

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH

CUSTOMS APPEAL NO. 52922 OF 2019

(Arising out of Order-in-Appeal No. CC(A)/CUS/D-II/Prev/NCH/650/2010-20 dated 30.09.2019 passed by the Commissioner of Customs (Appeals), New Custom House, Near IGI Airport, New Delhi 110037)

Deepak Handa

H.No. 91, Gali Hanuman, Pacca Danga,
Jammu 180001

.....Appellant

VERSUS

**Principal Commissioner of
Customs (Preventive)**

New Custom House, Near IGI Airport
New Delhi

.....Respondent

With

CUSTOMS APPEAL NO. 52923 OF 2019

(Arising out of Order-in-Appeal No. CC(A)/CUS/D-II/Prev/NCH/662/2010-20 dated 7.10.2019 passed by the Commissioner of Customs (Appeals), New Custom House, Near IGI Airport, New Delhi 110037)

Ravi Handa

H.No. 91, Gali Hanuman, Pacca Danga,
Jammu 180001

.....Appellant

VERSUS

**Principal Commissioner of
Customs (Preventive)**

New Custom House, Near IGI Airport
New Delhi

.....Respondent

APPEARANCE:

Shri R.K. Hasija, Advocate for the Appellant
Shri Rakesh Kumar, Authorised Representative for the Department

**CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)**

**DATE OF HEARING: 15.04.2021
DATE OF DECISION: 25.05.2021**

FINAL ORDER NO. 51520-51521/2021

P. Venkata Subba Rao:

These two appeals have been filed assailing orders dated 30.9.2019 and 7.10.2019 passed by the Commissioner of Customs (Appeals), New Custom House, New Delhi, both of which emanate out of appeals against the same order-in-original passed by the Additional Commissioner of Customs deciding on a Show Cause Notice dated 21.2.2018 issued by the Additional Director, Directorate of Revenue Intelligence, New Delhi. Hence, both the appeal are being disposed of together.

2. Acting on specific information, officers of DRI intercepted two persons sitting on seats C7 and C9 of Delhi Udhampur Express train (No. 22401) on 23.8.2017 while the train was still stationed in Delhi Rohilla Railway Station. They identified themselves as Deepak Handa¹, (the appellant in appeal No. 52922) s/o Vijay Kumar and Surinder Singh, s/o Bansi Singh. When asked, they denied that they were carrying any gold in any form. Officers searched them and their baggage under Section 102 of the Customs Act, 1962² and recovered 9 gold bars of foreign origin weighing 1000 grams each and gold jewellery weighing 5.429 kg and 120 gold coins suspected to be of foreign origin totally weighing 0.96 kg.

3. Surinder Singh, in his statement dated 24.8.2017, stated that he works as a casual labourer in the shop of Deepak on a salary of Rs. 7,500 per month and the statement of Deepak on

1 . Deepak

2 . Customs Act

24.8.2017 corroborated that Surinder Singh was only his employee.

4. While the jewellery was recovered from their bags, four of the foreign marked gold bars were recovered from the shoes of Deepak in which they were concealed. The remaining five gold bars and the gold coins were wrapped in brown colour tape and concealed in the specially designed secret pockets in the back pack.

5. The total gold weighing 15.389 kg estimated to be worth about Rs. 4.6 crores was seized under the Customs Act as Deepak did not have any bills for the gold nor any documents to show that the foreign marked gold was legally imported into India.

6. During investigation, Deepak said that the **gold bars were purchased from Kashi Kumar Aggarwal³**, agent of M/s. Pinki Chains, **gold ornaments and coins were purchased from Hardesh Kumar of M/s. T C Ornaments** and **gold chains were purchased from M/s. Tridev Jewellers** but he could not produce any evidence to support these claims.

7. **Kashi, in turn, said that he had sold nine gold bars to Deepak after procuring them from M/s. Uma Strips. The owner of M/s. Uma Strips, Bishan Chand Gupta** said that he owns the shop and runs it with his two sons and his staff. He purchases imported gold from agencies such as MMTC, PAMP, STC, Axis Bank and sells it to others. He knew Kashi and had also sold 28 kg of gold coins to him. But any gold which they sold is against proper invoice and his staff signs on every such

3 . Kashi

invoice. **He submitted copies of the sale and purchase ledgers and confirmed that all payments are for sale and purchase of his firm are only through bank accounts. These ledgers did not reflect the seized gold bars which Kashi claimed to have bought and sold to Deepak.**

8. Regarding the other gold articles which were seized, the jewelers from who they were said to have been bought denied having sold them to either Kashi or to M/s Pinki Chains or to Deepak. Scrutiny of the documents and bank statements of M/s. Pinki Chains, M/s. T C Ornaments and M/s Tridev Jewellers and other jewelers also did not corroborate the claims of Deepak Handa and Kashi Kumar Aggarwal.

9. **Deepak also said in his statement that five of the nine gold bars carried by him belonged to one, Shera of Star Jewellers, Srinagar** and Shera had made payment to M/s.Pinki Chains for them through RTGS. **Shera denied this claim and the documents also did not support this claim of Deepak.**

10. Deepak also said that he had purchased gold ornaments from Babli of M/s. T C Ornaments and gold chains from M/s. Tridev Jewellers but both these jewelers denied these claims of Deepak. Even the records did not support this claim.

11. In his statements dated 24.8.2017 and 25.8.2017, Deepak said that he got the jewellery manufactured at Delhi supplying gold of foreign origin. Therefore, it appeared to the revenue that the seized 5.429 kg of gold jewellery was got manufactured by them using illegally imported foreign origin gold and was being carried without any invoice or proper documents. Deepak could

not produce any valid document to support their legal possession.

12. In the follow up operations, gold and cash were seized from the shop of Kashi in Delhi (which is not subject matter of this appeal or the impugned orders). Further, from the Jammu based business premises of Deepak, viz., Baibhav Ornaments and Radhika Jewellers (being managed by his brother), DRI seized foreign origin gold coins weighing 1,118 grams (valued at Rs 46,83,820), Indian currency and National Savings Certificates and Kisan Vikas Patras. They recorded the statements of the brother of Deepak, Ravi Handa⁴ who was managing the businesses in Jammu. Some of the Indian currency seized and the National Savings Certificates and Kisan Vikas Patras seized were returned during investigations.

13. Investigations were completed and a Show Cause Notice was issued. The learned Additional Commissioner of Customs passed an order, the operative part of which is as follows:

- "i. I confiscate the seized gold weighing 15.3890 kg (recovered from Deepak Handa) valued at Rs. 4,60,02,337, seized vide panchnama dated 23/24-8-2017 under section 111(d), 111 (i) and 111(p) read with section 120 of the Customs Act, 1962.
- ii. I confiscate the seized gold weighing 2776.94 grams (recovered from Kashi Kumar Aggarwal) valued at Rs. 72,21,040/- seized vide panchnama dated 24.8.2017 under section 111(d), 111(i) and 111(p) read with section 120 of the Customs Act, 1962

4 . Ravi

- iii. I confiscate the seized gold weighing 1,118.24 grams (recovered from M/s. Baibhav Ornaments) valued at Rs. 46,83,820/- seized vide panchnama dated 24.8.2017 under sections 11(d), 111(i) and 111(p) read with section 120 of the Customs Act, 1962.
- iv. I confiscate Indian currency amounting to Rs. 8,86,500 seized vide panchnama dated 24.8.2017 under section 121 of the Customs Act, 1962.
- v. I confiscate Indian currency amounting to Rs. 9,64,600 seized from the business premises of M/s. Baibhav Ornaments and I confiscate Indian currency amounting to Rs. 3,64,500/- from the premises of M/s. Radhika Jewellers (Ground Floor) vide panchnama dated 24.8.2017 under section 121 of the Customs Act, 1962.
- vi. I impose a penalty of Rs. 50,00,000 under section 112 (b) (i) of the Customs Act, 1962 on Deepak Handa for his acts of omission and commission stated above.
- vii. I impose a penalty of Rs. 25,00,000 under section 112 (b) (i) of the Customs Act, 1962 on Kashi Kumar Aggarwal for his acts of omission and commission stated above.
- viii. I impose a penalty of Rs. 10,00,000 under section 112 (b) (i) of the Customs Act, 1962 on Ravi Handa for his acts of omission and commission stated above.
- ix. I do not impose any penalty under section 114AA of the Customs Act, 1962 on Deepak Handa, Kashi Kumar Aggarwal and Ravi Handa, for the reasons mentioned above."

14. Deepak and Ravi appealed to the learned Commissioner (Appeals) who passed order dated 30.9.2019 (impugned in appeal no. C/52922/2019 by Deepak) and order dated 7.10.2019 (impugned in appeal no. C/52923/2019 by Ravi). The appeals were rejected and the order in original of the Additional Commissioner was upheld. Hence, these appeals.

15. Learned Counsel for the appellants submitted as follows:

- a) The Customs Act regulates only foreign trade, i.e., imports and exports and not their internal trade within India. All the goods in question were seized within India.
- b) The gold was confiscated under sections 111 (d), 111(i) and 111(p) which read as follows:

“SECTION 111. Confiscation of improperly imported goods, etc. - The following goods brought from a place outside India shall be liable to confiscation: -
 (d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;
 (i) any dutiable or prohibited goods found concealed in any manner in any package either before or after the unloading thereof;
 (p) any notified goods in relation to which any provisions of Chapter IVA or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened.”

- c) Section 111(d) applies to goods which are imported or are attempted to be imported or are brought into the Indian Customs waters in violation of any prohibition imposed on their import under the Customs Act. In this case, the gold was procured locally and was being transported from Delhi to Jammu in a train where it was seized. Therefore, section 111(d) does not apply.

- d) Section 111(i) gets attracted only when any dutiable or prohibited goods are found concealed in any package either before or after unloading thereof. The term unloading must be understood in the context of sections 31, 32, 33, 34 and 36 which deal with unloading of the imported goods only at the authorized places in the Customs station. It has nothing to do with unloading of domestic railway passenger or his baggage containing locally bought goods which were neither dutiable nor prohibited.
- e) Section 111(p) applies to internal trade of goods of foreign origin which are notified under Section 11B (Chapter IVA) of the Customs Act. Gold is not notified under this section. Therefore, section 111(p) does not apply.
- f) Thus, all the three sections of 111 do not apply.
- g) The gold jewellery was confiscated invoking section 120 of the Customs Act which reads as follows:

“SECTION 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 value of the smuggled goods shall be liable to confiscation.”

- h) Since the goods themselves are not smuggled goods, section 120 also does not apply to the pieces of gold

and gold jewellery. Confiscation of these goods, therefore, cannot sustain.

- i) The currency was confiscated invoking section 121 of the Customs Act which reads as follows:

"SECTION 121. Confiscation of sale-proceeds of smuggled goods. - Where any smuggled goods are sold by a person having knowledge or reason to believe that the goods are smuggled goods, the sale-proceeds thereof shall be liable to confiscation."

- j) Since the goods themselves are domestically procured and not imported, the question of confiscation of the currency as sale proceeds of smuggled goods cannot sustain.

- k) The department relied on section 123 of the Customs Act to shift the burden of proving the non-smuggled nature of the gold on to the appellants. This section reads as follows:

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

- l) This section applies and the burden of proof shifts to the person from whom the goods are seized, provided the **seizure was under a reasonable belief that they are smuggled goods. In this case, there was**

no such reasonable belief. The goods were seized in a train in which Deepak and Surinder Singh were about to travel to Jammu from Delhi. Subsequent seizures were also from the shops in Delhi and Jammu. Nothing was seized either at the port or airport. Therefore, the officers had no reasonable belief that the gold was smuggled. Therefore, it is upon the department to prove that the seized goods are smuggled goods and they have not proved so. He relied on the decision in **Union of Indai vs Imtiaz Iqbal Pothiwala [2019 (365) ELT 167 (Bom)]** in support of this argument.

- m) As held in **RVE Venkatachala Gounder vs Arulmigu Visveswaraswami & VP Temple [2003 (8) SCC J752]**, the onus of proof, as opposed to the burden of proof, keeps shifting in certain circumstances and had, in the appellant's case, indeed shifted back to the DRI. The DRI failed to validate the legality or otherwise of the import of the gold bars seized from the appellant, even when the importer thereof had been identified, had relieved the appellants of the burden cast on them under section 123. Therefore, the appellants were not required to prove that the goods were not smuggled.
- n) Section 123 does not apply to goods seized under section 120 and cash seized as sale proceeds of the smuggled goods and to goods confiscated under section 121 at all.
- o) There was no confession by the appellants that the seized gold was smuggled.

p) Penalty was imposed on both the appellants under section 112(b) (i) which reads as follows:

"SECTION 112. Penalty for improper importation of goods, etc.- Any person, -
 (a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or
 (b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111, shall be liable, -
 (i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding the value of the goods or five thousand rupees, whichever is the greater;
"

q) Since the goods are not liable for confiscation under section 111, the penalty imposed under section 112(b)(i) is also not sustainable.

16. Learned Authorized Representative of the department supported the impugned orders and submitted as follows:

- a) DRI received information and on that basis, officers of DRI approached Deepak and his employee Surinder Singh and introduced themselves and asked if they (Deepak and Surinder) were carrying any gold in any form. They denied. No genuine businessman lies like this when they had nothing to fear if they were legitimately dealing in gold or gold jewellery.
- b) DRI officers conducted a search of Deepak, Surinder and their luggage and the gold was seized from the bags including the secret pockets of a back pack and from the shoes of Deepak.

- c) The nine gold bars had foreign markings on them and so did the cut pieces of the gold. The gold coins also had the same purity.
- d) The totality of these facts gave the officers of DRI a reasonable belief to seize the gold and gold articles as contemplated under section 123. Thus, the burden of proof shifted to Deepak (Surinder being just an employee). He relied on the judgment of the Supreme Court in **State of Maharashtra vs Natwarlal Damodardas Soni** reported in **[1983 (13) ELT 1620 (SC)]** to assert that the circumstances of the seizure and the totality of the circumstances must be considered to determine if there was a reasonable belief that the gold was smuggled. In the case before the Supreme Court, the gold biscuits bore foreign markings which proclaimed their foreign origin, the gold was of 24 carat purity, the biscuits were found concealed and stitched into the folds of the jacket prepared for the purpose and after the seizure the accused absconded from justice. Gold could be imported only with the permission of RBI at that time which the accused did not have. Considering all these factors, the Supreme Court reversed the acquittal of the accused by the High Court.
- e) During the period relevant to this case, import of gold in any form was restricted as per DGFT Notification No. 36/2015-202 dated 17 January 2017 and import was permitted only by nominated agencies. It was not a

freely importable good. Therefore, it was a **prohibited goods under section 2 (33) of the Customs Act** which reads as follows:

"2(33) "prohibited goods" means any goods **the import or export of which is subject to any prohibition under this Act or any other law for the time being in force** but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with;"

- f) In respect of gold in any form, import was prohibited except by nominated agencies as per the Foreign Trade Policy notification above issued under the Foreign Trade (Development and Regulation) Act, 1992. Unless this condition of the import (only by a notified agency) is fulfilled, gold is a prohibited good. Reliance is placed on the judgment of High Court of Delhi in **Commissioner of Customs & Central Excise Delhi IV vs Achiever International [2012 (286) ELT 180 (Del)]** in which it has been clarified that the prohibition under Section 11 of the Customs Act is different from confiscation under section 111(d) of the Customs Act. While section 11 deals with prohibitions under the Customs Act only, confiscation under Section 111(d) can be done even if the import violated any other law for the time being force. In the case before the High Court, section 3 of the Imports and exports (control) Act, 1947 was violated which is the predecessor law of Foreign Trade (Development and Regulation) Act, 1992 which has been violated in this case. The Supreme Court as per (a) Om Prakash Bhatiya [2003 (155) ELT 423 (SC)] and

(b) Sheikh Mod Omer [1983(13)ELT 1439 (SC) has held that section 2(33) of the Customs Act has wider connotations than section 11 of the Customs Act. Even if gold is not notified separately under section 11 of the Customs Act, the prohibition flows from the statute i.e section 123 of the Customs Act. Also, in Sheikh Mohd Omer vs. Collector of Customs, Calcutta 1983(13) ELT 1439 (SC) the Supreme Court had held that any prohibition referred in section 111 applies to every type of prohibition and that may be partial or complete. Any restriction to import or export is to an extent a prohibition

- g) The appellants are not a notified agency. Deepak claimed in his statements that the **gold bars were purchased from Kashi**, agent of M/s. Pinki Chains, **gold ornaments and coins were purchased from Hardesh Kumar of M/s. T C Ornaments** and **gold chains were purchased from M/s. Tridev Jewellers** but could not produce any evidence for the same.
- h) **Kashi, in turn, said that he had sold nine gold bars to Deepak after procuring them from M/s. Uma Strips. The owner of M/s. Uma Strips, Bishan Chand Gupta** said that he purchases imported gold from agencies such as MMTC, PAMP, STC, Axis Bank and sells it to others. He sells these goods only payments through RTGS and after issuing an invoice with the signature of his staff. He submitted copies of his sales ledgers which did not support the claim of

Deepak and Kashi of having purchased the gold bars from M/s. Uma Strips.

- i) Similarly, the other supposed vendors of the jewellery and coins have also not supported the claim of Deepak of having purchased the seized goods from them. Neither the documents nor the statements of any of the vendors supported the claim of the appellants to have procured the goods.
- j) Deepak also claimed that some of the gold bars seized from him were meant for Sheru of Kashmir. Sheru said that he purchases gold from Delhi and pays through bank but he had nothing to do with the gold bars seized from Deepak.
- k) To sum up, gold in any form falls under section 123 and if seized under reasonable belief that the gold is smuggled gold, the burden of proving that the seized gold is not smuggled rests on the person from whom it is seized. DRI seized the gold and gold jewellery on a reasonable belief that it was smuggled and further seized gold and cash in Jammu in follow up action again under the reasonable belief. There were no papers to support the claim of the appellants that the gold was not smuggled. Statements of Deepak claiming that the gold was procured from some vendors and that some of the gold bars actually belonged to one Sheru of Kashmir were not corroborated by the alleged suppliers or Sheru or the books of accounts.

- l) With respect to confiscation under section 111(p), he submits that section 111(p) requires that the goods have to be notified as prohibited under Chapter IVA i.e., section 11 of the Customs Act and so even if it is held that section 111(p) is not applicable, gold is still liable to confiscation under section 111(d) and 111(i) of the Customs Act.
- m) The gold jewellery is liable to confiscation as per section 120 of the Customs Act because it was made out of smuggled gold and notwithstanding any change in form, the smuggled goods are liable for confiscation.
- n) The factual and legal matrix discussed above clearly proves beyond doubt that Deepak Handa with Kashi were involved in business of smuggling of gold items and the sale proceeds seized during investigations were from the business of smuggled gold items and thus liable for confiscation under section 121 of the Customs Act. The fact that Deepak Handa had accepted his mistake of not carrying any relevant documents with regard to foreign marked imported gold items which are restricted as per DGFT and RBI guidelines is also a circumstantial evidence and self admission of carrying foreign marked gold items.
- o) He concedes that gold was NOT notified under Section 11B (Chapter IVA of the Customs Act) and therefore, section 111(p) does not apply to this case. However, the gold is still liable to confiscation under sections 111(d) and 111(i) of the Customs Act.

17. We have considered the arguments made on behalf of both the sides.

18. The following issues have to be decided in this case.

- a) Was the gold confiscated in the case covered by Section 123 of the Customs Act shifting the burden of proving the non-smuggled nature of the seized goods to the appellants?
- b) Was the gold jewellery confiscated covered by section 123 of the Customs Act?
- c) Was the cash seized as sale proceeds of smuggled goods confiscated under section 121 covered by Section 123 of the Customs Act?
- d) Did the officers have reasonable belief that the goods/cash seized were smuggled so as to shift the burden under section 123 upon the appellants?
- e) If section 123 applies to (a), (b) or (c) above, have the appellants discharged their responsibility of proving non-smuggled nature of the seized goods/cash?
- f) Considering all the above, is the confiscation of the gold under section 111(d),(i) and (p) correct ?
- g) Is the confiscation of the gold jewellery under section 111(d), 111(i) and 111(p) read with section 120 correct?
- h) Is the confiscation of the cash as sale proceeds of smuggled goods under section 121 correct?
- i) Was the penalty correctly imposed under section 112 of the Customs Act on the appellants?

19. Section 123 of the Customs Act shifts the burden of proof in certain cases. 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
(ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other person;
(b) in any other case, on the person, if any, who claims to be the owner of the goods so seized.
(2) This section shall apply to gold, and manufactures thereof, watches, and any other class of goods which the Central Government may by notification in the Official Gazette specify."

20. From the above, it is clear, that the burden of proof shifts under Section 123, when (a) there must be goods to which the section applies; (b) the goods must have been seized; and (c) the seizure must be under a reasonable belief that they are smuggled goods.

21. The terms 'goods' and 'smuggling' are defined in sections 2(22) and 2 (39) as follows:

"2(22) **"goods"** includes -
(a) vessels, aircrafts and vehicles;
(b) stores;
(c) baggage;
(d) currency and negotiable instruments; and
(e) any other kind of movable property
2(39) **"smuggling"**, in relation to any goods, means any act or omission which will render such goods liable to confiscation under section 111 or section 113;"

22. It is clear from section 2(22), that goods can include not only goods but also currency. Smuggling, as per section 2(39) is any act which renders the goods liable to confiscation under section 111 (in case of imports) or section 113 (in case of

exports). The next question is whether the goods seized in the case are covered under section 123. This section applies to gold and manufactures thereof and watches and any other goods notified by the government. There is nothing on the record to show that Indian currency is notified under section 123. Therefore, while the gold (in the form of bars, coins or pieces) and manufactures thereof (in the form of jewellery) are covered by section 123, seized currency is not so covered. There is also no allegation that the currency is smuggled. It has been confiscated as sale proceeds of smuggled goods, and not as smuggled goods. Such currency (being fruit of a poisonous tree), is liable to confiscation under section 121. A plain reading of section 123, which shifts the burden of proof, does not show it covers sale proceeds of smuggled goods. Therefore, while gold and manufactures thereof (jewellery in this case) are covered by section 123, currency is not covered at all. Thus, as far as currency is concerned, the burden of proof is on the department and not on the person from whom it is seized.

23. As far as the gold is concerned, there is no dispute that it is covered by section 123. As far as jewellery is concerned, the case of the Revenue is NOT that it is smuggled but that it is made from smuggled gold. Therefore, notwithstanding this change of form (from primary gold to ornaments), jewellery would be liable to confiscation under section 120. If the jewellery was allegedly smuggled and was seized under such a reasonable belief, section 123 would apply. Since jewellery is not even alleged to be smuggled, section 123 does not apply unless it can be shown that it has been made out of smuggled gold.

24. The next question is whether the officers had a reasonable belief, as required under Section 123, that the seized goods were smuggled goods. We find that the officers had received information acting on which they approached Deepak and his employee Surinder while they were on board a train in Delhi destined to Jammu. After introducing themselves, officers asked them if they were carrying any gold in any form. They replied in negative. Any ordinary businessman of ordinary prudence has no reason to lie so. When searched, the gold was seized not only from their bags but also from concealed in shoes and from specially made pockets of the backpack. When asked, they could not produce any document to show legitimate import. The seized goods included 9 gold bars with foreign markings with purity of 99.5%, five cut pieces of gold and also of 99.5% purity and 120 foreign marked gold coins with a purity of 91.6%. The rest of the goods were jewellery and miscellaneous gold items of 87.5% purity. In our considered view, in this factual matrix, the officers had a reasonable belief that they were smuggled goods. Therefore, the condition of reasonable belief is fulfilled insofar as the alleged smuggled goods are concerned.

25. Similarly, the gold coins seized in the Jammu based businesses of Deepak were also of foreign origin and therefore, the officers had a reasonable belief that they were smuggled gold.

26. Now we proceed to deal with confiscation of each of the goods.

A. Goods seized from Deepak Handa on 23.8.2017 in the Jammu bound Udhampur Express.

A.1. Foreign marked gold bars, nine, weighing 9 kg in total and having a purity of 99.5%, five small pieces of gold weighing 0.00277 kg in total and one hundred and twenty gold coins weighing 0.96 kg in total having a purity of 91.6 % (part of S.No.(i) of the operative part of the Order in Original)

27. These three types of goods weighing 9.9627 kg in all had extremely high levels of purity and were in primary form and had foreign markings. They were being carried surreptitiously in a train. When asked by the officers of DRI, Deepak and Surinder denied that they were carrying any gold in any form. On search, the goods were recovered from the shoes and bags including specially made pockets in the backpack. The officers had a reasonable belief that they were smuggled goods and accordingly, seized them. The burden of proof is on the person from who they are seized (Deepak) to prove that they were not smuggled.

28. Deepak said in his statements that the **gold bars were purchased from Kashi**, agent of M/s. Pinki Chains, **gold ornaments and coins were purchased from Hardesh Kumar of M/s. T C Ornaments**. Kashi, in turn, said that he had sold nine gold bars to Deepak after procuring them from M/s. Uma Strips. The owner of M/s. Uma Strips, Bishan Chand Gupta said that he purchases imported gold from agencies such as MMTC, PAMP, STC, Axis Bank and sells it to others. He only sells it on invoices duly signed by his staff and receives payment through banking channels. He also produced copies of his sales ledgers for the period. These did not reflect the nine gold bars in question. Neither Kashi nor Deepak had produced any documents to substantiate their claim of their legal import or purchase from

someone who legally imported the gold. We, therefore, find that the appellant had not discharged his burden of proving that these goods were not smuggled as is contemplated under Section 123.

29. The next question is whether these goods are liable to confiscation under Section 111 (d), 111(p) and 111(i) of the Customs Act as held in the Order in Original and upheld in the impugned orders. Under section 111 (d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force can be confiscated. Gold is a prohibited good inasmuch as its import was permitted during the relevant period only by designated agencies under the Foreign Trade (Development & Regulation) Act, 1992. There is no evidence on record whatsoever to show that the seized gold was imported by one of the approved agencies. Thus, the gold is liable for confiscation under section 111(d).

30. As far as section 111(i) is concerned, it provides for confiscation of **"any dutiable or prohibited goods found concealed** in any manner in any package either before or after the unloading thereof". The gold in question was, indeed found concealed in the shoes and secret pockets of the backpack. Learned counsel submitted that this should apply to only cases when the goods are being unloaded and not when the goods are being carried domestically in train. We have considered this argument. The section applies either before or after unloading. Thus, if smuggled goods are unloaded after concealing then by this logic it should not matter that they were being carried in a

concealed manner. A smuggler carrying a jacket full of gold biscuits can land and once he unloads the jacket, if the argument of the learned counsel is accepted, the concealment should not matter.

31. A careful reading of section 111(i) shows that it does not matter whether the concealment was before or after unloading so long as the concealed goods are either dutiable or prohibited goods. Dutiable goods as per section 2(14) means any goods which are chargeable to duty and on which duty has not been paid. Thus, once the duty is paid on the imported goods, they are no longer dutiable goods. Thereafter, one is free to carry them wherever, in any manner whatsoever they please. For instance, if any goods were imported and the duty has been paid on them, whether one carries them thereafter openly or concealed, section 111(i) does not apply. Until the duty is paid, they cannot be kept concealed. In case of prohibited goods, if the conditions subject to which the goods can be imported are fulfilled, they cease to be prohibited goods and they can be carried openly or concealed as one pleases. In case of gold during the period in question, if gold had been imported by a designated authority, it would not have been a prohibited good (since the condition of import was fulfilled) and if duty has also been paid, it would not have been a dutiable good. Thereafter, if the designated authority, in turn, sold the gold to anyone and such person carried them, concealed in a secret jacket or false bottom of a suitcase or shoes, section 111(i) would not apply. However, in this case, there is no evidence that the goods in question were imported by the designated organizations who alone could have imported the

gold. Therefore, the confiscated gold is prohibited good and since it has been found concealed in the shoes of Deepak and in the secret pockets of his back pack, Section 111(i) applies.

32. As far as section 111(p) is concerned, it provides for confiscation of “any notified goods in relation to which any provisions of Chapter IVA or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened”. It is undisputed that gold was NOT notified under Chapter IVA during the relevant period and therefore, it cannot be confiscated under section 111(p). Learned Authorised Representative argued that the goods must have been notified under section 11 for the goods to be liable for confiscation under section 111(p). This is not correct. Section 111(p) requires the goods to be notified under Chapter IVA, i.e., under section 11B and not under Section 11. There is nothing on the record to show that gold was notified under section 11B during the period.

33. To sum up, the confiscation of these goods under sections 111(d) and section 111(i) are sustainable and confiscation under section 111(p) needs to be set aside.

A.2. Gold jewellery weighing 4.687 kg and miscellaneous items of gold weighing 0.742 kg with a purity of 87.5% seized (part of S.No.(i) of the operative part of the Order in original)

34. These gold ornaments were confiscated in the order in original and upheld in the impugned order under sections 111(d), 111(i) and 111(p) read with section 120 of the Customs Act. Section 120 provides that smuggled goods may be confiscated notwithstanding any change in their form. Further, it also provides that 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.

35. It is the case of the department that the seized jewellery was made out of smuggled gold and NOT that it itself was smuggled. There were also no foreign markings on them to show that the jewellery was smuggled. Deepak had no bills or invoices to show legitimate purchase of these ornaments. In his statement dated 25.8.2017, Deepak said "I did not pay for the recovered jewellery in cash as I supply the imported gold bar to Babli and Tridev Jewellery for making jewellery as per my order who return the jewellery made from it by deducting his expenses and commission. Against 1000 grams of imported gold of 995 purity of foreign marking given by me, I get jewellery totally containing 777 grams of Gold. If stones are fixed in the jewellery, I have to pay for the cost of stones additionally in cash. I have to purchase imported gold as Indian gold is not available and jewellery made by Indian gold lacks finishing and is brittle and of poor quality." The statements made by Deepak could not be substantiated by the documents and records. Thus, it is not in dispute that the gold jewellery was not smuggled but made in India.

36. In his statement, Deepak, said that he got the jewellery made by supplying imported foreign marked, gold to the jewelers. Even if this statement is taken on face value, it does not say that smuggled gold was supplied to make the jewellery. It only says the jewellery was made from imported gold which could be (a) legitimately imported gold sold by traders; or (b)

smuggled gold. If it was established with some evidence (including statements) that the jewellery was manufactured out of smuggled gold, then such smuggled gold would have been covered under Section 123 and by virtue of section 120, would have been liable for confiscation notwithstanding the change in its form into jewellery. However, there is no such evidence on record. In our considered view, therefore, the jewellery is not liable to confiscation in the absence of any evidence that it is smuggled or it has been made by converting smuggled gold. The mere fact that the jewellery was found along with the smuggled gold bars and gold coins makes no difference.

B. Foreign origin gold coins weighing 1118.24 grams in all seized from the business premises of M/s. Radhika Jewellers and M/s. Baibhav Ornaments, Jammu seized on 24.8. 2017 (S.No. (iii) of the operative part of the order in original)

37. These coins were seized in the follow up action in Jammu at the above business premises. Gold is covered under Section 123 and if it is seized on a reasonable belief that it is smuggled, the burden of proof shifts to the person from whom it is seized and to the person who claims to be the owner of the gold. In this case, the gold coins had foreign markings. Import of gold was permitted during the relevant period only by authorized agencies and the appellants were not so authorized. If they had purchased the gold from some authorized agency, they would have the documents to establish this fact. From the records of the case, it is evident that the appellants could not produce any such documents to show that these were not smuggled. Therefore, the presumption is that these are smuggled gold. As discussed

above, these coins are liable for confiscation under section 111(d) of the customs Act.

C. Indian currency amounting to Rs. 9,64,000 seized from Baibhav Ornaments and Rs. 3,64,500 seized from Radhika Jewellers (S.no. (v) of the operative part of the order in original)

38. The currency was seized under section 121 as 'sale proceeds of smuggled goods'. This section states that 'Where any smuggled goods are sold by a person having knowledge or reason to believe that the goods are smuggled goods, the sale-proceeds thereof shall be liable to confiscation'. This section does not shift the burden of proof to the person(s) from whom the cash is seized. It is for the Revenue to establish that the cash which was seized was (a) the sale proceeds; (b) the goods sold were smuggled goods; and (c) the person who has so sold the goods had either the knowledge or the reason to believe that the goods were smuggled. Merely because some unaccounted for cash is lying, it cannot be confiscated unless the three conditions in Section 121 are fulfilled. From the records of this case, we do not find that the Revenue has established any of these factors or even identified which were the smuggled goods which were sold by the person from whom the cash is seized. Confiscation of this cash, is therefore, liable to be set aside and we do so.

39. We note that some confiscations were made at S.No. (ii) and (iv) of the operative part of the Order in Original of goods seized from Kashi Kumar Aggarwal and a penalty was imposed at S.No. (vii) but these are not the subject of these appeals.

Penalty of Rs. 50,00,000 imposed on Deepak Handa under Section 112 (S.No. (vi) of the operative part of the Order in Original)

40. It is not in doubt that Deepak was in possession of and was found carrying smuggled gold bars and gold coins which we have held were correctly confiscated under Section 111(d) and 111(p) of the Customs Act. Therefore, Deepak had rendered himself liable to penalty under section 112. A penalty of Rs. 50,00,000/- was imposed upon him. Considering that we had set aside some of the confiscations (jewellery and currency) as not sustainable, we reduce the penalty on Deepak Handa to Rs. 20,00,000/-.

Penalty of Rs. 10,00,000 imposed on Ravi Handa under Section 112 (S.No. (viii) of the operative part of the Order in Original)

41. Ravi Handa, brother of Deepak Handa was managing the Baibhav ornaments in Jammu where 1118 grams of the confiscated foreign marked gold coins recovered. Indian currency recovered from him was also confiscated which we have set aside. Considering these factors, we find that Ravi Handa has rendered himself liable to penalty under Section 112 but the penalty needs to be reduced. Accordingly, we reduce the penalty imposed on Ravi Handa to Rs. 2,00,000/-.

42. Thus, we answer the questions which we framed in paragraph 16 above as follows:

- a) Yes. The confiscated gold was covered by Section 123 of the Customs Act and so the burden of proving the non-smuggled nature of the seized goods shifts to the appellants.
- b) No. The gold jewellery confiscated was not covered by section 123 of the Customs Act because it has not even been alleged that it was smuggled. It is alleged to have

been converted from smuggled gold which is not established in this case.

- c) Currency is goods as per Customs Act but it is not covered by section 123 and there is also no allegation that it is smuggled. The allegation is that it is sale proceeds of smuggled goods and has been confiscated under section 121 but the Revenue could not prove that the cash was sale proceeds of smuggled goods.
- d) Yes. The officers did have a reasonable belief that the foreign marked gold was smuggled in the factual matrix of this case and hence the burden shifts upon the appellants under section 123.
- e) The appellants could not discharge their responsibility of proving non-smuggled nature of the seized foreign marked gold.
- f) The confiscation of the gold bars, gold coins and small pieces of gold under section 111(d) and section 111(i) is correct. Confiscation under section 111(p) is not correct since gold is not a notified good under Chapter IVA of the Customs Act.
- g) Confiscation of the gold jewellery under section 111(d), 111(i) and 111(p) read with section 120 is not sustainable because there is no evidence on record that the jewellery was made out of smuggled gold.
- h) Confiscation of the cash as sale proceeds of smuggled goods under section 121 is not sustainable because Revenue could not prove that the seized cash was the sale proceeds of smuggled gold.

- i) The penalty was correctly imposed under section 112 of the Customs Act on the appellants but considering that we found the confiscation of jewellery and cash not sustainable, the quantum of penalty needs to be reduced.

43. The appeal is partly allowed and the impugned orders are modified as follows:

- a) Of the goods seized from Deepak Handa in the train, confiscation of gold jewellery weighing 4.687 kg and miscellaneous items of gold weighing 0.742 kg is set aside and the confiscation of the remaining goods is upheld.
- b) Confiscation of the Indian currency (cash) seized in Jammu is set aside.
- c) The penalty imposed on Deepak Handa is reduced to Rs. 20,00,000/-
- d) The penalty imposed on Ravi Handa is reduced to Rs, 2,00,000/-.

(Order Pronounced on 25.05.2021)

(JUSTICE DILIP GUPTA)
PRESIDENT

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