IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

Customs Appeal No. 40912 of 2013

(Arising out of Order in Original No. 01/2013 dated 18.01.2013 passed by the Commissioner of Customs, Trichy)

Shri K. Sivamani **Appellant**
S/o Kunju Pillai
No. 4/7, Keela Mada Vilagam
Vedaranyam Taluk
Nagapattinam District.

Vs.

Commissioner of Customs **Respondent**
No. 1, Williams Road
Cantonment, Trichy – 620 001.

APPEARANCE:

Shri S. Satishchandrasekaran, Advocate for the Appellant
Smt. O.M. Reena, Authorised Representative for the Respondent

CORAM

Hon'ble Shri M. Ajit Kumar, Member (Technical)
Hon'ble Shri Ajayan T.V., Member (Judicial)

FINAL ORDER NO. 40165/2026

Date of Hearing: 13.08.2025
Date of Decision: 02.02.2026

Per M. Ajit Kumar,

This appeal is filed by the appellant against Order in Original No. 01/2013 dated 18.01.2013 passed by the Commissioner of Customs, Trichy who has imposed a penalty of Rs.2.50 crores under section 112(a) of the Customs Act, 1962.

2. Brief facts of the case are that Customs officers allegedly acting on specific intelligence, intercepted a TATA Sumo Grande (EX) near Vailankanni on 10 November 2011. Shri J. Anand and the driver Shri Vedayan were found as occupants of the vehicle. Upon inspection,

of the vehicle, officers allegedly found and seized 156 foreign-marked gold biscuits (totaling 15,600 grams, valued at ₹4,52,40,000), along with the vehicle. Investigation revealed that Shri J. Anand was previously known for smuggling, and his phone records linked him to Shri Sathish Kumar, a driver for the appellant K. Sivamani. Shri K. Sivamani and Shri J. Anand were close relatives. They were involved in illegal smuggling activities through Kodiakarai coastal region, collaborating with contacts in Sri Lanka. The appellant herein was allegedly found to be the mastermind of the illegal activity. A Show Cause Notice was issued for confiscation and penalties. The Commissioner of Customs ordered absolute confiscation of the gold and vehicle (with an option to redeem the vehicle for ₹1,25,000) and imposed a penalty of ₹2,50,00,000 on both J. Anand and K. Sivamani under Section 112(a) of the Customs Act, 1962. Aggreived by the said order, Shri K. Sivamani has appealed this decision before us.

3. The learned Advocate Shri S. Satishchandrasekaran appeared for the appellant and Ld. Authorized Representative Smt. O.M. Reena appeared for the respondent.

3.1 Shri S. Satishchandrasekaran the Ld. Counsel for the appellant submitted the following:

A) The Ld. Commissioner Appeals has relied upon notification no.31/2003-CUS, dated 01/03/2003, which is applicable for import of gold by eligible passengers and found that the said notification was not applicable in this case as it was not dealing with the case of a passenger. The Ld. Counsel stated that the authorities failed to verify whether the individuals from whom the gold was seized, or the other co-noticees, qualified as eligible passengers. As a result, the proceedings are fundamentally flawed on this basis alone.

B) He further contended that Section 123 of the Customs Act, which places the burden of proof on the person from whom goods are seized, is not applicable in this case. Both the Show Cause Notice and the Order in Original proceed solely on the presumption that the gold biscuits originated from Sri Lanka, without any supporting evidence, including from the 108 statements recorded. Therefore, the confiscation of the gold under Section 111(d) is based on conjecture and is unsustainable.

C) Additionally, there is no indication that the officers who conducted the search were "proper officers" as defined under Section 2(34) read with Sections 105, 106, and 106A of the Act. This renders the seizure improper and the entire action unreliable. The statements recorded under Section 108 were taken without explaining the relevant legal provisions to the deponents, making both the Show Cause Notice and the Order in Original legally untenable.

D) The counsel also highlighted the lack of corroborative evidence supporting the statements, rendering the issue of retraction before the magistrate or the Commissioner irrelevant. Notably, there was no verification or seizure of the alleged Rs. 30,000 paid to Anand, nor was any mobile phone or SIM card recovered to confirm the use of the number 9698275027 by either Anand or the appellant.

E) Furthermore, the appellant was not afforded the opportunity to cross-examine those who gave statements against him, which is both prejudicial and contrary to the principles of natural justice. Numerous discrepancies exist in the recorded statements, and the Order in Original is based solely on circumstantial evidence, with no primary evidence against any of the co-noticees, including the appellant. Unless the absence of primary evidence is properly explained, reliance on secondary or circumstantial evidence is not legally sustainable.

F) The impugned Order-In-Original mentions that since the Gold was received by the said Anand near the sea shore, the same has been imported from Srilanka since both Anand and the Appellant Sivamani have been in constant touch with their counter parts in Srilanka. The said allegation has been without any basis and there has been no corroborative evidence to prove the said presumption of the department. Consequently, invoking the presumption under Section 123(1) of the Customs Act is unwarranted. The initial stop and search of the vehicle occurred without independent witnesses, further undermining the credibility of the proceedings. Additionally, the seizure documentation was prepared by a Central Excise officer from Chennai, who does not qualify as a "proper officer" under Section 2(34) of the Act.

G) In summary, there is neither direct nor circumstantial evidence linking the appellant to the alleged offence, and the failure to specify the relevant subsections of Section 112 in the Show Cause Notice further vitiates the proceedings. The absence of a clear rationale for invoking Section 112(a) against the appellant and Anand demonstrates a lack of application of mind by the adjudicating authority.

H) The Ld. Counsel further relied on the following judgments in support of his submissions.

i) **Noor Aga Vs. State of Punjab & Another** (2008) 16 SCC 417

It has been held in para 150 of the said judgement that "where there are a large number of discrepancies, the appellant has been gravely prejudiced by their non-examination. In a case where procedural safeguards were required to be strictly complied with, it is for the prosecution to explain why the material witnesses had not been examined".

ii) **Nishad K.U. Vs The Joint Commissioner, Central Tax and Central Excise and 2 others** (W.P. (C) NO. 26732 OF 2024), KERALA HIGH COURT.

It has been held in para 18 of the said judgement that, "Considering the nature of the order issued against the petitioner which is impugned in this writ petition, this court is of the view that failure to grant an opportunity to the petitioner for cross examination and relying the statements of persons to impose penalty have violated the principles of natural justice.

iii) **B. Lakshmichand Vs. Government of India**, 1983 (12) ELT 322 (Mad) – Madras High Court

It has been held in para 2 of the order that "If the penal action is proposed to be taken and proceedings initiated which are likely to culminate in the imposition of penalty, then the authorities must be clear in their mind as to whether clause (a) or clause (b) of section will apply or both failing which proceedings were liable to be quashed".

iv) **K.V.Rajagopal Vs Commissioner of Customs, Trichy**, 2000 (125) ELT 777 (Tribunal), Madras

It has been held in para 4 that "the Department has failed to prove that the bars seized are from foreign origin, confiscation justified, and opportunity to redeem the goods on payment of fine should be given to the appellant.

The Ld. Counsel prayed that the impugned order may be set aside and their appeal be allowed.

3.2 Smt. O.M. Reena the Ld. A.R. took us through the findings in the impugned order and reiterated the same. She drew attention to the 5 judge Constitutional Bench decision of the Hon'ble Supreme Court in

THE COLLECTOR OF CUSTOMS, MADRAS Vs NATHELLA SAMPATHU CHETTY AND ANOTHER [AIR 1962 SUPREME COURT 316 / 1962 MAD LJ (CRI) 1], submitted earlier, to state that the physical properties of gold permit easy division, fusion, and alteration, and gold in the market generally lacks identification marks. Consequently, it is impossible to determine by inspection whether any gold has been lawfully imported or is of illicit origin. This inherent anonymity renders it extremely difficult for customs authorities to prove that a particular quantity of gold has been smuggled. In recognition of this challenge, the law appropriately places the burden on the possessor to establish the lawful origin of the gold. She also referred to the judgment of the Hon'ble Madras High Court in the case of **Commissioner Of Customs Vs Mohammed Ali Jinnah** [C.M.A.No.2685 of 2023, Dated: 09.05.2025], in this regard. Further the Ld. A.R. stated that the Hon'ble Madras High Court in **K.P. Abdul Majeed Vs Collector Of Customs And Central** [1995 (80) E.L.T. 35 (MADRAS)], held that there is no bar under Section 122 of the Customs Act to proceed against the person who is outside the territorial limits. She stated that the impugned order was well reasoned and the appeal may be rejected.

4. We have gone through the appeal papers and have heard the parties to the dispute through their representatives. We find that the importation of gold into India is a highly regulated activity and has been a subject of special treatment both under the Customs Act and the Foreign Trade Policy. The appeal in this case relates to the charge of smuggling of gold, which is nothing but importing goods

clandestinely, without payment of duty. Such goods fall within the definition of "prohibited goods", under Section 2(33) of the Customs Act. These activities threaten national economic interests. Moreover, the inherent malleability of gold facilitates its transformation into various forms, making it exceedingly difficult to visually ascertain its licit origin. It is perhaps for these reasons that as per Section 123 of the Act, the burden of proving that the goods are not 'smuggled' goods is placed upon the person from whom the goods are seized or the person who claims to be owner. Having said so the presumption of innocence being a background assumption of our legal system, it needs to be balanced with the doctrine of reverse burden. The appellant must be afforded the protection of law, failing which he cannot be expected to discharge a higher standard of proof than required normally, to prove his innocence. The Hon'ble Supreme Court of India in **Noor Aga Vs State Of Punjab & Anr** [2010) 3 SCC (Cri) 748 / 2008 AIR (SCW) 5964] held:

> "68. We may notice that Sachs, J. in State v. Coetzee [(1997) 2 LRC 593] explained the significance of the presumption of innocence in the following terms :-
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> > "**<u>There is a paradox at the heart of all criminal procedure in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become."</u>**
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> (emphasis added)

5. The appellant has submitted that he was not afforded the opportunity to cross-examine those who gave statements against him, which is both prejudicial and contrary to the principles of natural justice. We feel that denying the appellant the right of cross

examination in such a situation would impair the effectiveness of the of the appellant in defending himself.

6. Constitutional courts had earlier felt that the question of cross-examination of a party would depend on the facts and circumstances of a case. The Hon'ble Supreme Court in **M/s Telestar Travels Pvt. Ltd. & Ors Vs Special Director of Enforcement** [2013 (289) ELT (3) SC], held as under;

> "18. . . . **<u>It is only when a deposition goes through the fire of cross-examination that a Court or Statutory Authority may be able to determine and assess its probative value.</u>** Using a deposition that is not so tested, may therefore amount to using evidence, which the party concerned has had no opportunity to question. Such refusal may in turn amount to violation of the rule of a fair hearing and opportunity implicit in any adjudicatory process, affecting the right of the citizen. **<u>The question, however, is whether failure to permit the party to cross examine has resulted in any prejudice so as to call for reversal of the orders and a de novo enquiry into the matter. The answer to that question would depend upon the facts and circumstances of each case.</u>** For instance, a similar plea raised in **Surjeet Singh Chhabra v. Union of India and Ors.** (1997) 1 SCC 508 before this Court did not cut much ice, as this Court felt that cross examination of the witness would make no material difference in the facts and circumstances of that case.
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> (emphasis added)

It was held by Courts that statements recorded under the Central Excise Act 1944 and the Customs Act 1962, were admissible in evidence. [See: **Naresh J. Sukhwani Vs UOI** - 1996 (83) E.L.T. 258 (SC); **SURJEET SINGH CHHABRA Vs UNION OF INDIA** - 1997 (89) E.L.T. 646 (S.C.); **Romesh Chandra Mehta Vs State of West Bengal** - 1999 (110) E.L.T. 324 (S.C.); **Asst. Collector Of C Ex, Rajamundry Vs Duncan Agro Industries Ltd** - 2000 (120) E.L.T. 280 (S.C.)]. However, the present judicial trend largely has been to follow the specific procedure set out in Section 138B of the Customs Act, 1962 so as to establish the truth of the facts contained in the statements being relied upon.

7. Thus, in the light of the evolving judicial views, there is seen to be a non-adherence of the principles of natural justice in this case, more so in a case involving reverse burden of proof. However, this is a curable defect. Considering the gravity of the charge and the need for the appellant to defend himself, it is hence felt necessary that the matter should be remanded to the file of the Original Authority to follow the procedure set out in section 138B of the Customs Act 1962. He should afford an opportunity to the appellant, in terms of the section, to cross examine the remaining persons whose statements were relied upon in the SCN and had been requested by the appellant for cross-examination but were not permitted by the Ld. A.A.. This view is also supported by the recent judgment of the Hon'ble Allahabad High Court in **Commissioner Of Customs (Preventive) Lucknow Vs Shri Sarad Chand Agrahari @ Sharad Chand Agrahari** [2026:AHC-LKO:3332-DB / CUSTOM APPEAL No. - 19 of 2025, Dated: 16.01.2026], that set aside a CESTAT order which had invalidated customs adjudication proceedings on the ground that cross-examination under Section 138B of the Customs Act was not provided. The Hon'ble Court held:

> "11. **<u>Upon a perusal of Section 138-B of the Act, 1962, it is clear that there is no specific requirement for allowing cross-examination.</u>** Furthermore, the law established by the Hon'ble Supreme Court and various High Courts as discussed above is that in the event, any material is relied upon by the authorities, any witnesses are examined by the authorities, upon a request made by the show cause noticee, the said relied upon documents are to

> be provided to the noticee and the witnesses that have been examined and whose statements are being relied upon by the authorities shall be subject to cross-examination by the noticee. **The law does not mandate that in each and every case, cross-examination is required to be provided. We are of the view that it is incumbent upon the noticee to seek cross-examination of the witnesses, and if such a request is made, it is mandatory for the authorities to provide such cross-examination.** In the event, such cross-examination is not possible, the adjudicating authority in his order has to specifically note down the reasons as to why the witnesses could not be subjected to cross-examination. Such reasons could be as specified in Section 138-B such as death of the witness, the witness being incapable of giving evidence, the witness not being traceable, amongst others."
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> (emphasis added)

8. We hence remand the matter to the Original Authority to decide the issue afresh in denovo proceedings after following the procedure set out in section 138B of the Customs Act 1962. The appellant is at liberty to advance arguments both orally and in writing on the merits of the case. All contentions are left open. The appellant should also co-operate with the adjudicating authority in completing the process expeditiously and in any case within ninety days of receipt of this order. The appeal is disposed of accordingly.

(Order pronounced in open court on 02.02.2026)

Sd/-	Sd/-
(**AJAYAN T.V.**)	(**M. AJIT KUMAR**)
Member (Judicial)	Member (Technical)

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