marked gold coins which were found in his office at the time of search. The appellant sought to plead that the statements were retracted during cross examination and, therefore, they cannot be relied upon. It is worth noting that personal hearings were held and cross examination were allowed in all cases where they were sought. Simply because the person making the statement retracts his earlier statement during cross examination, it does not mean that the adjudicating authority must hold that the original statement was wrong and the subsequent statement during the cross examination itself was correct. What needs to be seen by the adjudicating authority is whether the original statement or the subsequent retractions substantiate the undisputed facts on record. In this case, the purity of the gold being 99.9% is undisputed. This was found during the assay. The ledger stock of the gold in question as on 8.5.2014 is undisputed. The invoice for 2 kg of gold supposedly purchased by Shri Balaji of M/s SLN Security as far as the gold of lower purity. The gold was seized in the morning of 9.5.2014 at about 9.00 AM and the invoice was also dated the same. It is physically impossible for 99.5% gold to instantly correct into in 99.9% gold and cut into pieces and supply to Shri Sathyanarayana and also being carried by him in the same morning before being got it the Railway Station. Therefore, the adjudicating authority was correct in concluding that the invoice of 2 kg of gold supposedly purchased by M/s SLN Securities does not pertain to the seized gold in question.

19. In view of the above, we are no hesitation in concluding that the seized gold is of foreign origin and the DRI officers had a reasonable belief that it was smuggled and has correctly been seized. Neither the person from whom the gold was seized, i.e. that Shri Sathyanarayana nor the alleged owner of the gold Shri Manda Ramu, could discharge the onus of showing that it is not smuggled gold. Much emphasis has been laid in all appeals on the fact that the pieces of gold which have been seized had no foreign markings. Be that as it may, lack of foreign markings does not change the status of the goods under Section 123. It reads as follows :-

> "**SECTION 123. Burden of proof in certain cases.** — [(1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be -
>
> (a) in a case where such seizure is made from the possession of any person, -
>
> (i) on the person from whose possession the goods were seized; and
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> (ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other person;
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> (b) in any other case, on the person, if any, who claims to be the owner of the goods so seized.]
>
> (2) This section shall apply to gold, [and manufactures thereof,] watches, and any other class of goods which the Central Government may by notification in the Official Gazette specify".

In fact, Section 120 of the Customs Act specifically provides that the smuggled goods if confiscated notwithstanding any change in their form. It reads as follows :

> "120. Confiscation of smuggled goods notwithstanding any change in form, etc.—
>
> (1) Smuggled goods may be confiscated notwithstanding any change in their form.

> (2) Where smuggled goods are mixed with other goods in such manner that the smuggled goods cannot be separated from such other goods, the whole of the goods shall be liable to confiscation: Provided that where the owner of such goods proves that he had no knowledge or reason to believe that they included any smuggled goods, only such part of the goods the value of which is equal to the values of the smuggled goods shall be liable to confiscation.

20. What is significant in this case is that the gold was of 99.9% purity which is the purity of the foreign gold.

21. It has also been argued that the in addition to import of gold by nominated agencies such as banks, etc. gold can also be imported by passengers who fulfill certain requirements. We agree. However, as long as the gold is covered by Section 123 and there is a reasonable belief of the officers that it is smuggled, the burden of proof shifts on to the person from whom it is seized to prove that it is not smuggled. If it is bought from passengers, such documents can be shown. The reasonable belief has to be examined in the factual matrix of each case. In this case, the purity of the gold, the lack of invoice, the payment for the gold in cash concealed in a jacket and in which the gold was also being carried all add up to give reasonable belief to the officer. The original and duplicate copies of the invoice, unsigned, prepared by Shri Balaji in favour of Shri Manda Ramu do not inspire any confidence because if it was an invoice issued for sale it should have been sent with the goods after signature which is not the case. In fact, the initial statement Shri Balaji clarified that he prepared the invoice after receiving the same information about the seizure of gold. This is nothing but an attempt to cover up. The other invoice showing purchase of 2000 gm of gold also does not support the appellant’s case because the purity of the gold was different.

22. In view of all the above factors, we find that confiscation of the 3.158 kg. of gold seized from Shri V. Sathyanarayana under Section 111(a) & (d) read with Section 120 of the Customs Act needs to be upheld. Similarly, confiscation of the goods used for concealment of smuggled gold of no commercial value (Jacket) also need to be upheld.

23. The 173.400 gm of cut pieces of gold bars and 70 gm of foreign marked gold coins seized from the premises of M/s SLN Security are less than the closing stock of the gold as on 8.5.2014. The 70 gm. of gold coin had foreign marks and there were no corresponding invoices or documents to show their legitimate imports and hence their confiscation needs to be upheld. In our considered view, the 173.400 gm of cut pieces of gold bars do not fall under the mischief of Section 123. Therefore, the confiscation of this gold cannot be sustained.

24. As far as Rupees Ninety lakhs receives by M/s SLN Security from Shri Manda Ramu through RTGS is concerned, the transaction is undisputed till now. According to the appellants, the payment was for 3.158 kg. of gold which we have already held to be smuggled and hence liable for confiscation. Consequently, Rupees Ninety lakhs can only be considered as sale proceeds of this smuggled gold liable for confiscation under Section 121 of the Custom Act, 1962.

25. As far as imposition of penalty of Rs. 10 lakhs upon Shri V. Sathyanarayana under Section 112(b) of Customs Act, 1962 is concerned, we find that the confiscated gold was being carried by

him, though as a courier for Shri Manda Ramu this penalty needs to be upheld. Therefore, he has rendered himself liable for penalty under Section 112(b). However, considering that he was only a courier carrying the gold reduced to penalty on him to Rupees One lakh.

26. As far as the penalty of Rupees Twenty lakhs upon Shri Manda Ramu is concerned, we find that he was the buyer of the smuggled gold which has been confiscated and therefore, we find no interference is required with the penalty imposed upon him.

27. Similarly, we find no reason to interfere with the penalty of Rupees Twenty lakhs imposed upon Shri Balaji under Section 112(b) of the Customs Act, 1962.

28. Regarding penalty of Rupees Five lakhs imposed upon Shri K. Srinivasulu, we find that the impugned order itself notes that he is just another Director of M/s SLN Security & Forex Private Limited and had no active role in this entire operation except that he is a partner/Director of the company. In fact, due to demise of his mother he was not taking any active interest in the business at all. Having come to such a conclusion, we find that the learned adjudicating authority has wrongly imposed penalty of Rupees Five lakhs upon him. We therefore, find that this penalty needs to be set aside.

29. In view of the above, we dispose of the appeals as follows:

(a) Confiscation of 3.158 kg. of gold valued at Rs. 94,61,368/- under Section 111(a) and (d) read with Section 120 of the Customs Act is upheld.

(b) Confiscation of the goods of no commercial value used for concealment the above gold is upheld under Section 119.

(c) Confiscation of 173.400 gm of pieces of gold bars is set aside.

(d) Confiscation of 70.300 gm. of foreign marked coins under Section 111(a) & 111(d) is upheld.

(e) Confiscation of Rupees Ninety lakhs under Section 121 of the Customs Act is upheld.

(f) Penalty upon Shri V. Sathyanarayana under Section 112(b) of the Customs Act is reduced to Rupees One lakh.

(g) Penalty of Rupees Twenty lakhs under Section 112(b) of the Customs Act Shri Manda Ramu is upheld.

(h) Imposition of penalty under Section 112(b) of Rupees Twenty lakhs upon Shri P. Balaji is upheld.

(i) Imposition of penalty of Rupees Five lakhs on Shri K. Srinivasulu is set aside.

30. All the appeals are disposed of on above terms with consequential reliefs, if any. The miscellaneous application filed by the appellant also stands disposed of.

(Pronounced in Court on 14.12.2021)

(Sulekha Beevi C.S.)
Member (Judicial)

(P.V. Subba Rao)
Member (Technical)

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