

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.
PRINCIPAL BENCH – COURT NO.III**

Customs Appeal No.50934 of 2018 (DB)

(Arising out of Order-in-Original No. DLI/CUSTOM/PRE/OPD/PR.COMMR/21/2017 dated 05.01.2018 passed by the Principal Commissioner of Customs, New Customs House, New Delhi)

Commissioner of Customs (Preventive)
New Customs House,
Near IGI Airport,
New Delhi-110 037.

Appellant

Versus

Suresh Bhonsle
S/o Jaysingh Bhonsle,
R/o 86/87, S.S. Market,
Silliguri,
West Bengal-734 001.

Respondent

With

Customs Appeal No.51257 of 2018 (DB)

(Arising out of Order-in-Original No. DLI/CUSTOM/PRE/OPD/PR.COMMR/21/2017 dated 05.01.2018 passed by the Principal Commissioner of Customs, New Customs House, New Delhi)

Suresh Bhonsle
S/o Jaysingh Bhonsle,
R/o 86/87, S.S. Market,
Silliguri,
West Bengal-734 001.

Appellant

Versus

Commissioner of Customs (Preventive)
New Customs House,
Near IGI Airport,
New Delhi-110 037.

Respondent

And

Customs Appeal No.51737 of 2018 (DB)

(Arising out of Order-in-Original No. DLI/CUSTOM/PRE/OPD/PR.COMMR/21/2017 dated 05.01.2018 passed by the Principal Commissioner of Customs, New Customs House, New Delhi)

Shri Mohd. Wajid @Bunty,
S/o Shri Saddik Ahmad,
R/o 2B-350, Awas Vikas Colony,
J.P. Nagar,
Amroha, Uttar Pradesh.

Appellant

Versus

Commissioner of Customs (Preventive)
New Customs House,
 Near IGI Airport,
 New Delhi-110 037.

Respondent

APPEARANCE:

Shri Rakesh Kumar, Authorised Representative for the Revenue.
 Shri Navneed Panwar, Advocate (Customs Appeal No.50934 and 51257/2018) and
 R.K. Rawal, Consultant (Customs Appeal No.51737/2018) for the assessee.

CORAM:

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

FINAL ORDER NOS.50015-50017/2024

DATE OF HEARING:03.10.2023
DATE OF DECISION:04.01.2024

BINU TAMTA:

1. Separate appeals have been filed by the two appellants, namely Suresh Bhonsle and Mohammed Wajid against the order-in-original no.DLI/CUSTOM/PRE/OPD/PR.COMMR/21/2017 dated 05.01.2018 ordering confiscation under Section 111(b) and Section 111(d) of the Customs Act, 1962, (hereinafter referred to as the Act) and have also challenged the penalty imposed under Section 112 (b)(i) and Section 112(b) of the Act. The Revenue also filed separate appeal challenging non-imposition of penalty under Section 114AA of the Act against the appellant, Suresh Bhonsle.
2. The facts of the case are that acting on a specific information that three persons would engage themselves in handing and taking over smuggled gold in Delhi, the officers of Directorate of Revenue Intelligence, (DRI), apprehended three persons, namely, Shri Amzad Khan, Shri Imran Mullick and Mohammed Wajid in presence of independent witnesses on 14.05.2016 at around, 09:40 hours. Pursuant to notice under Section 102 of

the Customs Act, they were apprised of the right to be searched either in the presence of a Magistrate or a Gazetted Officer, they were searched as per their reply given in writing in the presence of a gazetted officer at the DRI office. On the personal search of Shri Amzad Khan and Imran Mullick apart from other things, three pieces of heavy yellow colour metal bars wrapped in carbon paper and Newspaper and fastened on their waist under the shirt were recovered. The recovered yellow colour metal bars were got examined and valued from Shri Vikram Bhasin, Jewellery Appraiser, Customs, (IGIA) in presence of independent witnesses and as per his report, all the six yellow bars were gold bars of purity 999 collectively weighing, 10,000 gms. having market value of Rs3,05,00,000/-. None of the persons could produce any documents to show the legal possession of the gold bars recovered from them.

3. The voluntary statement of all the three persons, Amzad Khan, Imran Mullick and Mohammed Wajid were recorded under Section 108 of the Act on 14.05.2016 and thereafter on 16.09.2016. Both Amzad Khan and Imran Mullick revealed about the past transactions in the month of December 2015, February 2016 and April 2016 when they had indulged in delivering gold illegally to Mohd. Wajid in Delhi at the behest of Sh. Suresh Bhonsle. Amjad Khan also referred to certain instances where he alone delivered gold to Mohd. Wajid in Delhi. In respect of the present consignment, both of them stated that on 12.05.2016, Sh. Suresh Bhonsle gave him three packets containing five kgs. of gold to him as well as three packets containing 5 kgs. of gold to Shri Imran Mullick, with two delivery challans of M/s. Buillion Traders, Siliguri for delivery to Mohd. Wajid at Delhi and for this they boarded Brahmaputra mail on 12.05.2016 and reached Old Delhi Railway

Station at around 6.30 a.m. on 14.05.2016, when they met Mohd. Wajid at 9.40 am. and as soon he handed over a bag, the DRI officers intercepted.

4. Shri Mohd. Wajid in his voluntary statement recorded under Section 108 of the Act on 14.05.2016, stated how he met Shri Suresh Bhonsle in December 2015, at a function in Kathmandu, Nepal, and thereafter Shri Bhonsle called him up to sell 3/4 kgs. of gold through him. He then contacted Mohammed Abid who agreed to sell the gold at Delhi. In his statement, he specifically stated that Sh.Bhonsle had told him that the gold was from outside India. Mohammed Abid in his voluntary statement dated 30.05.2016, agreed that he was disposing of the smuggled gold, handed over to him by Mohammed Wajid in the market, for which he was getting commission of Rs.50 per lakh of the sale proceeds. He also admitted that Mohd. Wajid had told him that the said gold was being received from Nepal.

5. In further follow-up action, search was conducted at M/s. Bullion Traders, Siliguri where statement of Smt. Shalan Bhonsale, partner of M/s Bullion Traders (mother of Suresh Bhonsle) was recorded under Section 108 of the Act on 14.05.2016, however, she denied having signed any Challans (copies of challans recovered from Amjad Khan and Imran Mullick) as she did not look after the business at all. As per the statement of Shri Shyamal Roy, Accountant of M/s. Bullion Traders, there was no transaction after March 2016 and there was no stock apart from what was shown in the stock register.

6. Shri Suresh Bhonsle in his statement recorded under Section 108 of the Act on 17.05.2016 stated that they were in the business of trading of gold and silver, and he was a partner along with his brother and mother in the firm M/s.Bullion Traders. He denied that he knows Shri Amzad Khan and

Shri Imran Mullick. On 15.07.2016 when the statement of Shri Suresh Bhosale was recorded he admitted that he used to receive gold from one Shri Mohan of Kathmandu, Nepal through one Shri Ramesh in melted condition to suppress the foreign originality. He also admitted the transaction of gold being delivered by Shri Amzad Khan and Shri Imran Malik at Delhi and also that he took signatures of his mother on blank pages of Challan book to use the same to cover the transportation of smuggled goods. He categorically admitted that he did not make any entry in the stock register in respect of the 10 Kg. gold as these were smuggled gold bars from Nepal.

7. Investigation of the mobile numbers held by these persons revealed that Shri Suresh Bhonsle was in constant touch with all of them and also in Nepal. From verification of the stock register of M/s. Bullion Traders, it was found that there was no sale and purchase of any kind of gold from 1.04.2016 to 14.05.2016, due to All India strike of Gold Jewellers Association.

8. Accordingly, show cause notice dated 7.11.2016 was issued proposing confiscation of the seized gold under Section 111(b) and Section 111(d) of the Act and imposition of penalty under Section 112(b)(i) and Section 112(b) and also under Section 114AA of the Act. On adjudication, the proposal in the show cause notice was affirmed ordering absolute confiscation of the seized gold and penalty was imposed as under:-

“(iii) I impose under Section 112 (b)(i) of the Customs Act, 1962, a penalty of Rs.75,00,000/- (Rupees Seventy Five Lakh Only) on Shri Suresh Bhonsle S/o Late Jaysingh Bhonsle, partner of Bullion Traders and resident of 86/87, S.S. Market Siliguri (W.B.) which should be recovered from him forthwith.

(iv) I impose under Section 112(b) of the Customs Act, 1962, a penalty of Rs.20,00,000/- (Rupees Twenty Lakh

only) on Shri Imran Mullick S/o late Shoib Mullick, which should be recovered from him forthwith.

(v) I impose under Section 112(b) of the Customs Act, 1962, a penalty of Rs.20,00,000/- (Rupees Twenty Lakh only) on Shri Amjad Khan, S/o late Mohd. Khan, which should be recovered from him forthwith.

(vi) I impose under Section 112(b) of the Customs Act, 1962, a penalty of Rs.5,00,000/- (Rupees Five Lakh only) on Mohd. Wajid @ Bunty, S/o Shri Saddik Ahmad, which should be recovered from him forthwith.

(vii) I impose under Section 112(b) of the Customs Act, 1962, a penalty of Rs.2,00,000/- (Rupees Two Lakh only) on Mohd. Abid, S/o Mohd. Allaudidin, which should be recovered from him forthwith."

9. The appellant, Shri Suresh Bhonsle has challenged the confiscation and the penalty imposed by the impugned order before this Tribunal in the present appeal and the appellant, Mohd Wajid has challenged the penalty imposed on him. Whereas the Revenue has challenged that despite there being a proposal in the show cause notice for imposing penalty under Section 114AA, no penalty has been imposed by the Adjudicating Authority on Shri Suresh Bhonsle.

10. We have heard the Shri R. K. Rawal, Consultant for the appellant and also Shri Rakesh Kumar, Authorised Representative for the Revenue and perused the records of the case.

11. The first submission on behalf of the appellant is that the gold seized is not of foreign origin. He has seriously challenged the report of the jewellery appraiser and sought for retesting of the gold to ascertain the purity, but the same has not been allowed. He also submitted that gold was entrusted to Shri Amzad Khan and Imran Mullick for delivery to Delhi under proper challan, therefore, the burden of proof shifts on to the department and relied on the decision in **Ashok Kumar Aggarwal – 2016 (342) ELT 232 (Cal.)**. Further, there is no evidence of the smuggled nature of the gold. For imposing penalty under Section 112(b) of the Act, the department was

required to produce cogent evidence. No CDR has been furnished to show any conversation with Shri Mohan of Nepal. Referring to the decision of the Apex Court in **Mohtesham Mohd. Ismal vs Special Director Enforcement, Directorate, 2007(220) ELT 2**, he submitted that confession of co-accused cannot be treated as substantive evidence.

12. Shri Rakesh Kumar has opposed the appeals filed by Amjad Khan and Imran Mullick on the principle that import of gold is prohibited under Foreign Trade (Development and Regulation) Act, 1992 except by authorised banks and nationalised agencies and the appellant has not been permitted to import gold by the DGFT. Therefore, the gold seized is prohibited and the burden of proof that it is not smuggled gold lies on the appellant under Section 123 of the Act which he failed to discharge and the goods are therefore liable for confiscation under the Act. He relied on various judgments which have settled the law on the issue of import of gold. On the issue of penalty under Section 112(b), he submitted that the gold was seized of which the appellant was the owner but he could not produce any evidentiary document showing that the gold was acquired legally. Referring to the provisions of Section 114 AA of the Act, Shri Rakesh Kumar submitted that the present case was of creating false/fake documents to mask the smuggled gold which was transported to Delhi.

13. Over the period, the law on the subject relating to import of gold is well settled by catena of decisions interpreting the statutory provisions, particularly the definition of 'prohibited goods' under Section 2(33), 'dutiable goods' under Section 2(14) and 'smuggling' as defined under Section 2(39) of the Act read with Section 111 providing for various circumstances under which confiscation can be made, Section 110A and read with Section 125 for provisional release on payment of redemption fine and Section 123 requiring

the burden of proof to be discharged by the person in possession or owner of the seized goods that they are not smuggled goods.

14. On examining the facts of the present case, we find that there is no dispute that huge quantity of gold in question had been recovered which was concealed on the body of Amzad Khan and Imran Mullick to be handed over to Mohd. Wajid on the instructions of Suresh Bhonsle. From the statements recorded under section 108 of the Act, not only the instant chain of events is clearly established but even the past involvement shows that the appellants are habitual offenders. The connivance of all the persons involved stands proved by the detailed call records of different mobile numbers of Suresh Bhonsle to Mohd. Wajid, Imran Mullick, Amjad Khan and Mohd. Abid showing regular incoming and outgoing calls to each other during the relevant period as noted extensively in the impugned order. The frequent phone calls between all of them clearly establish their connivance in dealing with the sale purchase of gold procured in an illegal manner which amounts to smuggling. No document has been produced to show legal procurement of gold. These facts are sufficient to draw the conclusion that all these persons are involved in illicit trade of gold on regular basis.

15. The contention of the appellant that gold is not of foreign origin is not sustainable in view of his own statement dated 15.07.2016 where he specifically admitted that he used to get gold from one Mohan of Kathmandu, Nepal through one Rajesh. Gold of foreign origin was received in melted form to hide its identity and suppress that it is of foreign origin. It is a settled principle of law that the statement recorded under section 108 of the Act is binding on the appellant **(Romesh Chandra Mehta vs. State of West Bengal, 1969 (2) SCR 461, Percy Rustam Ji Basta vs. State of**

Maharashtra, 1971 (1) SCC 847, Assistant Collector Central Excise, Rajamundry vs. Duncan Agro Industries Ltd & Ors. 2000(7) SCC 53 and **Gulam Hussain Shaikh Chougule vs. Reynolds Supdt. of Customs Marmgoa 2001 (134) ELT 3(SC)** and the said statement of the appellant is further corroborated by the statement of the co-noticees that they were aware that the gold in question was of foreign origin. Once there is an admission by the appellant himself nothing further is required to be proved to the contrary. The Apex Court in **Surjeet Singh Chhabra vs. Union of India 1997 (89) ELT 646** held that confession made by the appellant binds him. Reliance is placed on **Commissioner of C. EX, Madras vs. M/s Systems and Components Pvt. Ltd 2004 (165) ELT 136, (SC)** where it has been held that it is a basic and settled law that what has been admitted need not be proved.

16. On the issue of burden of proof, the submission that gold was entrusted to Amzad Khan and Imran Mullick for delivery to Delhi under proper voucher would shift the burden on the department to prove that it was smuggled gold, we are of the view that the challan issued by the appellant had no sanctity as he could not show the source of procuring the gold. The appellant has not been able to discharge the burden that he has purchased the gold as per the specified sources by the RBI. There was no record or entry in their stock register of the gold covered by the challans issued. Moreover, the statement of Shri Shyamal Roy, the accountant of M/s Buillion Traders that there had been no transactions of sale-purchase of gold due to strike also corroborates that the delivery of gold under the challans was fraudulent and illegal. In the circumstances, as per Section 123 of the Act the department was under reasonable belief that it was smuggled gold and therefore the burden was on the appellant being the owner of it to prove

that the gold seized was not smuggled gold, which remained undischarged at his end. The reliance placed by the appellant on the decision in **Ashok Aggarwal (supra)** is clearly distinguishable as the gold in that case was imported by MMTC Ltd and the respondent had produced the purchase bill and seller had confirmed the sale of such gold to him and in that event it was observed that the onus shifted to the department. We are of the opinion that as the appellant failed to prove that the gold seized was validly procured in compliance of the statutory provisions whereby gold has been put in restricted category by DGFT and in terms of the RBI Circular only nominated agencies and banks are entitled to import the foreign marked gold bars.

17. Having arrived at the finding that the gold seized was smuggled gold, it would fall under the category of 'prohibited goods' as defined in Section 2(33) of the Act and therefore liable for confiscation under the provisions of section 111 of the Act. We have recently observed in the case of **Shankar Lal Goyal vs. Commissioner of Customs Final Order No.51685/2023 dated 22.12.2023** relating to seizure of gold :

"10. The definition of 'prohibited goods' have been the subject matter of interpretation in various decisions. In the case of **Sheikh Mohammed Omar Vs Collector of Customs, Calcutta & Ors. - 1970(2) SCC 728**, the contention raised by the appellant therein that the expression 'prohibition' used in Section 111(d) must be considered as a total prohibition and that the expression does not bring within its fold the restrictions imposed by clause (3) of the Import (Control) Order, 1955 was negated by the Supreme Court, holding that the word 'any prohibition' in section 111(d) of the Act meant complete as well as partial prohibition and merely because section 3 of the Imports and Exports (Control) Act, 1947, **used three different expressions, "prohibiting", "restricting" or otherwise, "controlling" was not to cut down the amplitude of the word , "any prohibition" in Section 111(d) of the Act.**

11. Following the aforesaid decision in **Sheikh Mohammed Omar**, the Supreme Court in the case of **Om Prakash Bhatia Vs. Commissioner — 2003 (155) ELT 423 (SC)** enunciated the meaning to the term 'prohibited goods' as defined by Section 2(33)

and the authority of the Customs department to confiscate the goods, observing as:

"10. From the aforesaid definition, it can be stated that (a) if there is any prohibition of import or export of goods under the Act or any other law for the time being in force, it would be considered to be prohibited goods; and (b) this would not include any such goods in respect of which the conditions, subject to which the goods are imported or exported, have been complied with. This would mean that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. This would also be clear from Section 11 which empowers the Central Government to prohibit either 'absolutely' or 'subject to such conditions' to be fulfilled before or after clearance, as may be specified in the notification, the import or export of the goods of any specified description. The notification can be issued for the purposes specified in sub-section (2). Hence, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods."

12. Similar issue was raised before the Madras High Court in the case of **Malabar Diamond Gallery P. Ltd Vs. Additional Director General, Directorate of Revenue Intelligence, Chennai - 2016 (341) ELT 65 (Mad.)** that gold jewellery was not an item whose import was prohibited and therefore the goods were not liable to be confiscated, the Division Bench referring to the observations in **Sheikh Mohammed Omer** (Supra) and **Om Prakash Bhatia** (Supra) and other decisions, inter-alia observed:

"86. If there is a fraudulent evasion of the restrictions imposed, under the Customs Act, 1962 or any other law for the time being in force, then import of gold, in contravention of the above, is prohibited. For prohibitions and restrictions, Customs Act, 1962, provides for machinery, by means of search, seizure, confiscation and penalties. Act also provides for detection, prevention and punishment for evasion of duty.

87. The expression, "subject to prohibition in the Act and any other law for the time being in force." in Section 2(33) of the Customs Act, has wide connotation and meaning, and it should be interpreted, in the context of the scheme of the Act, and not to be confined to a narrow meaning that gold is not an enumerated prohibited goods to be imported into the country. If such narrow construction and meaning have to be given, then the object of the Customs Act, 1962, would be defeated."

13. We would now consider the latest decision by the jurisdictional High Court in the case of **Nidhi Kapoor - dated 21.08.2023** reported in **2023 (8) TMI 1008**, where both the learned Judges have passed separate detailed judgment considering the various notifications issued by the DGFT and also the Circulars issued by RBI, specifically considering the following issues:

I. In respect of Scope of 'prohibited goods' under section 2(33) of the Customs Act, 1962 ('Act')

- i. whether the definition of prohibited goods under the act includes goods which are subject to conditions?
- ii. Which category of goods will be non-prohibited, but nonetheless liable to confiscation.

II. Whether gold is a prohibited item ?

III. What is the scope of redemption under section 125 of the Act?

In the main judgement, **Justice Dharmesh Sharma** categorically held that smuggling of gold is per se restricted by virtue of section 111 as also in terms of various notifications issued under the FTDR Act and under the RBI Act and therefore the importation of gold into India is highly regulated and bulk importation of gold item could only be affected by the nominated banks, agencies or business houses in the manner laid down by various DGFT regulations as well as the RBI circular or by the eligible passengers in the manner provided by the relevant regulations as the main object of the Customs Act is to prohibit smuggling of goods and sternly deal with the same as can be gathered on a conjoint reading of Section 2(25), 11(2)(c), 111 and 112 of the Act. The concluding para reads as under:

"70. In the foregoing discussion, we answer the issues framed to the effect that Section 2(33) of the Act shall also include importation of such goods within the scope of "prohibited category" with regard to which the mandatory condition under the Act as also in other relevant notifications/circulars issued by the DGFT, the RBI or any other authority have not been complied with, or in other words the restrictions imposed by the concerned authorities have not been adhered to. We further have no hesitation in holding that the importation of the gold is a prohibited item within the meaning of Section 2(33) of the Act; and that redemption in case of imposition of gold which is brought into India illegally in the form of "smuggling" does not entitle the owner or importer for automatic release/redemption of such item, and therefore, as a necessary corollary a decision to allow release/redemption of the goods confiscated with or without imposition of fine in addition to payment of

requisite duty is vested in the discretion of the Adjudicating Officer, who needless to state is duty bound to exercise his discretionary powers not only after considering the facts and circumstances of each case before it, but also in a transparent, fair and judicious manner under Section 125 of the Act.”

In his separate judgement concurring with the aforesaid view, **Justice Yashwant Varma** observed as under:-

“**145.** In summation, we note that [Section 2\(33\)](#) of the Act while defining prohibited goods firstly brings within its dragnet all goods in respect of which a prohibitory notification or order may have been Signature Not Verified Digitally Signed By:NEHA Signing Date:21.08.2023 17:00:50 issued. That order could be one promulgated either under [Section 11](#) of the Act, Section 3(2) of the FTDR or any other law for the time being in force. However, a reading of the latter part of [Section 2\(33\)](#) clearly leads us to conclude that goods which have been imported in violation of a condition for import would also fall within its ambit. If [Section 2\(33\)](#) were envisaged to extend only to goods the import of which were explicitly proscribed alone, there would have been no occasion for the authors of the statute to have spoken of goods imported in compliance with import conditions falling outside the scope of — prohibited goods”.

146. Our conclusion is further fortified when we move on to [Section 11](#) and which while principally dealing with the power to prohibit again speaks of an absolute prohibition or import being subject to conditions that may be prescribed. It is thus manifest that a prohibition could be either in absolutist terms or subject to a regime of restriction or regulation. It is this theme which stands reiterated in Section 3(2) of the FTDR which again speaks of a power to prohibit, restrict or regulate. It becomes pertinent to bear in mind that in terms of the said provision, all orders whether prohibiting, restricting or regulating are deemed, by way of a legal fiction, to fall within the ambit of [Section 11](#) of the Act. This in fact reaffirms our conclusion that [Section 2\(33\)](#) would not only cover situations where an import may be prohibited but also those where the import of goods is either restricted or regulated. A fortiori and in terms of the plain language and intent of Signature Not Verified Digitally Signed By:NEHA Signing Date:21.08.2023 17:00:50 [Section 2\(33\)](#), an import which is effected in violation of a restrictive or regulatory condition would also fall within the net of —prohibited goods.

147. We are further of the considered opinion that the absence of a notification issued under [Section 11](#) of the Act or Section 3(2) of the FTDR would have no material bearing since a restriction on import of gold stands constructed in terms of the FTP and the specific prescriptions forming part of the ITC (HS). Those restrictions which are clearly referable to Section 5 of the FTDR and the relevant provisions of that enactment would clearly be a restriction imposed under a law for the time being in force. Once the concept of prohibited goods is understood to extend to a restrictive or regulatory measure of control, there would exist no justification to discern or discover an embargo erected either in terms of [Section 11](#) of the Act or Section 3(2) of the FTDR. This more so since, for reasons aforementioned, we have already found that the power to prohibit as embodied in those two provisions itself envisages a notification or order which may stop short of a complete proscription and merely introduce a restriction or condition for import.

14. From the analysis of the statutory provisions, one thing is clear that the Act does not define the expression 'restricted goods', but the decisions referred to above, have interpreted the expression 'prohibited goods' under Section 2(33) so as to include restricted goods. In terms of the definition of 'prohibited goods' in Section 2(33) even prohibited goods could be imported or exported, subject to compliance with the terms and conditions as prescribed but if import is not done lawfully as per the procedure prescribed under the Customs Act or any other law for the time being in force, in that event the said goods would fall under the definition of 'prohibited goods'. The necessary corollary is that goods being imported if not subjected to check up at the customs on their arrival and are cleared without payment of customs duty are treated as 'smuggled goods'. As observed by the Madras High Court in **Malabar Diamond Gallery P Ltd.** (supra) " The expression, subject to the prohibition under the Customs Act, 1962, or any other law for the time being in force, in Section 2(33) of the Customs Act, has to be read and understood, in the light of what is stated in the entirety of the Act and other laws. Production of legal and valid documents for import along with payment of duty, determined on the goods imported, are certainly conditions to be satisfied by an importer. If the conditions for import are not complied with, then such goods , cannot be permitted to be imported and thus, to be treated as prohibited from being imported."

The observations of the High Court of Gujarat in **Bhargavraj Rameshkumar Mehta Vs UOI - 2018 (361) ELT 260** has also enunciated the principle that, "condition of declaration of dutiable goods, their assessment and payment of customs duties and other charges is a fundamental and essential condition for import of dutiable goods within the country. Attempt to smuggle the goods would breach all these conditions."

18. The provisions of Section 111 specify several eventualities where goods shall be liable to confiscation. The Adjudicating Authority has confirmed the confiscation under Section 111(b) and 111(d) of the Act, which reads as :

“**111.** Confiscation of improperly imported goods, etc.
The following goods brought from a place outside India shall be liable to confiscation:

(b) any goods imported by land or inland water through any route other than a route specified in a notification issued under clause

(c)

(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;

The factum of recovery of such large quantity of 10 kgs. of gold concealed under the shirt speaks for itself and the appellant being the owner thereof was unable to provide any licit document of procuring the gold, justifies the confiscation under Section 111(b) and 111(d). Taking note of the fact that the appellant had indulged in such illegal gold transactions in the past, the absolute confiscation needs to be affirmed and therefore the gold seized cannot be provisionally released in terms of section 110A read with Section 125 of the Act. The decision in **Abdul Razak vs. Union of India, 2012 (275) ELT 300 (Ker.)** and in the case of **Malabar Diamonds Gallery P. Ltd Addl. Director General, DRI, Chennai 2016 (341) ELT 65(Mad.)** has held that provisional release of goods on payment of redemption fine and duty is not as a matter of right and cannot be claimed automatically. We would also like to refer the decision of this Tribunal in **Deepak Handa vs. Principal Commissioner of Customs (Preventive)**

Customs Appeal No. 52922/2019 vide Final Order No. 51520-51521/2021 dated 25.05.2021 where gold bars of foreign origin recovered without any licit documents were held liable for absolute confiscation with penalty. The relevant para reads as under :

"29. 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). 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.

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 to the person who claims to be 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."

In **Shankar Lal Goyal's case** with reference to absolute confiscation, we have observed as :

"17.(iii) The issue whether the goods are liable to absolute confiscation has been dealt by the Supreme Court in **Union of India Vs. Raj Grow Impex LLP – 2021 (377) ELT 145 (SC)** and

referring to the provisions of section 125 of the Act, it was observed:

"69.1 " A bare reading of the provision aforesaid makes it evident that a clear distinction is made between 'prohibited goods and 'other goods'. As has rightly been pointed out, the latter part of section 125 obligates the release of confiscated goods (i.e., other than prohibited goods) against redemption fine but, the earlier part of the provision makes no such compulsion as regards the prohibited goods; and it is left to the discretion of the Adjudicating Authority that it may give an option for payment of fine in lieu of confiscation. It is innate in this provision that if the Adjudicating Authority does not choose to give such an option, the result would be of absolute confiscation."

Further, on the exercise of this power by the adjudicating authority which has to be exercised judiciously and for which all the relevant facts and factors and the implication of discretion has to be weighed to arrive at a balanced decision, the Supreme Court in the case of **Union of India Vs. Raj Grow Impex LLP (supra)** made observations to the following effect :

"79. As noticed, the exercise of discretion is a critical and solemn exercise, to be undertaken rationally and cautiously and has to be guided by law; has to be according to the rules of reason and justice; and has to be based on relevant considerations. The quest has to be to find what is proper. Moreover, an authority acting under the Customs Act, when exercising discretion conferred by Section 125 thereof, has to ensure that such exercise is in furtherance of accomplishment of the purpose underlying conferment of such power. The purpose behind leaving such discretion with the Adjudicating Authority in relation to prohibited goods is, obviously, to ensure that all the pros and cons shall be weighed before taking a final decision for release or absolute confiscation of goods."

19. We find that the Allahabad High Court in **Jalil Ahmad vs. State vide order dated 22.12.1978 – 1979 Cri.L.J.514** rightly concluded that goods were smuggled goods as neither the appellant adduced evidence that they paid the customs duty nor that they had brought these goods from Indian manufacturers. Similarly, in the present case the appellant neither adduced any evidence to show that he had legally procured the gold by following requisite conditions of payment of customs duty and other charges nor did he produce any documents for having purchased the said gold within India

and therefore the gold recovered were in violation of the prohibition imposed by DGFT and RBI apart from the provisions of the Customs Act hence was liable for confiscation under section 111 of the Act.

20. The submission on behalf of the appellant that statement of co-noticees, Imran Mullick, Amjad Khan and Mohd. Wajid cannot be taken into account to fasten guilt on the appellant and in support he relied on the decision of the Apex Court in **Mohtesham Mohd. Ismal vs. Spl. Director, Enforcement Directorate 2007(220) ELT 2 (SC)** cannot be doubted, however in the facts of the present case the statement of the appellant recorded under section 108 is on record and the same is admissible in evidence as per the settled law. Infact the appellant has tried to get out of his confessional statement recorded on 15.07.2016 by submitting a letter through his advocate dated 16.11.2017 to say that he was forced and threatened to give his statement. The retraction sought to be made after one year and five months does not inspire any confidence as it is an afterthought based on legal advice by his counsel and hence needs to be rejected. Reliance is placed on **Surjeet singh Chhabra** (supra) that confession, though retracted, is an admission and binds the petitioner.

21. Much emphasis has been laid by the appellant on the veracity of the test report by the jewellery appraiser and the request for re-testing. In this regard we find that the appellant had approached the Delhi High Court for re-testing in Writing Petition No. 9174/2017 which was disposed of vide order dated 17.10.2017, granting liberty to the appellant to agitate the issue before the adjudicating authority. As per the common practice, jewellery appraiser is called immediately at the spot and he on the basis of touchstone test ascertain as to whether the metal bar seized is gold and also to large extent its quality/ purity. The same practice was followed here at the time of

seizure. We also find that on the request made by the appellant, the Jewellery Appraiser, Shri Vikram Bhasin was called and cross examined by Sh. Deepak Choudhry, Advocate for the appellants. We find that on being asked about the margin of accuracy of purity, which could be drawn by using the touchstone method, Shri Bhasin replied that in that particular case, the margin of accuracy was almost 100% as they were gold bars cut pieces. He further added that consistency level will remain almost the same as gravity of the gold bar remains the same. It is also pertinent to note that on being asked as to whether the method of analysis adopted by him is capable of ascertaining whether the gold bar is made up from melting jewellery or it is a virgin bar, Shri Bhasin replied in affirmative. All this would reveal that fair opportunity has been granted to the appellants and the plea of re-testing was nothing but delaying tactics as it would not really make any difference if the gold recovered was less pure. Purity of the gold, in the instant case is not really relevant in view of the peculiar circumstances, i.e., the voluntary statements of all the persons recorded under section 108 of the Act which reveals the conspiracy in executing the smuggling of gold, the manner of concealment of gold in such large quantity when recovered, its transportation and the use of fake challans along with the phone call details clearly establish the role and involvement of all the persons involved. The appellant by taking such plea is indeed trying to mislead but the fact is that the goods smuggled, even if they change their form by melting, they still remain smuggled goods which are liable to confiscation under the Act. Reliance is also placed on the decision of the Kerala High Court in **Mammu & Anr. Vs Asst Collector of Central excise 1984 (171) ELT 54** where it has been held that since no definite tests have been prescribed under law, whether an article is gold of particular quality and purity, it has to

be borne in mind that the opinion of an expert on this point is relevant under section 45 of the Evidence Act.

22. We may now consider the penalty imposed on both the appellants, namely Suresh Bhonsle and Mohd. Wajid (along with others) under Section 112(b)(i) and 112(b) of the Act, respectively, the provisions thereof are quoted below :

“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 penalty²¹⁶ [not exceeding the value of the goods or five thousand rupees], whichever is the greater;

As gold is a restricted item, the same has been treated as ‘prohibited goods’ in view of the interpretation placed by various decisions on the definition of ‘prohibited goods’ as defined in Section 2(33) and hence the same have been held to be liable for confiscation. Once it is found that the gold recovered was not under valid documents, the same would be treated as prohibited goods liable to confiscation and consequently, penalty is inbuilt and is leviable under Section 112 of the Act. Both the appellants as discussed above were consciously and intentionally dealing with illegal activity of sale purchase of gold and therefore the penalty imposed by the adjudicating authority is justified and needs no interference.

23. We accordingly, dismiss the appeals filed by the two appellants, Appeal No. C/51257/2018 and Appeal No. C/51737/2018.

Appeal No. C/50934/2018

24. The above appeal is filed by the Revenue assailing the order-in-original, whereby the Adjudicating Authority has failed to Impose penalty under Section 114AA of the Act. We find that in the show cause notice there is a specific proposal for imposing penalty under section 114AA on the appellant, Shri Suresh Bhonsle, the said clause reads as :

“(V) penalty should not be imposed upon him under section 114AA of the Customs Act, 1962, for his act of omission and commission as brought out here in above. ”

25. From the perusal of the impugned order, we find there is no discussion by the Adjudicating Authority on the proposal of imposing the penalty under Section 114AA. Without stating anything on this issue on merit, we consider it appropriate to remand the matter to the adjudicating authority for limited purpose to consider the said proposal in the light of the facts and circumstances and the legal provisions. We accordingly, allow the appeal filed by the Revenue by way of remand.

[Order pronounced on 04.01.2024]

(BINU TAMTA)
Member (Judicial)

(HEMAMBIKA R. PRIYA)
Member (Technical)

Ckp.