

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

PRINCIPAL BENCH- COURT NO. I

**CUSTOMS APPEAL NO. 51986 OF 2024**

[Arising out of Order-in-Original No. DLI/CUS/Prev/HKP/Commr/03/2024-25 dated 25.06.2024 passed by the Commissioner of Customs (Preventive), New Delhi]

**Bharat Shantilal Shah**

Flat No. 1003, 10th Floor, Crerscent Bay  
Jerbai Wadia Road, Parel  
Mumbai – 400 012

**...Appellant**

Versus

**Principal Commissioner of Customs  
(Preventive)**

New Customs House,  
New Delhi

**...Respondent**

**APPEARANCE:**

Shri Rupesh Kumar, Senior Advocate, Shri Subas Chandra Acharya and Shri Vaibhav Jain Advocates for the Appellant

Shri Gurdeep Singh, Special Counsel and Shri Rakesh Kumar, Authorised Representative of the Department

**CORAM:**     **HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT**  
                  **HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)**

**DATE OF HEARING: 13.08.2025**  
**DATE OF DECISION: 08.12.2025**

**FINAL ORDER NO. 51837/2025**

**JUSTICE DILIP GUPTA:**

Bharat Shantilal Shah<sup>1</sup> has filed this appeal to assail that part of the order dated 25.06.2024 passed by the Commissioner of Customs (Preventive)<sup>2</sup> that imposes a penalty of Rs. 1.50 crores upon the appellant under section 112(b)(i) and a further penalty of Rs. 1.50 crores upon the appellant under section 114AA of the Customs Act 1962<sup>3</sup>.

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1.     **the appellant**
  2.     **the Commissioner**
  3.     **the Customs Act**

2. To appreciate the issues that have been raised in this appeal, it would be useful to narrate the relevant facts.

3. On 19.01.2023, Manish Kumar and Naresh Kumar who were travelling from Chennai to New Delhi in a train were intercepted at Hazrat Nizamuddin Railway Station, New Delhi by officials of the Directorate of Revenue Intelligence<sup>4</sup> and a notice under section 102 of the Customs Act was issued to them for search of their luggage. They were then taken for a physical search at the DRI Head Quarters at New Delhi. Thereafter, their statements were recorded at the DRI Office under section 108 of the Customs Act. The search of Manish Kumar and his baggage resulted in recovery and seizure of 7 gold bars, collectively weighing 7000gm, from a blue colour trolley bag which contained a purple colour trolley bag and a black colour bag. Rs. 1,17,590/- of Indian currency was also recovered and seized. Similarly, the search of Naresh Kumar and his baggage resulted in recovery and seizure of 5 gold bars, collectively weighing 5000 gm from a blue colour trolley bag, which contained a brown colour trolley bag and a black colour bag. Rs. 1,19,820/- of Indian currency was also recovered from him and seized.

4. On the same date Subhash Tukaram Karan, an employee of the appellant, who was travelling from Mumbai to New Delhi by train was intercepted by DRI Officials at Hazrat Nizamuddin Railway Station. The DRI Officers issued a notice to him under section 102 of the Customs Act for search of his baggage. Subsequently he and Sanjay Ram, who had come to pick him, were taken to the DRI Office. At the DRI office, a search was effected resulting in recovery of 12 boxes containing gold jewellery from one dark grey colour trolley. A box was also found to

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4. DRI

contain a blue paper envelope with the marking 'Anand Shah', containing Original Invoice No. SG-460 dated 17.01.2023 issued by M/s. Anand Shah Jewels LLP, Mumbai to M/s. Vikas Chain Jewellery India Ltd, New Delhi. 5 boxes of gold jewellery and another Invoice No. SG-160 dated 18.01.2023 were also recovered from one green trolley and black backpack. This invoice was issued by M/s. Mahalaxmi Chains & Jewellery, Mumbai to M/s. Khandelwal Chain Co., New Delhi. The gold jewellery seized from Subhash Tukaram Karan collectively weighed 20,756.3 gm. The statements of both these persons were also recorded at the DRI Office under section 108 of the Customs Act.

5. Pursuant to the statement made by Manish Kumar, a search of the premises of M/s. Bikaner Jewellers, New Delhi was carried out on 19.01.2023. Pawan Soni was found to be present at the shop premises and search of the premises was conducted in his presence. This search resulted in recovery of gold jewellery and articles (in different forms, including cut pieces) from 5 transparent boxes. A black colour bag was also found in one wooden cupboard. There were 2 transparent plastic boxes underneath the black bag and 3 boxes inside it. The following seizures were recorded:

- (i)** Gold cut pieces recovered from one transparent box
  - 5 gold pieces: 566 gm
  - 15 small uneven cut pieces: 332.5 gm
  - 17 uneven cut pieces: 1920 gm
  
- (ii)** Gold jewellery recovered from other 4 transparent boxes
  - Chains: 7898 gm
  - Rings: 1938.4 gm
  - Mix gold articles/jewellery: 1388 gm
  - A total of 11,224.4 gm of gold was seized from the premises of M/s. Bikaner Jewellers.

- (iii) Gold jewellery/articles recovered from metal locker  
3 transparent plastic boxes, 1 pink colour transparent plastic box, 1 big transparent plastic box, collectively weighing 6730 gm along with Rs. 1,60,000 of Indian currency were also recovered and 'detained'.

6. Based on the aforesaid Invoice No. SG-460 recovered from Subhash Tukaram Karan, a search of the premises of M/s. Khandelwal Chain and Co., New Delhi was carried out on 19.01.2023. The proprietors of the said shop, Sanjay Khandelwal and Sunil Khandelwal, were present at the shop premises. The search resulted in recovery of gold jewellery, collectively weighing 24626.56 gms, from two safety-deposit lockers and gold chains from folders and some boxes. 19 gold coins/bars were also recovered. Rs. 50,50,000 as opposed to the figure of Rs. 22,92,605.5 in the account was also recovered and detained due to the mismatch in the tally.

7. Based on the statements of Manish Kumar, Naresh Kumar and Subhash Tukaram Karan, a search of the shop premises of M/s. Mahalaxmi Chains, Mumbai (of which the appellant is the proprietor) was also carried out by DRI on 19.01.2023. Pursuant to the search, several documents and a laptop, were recovered and seized. However, nothing incriminating was found at the said shop premises. The shop premises were also sealed by the DRI after the search.

8. The appellant, who claims to have travelled to New Delhi for business and for collecting the assorted gold articles weighing 20756.3 gms carried to Delhi by his employee Subhash Tukaram Karan, was intercepted by officials of the DRI on 19.01.2023 in front of Kothi No. 32, Mahadeo Road, Delhi and his statement under section 108 of the Customs Act was also recorded at the DRI Office.

9. On 20.01.2023, Pawan Soni, Sanjay Ram and Sunil Khandelwal responded to the summons issued to them under section 108 of the Customs Act and their statements were recorded. The appellant also responded to the previously issued summons dated 19.01.2023 and his statement was also recorded on 20.01.2023 in continuation of his earlier statement recorded on 19.01.2023.

10. On 20.01.2023, the appellant, Manish Kumar and Naresh Kumar were arrested by the DRI and remanded to judicial custody.

11. On 30.01.2023, the appellant, Manish Kumar and Naresh Kumar, while in judicial custody, retracted their previous statements recorded on 19.01.2023 because, according to them, such statements had been recorded by use of force, undue pressure, and intimidation. The appellant categorically refuted that Manish Kumar and Naresh Kumar were carrying the seized gold bars on his instructions and also stated that the said gold bars did not belong to him. Manish Kumar and Naresh Kumar stated that they were hired by one Chennai based businessman named Rinkesh Kumar alias Prem Singh who wanted to send some well-documented gold to Delhi and had provided them 12 gold bars with Rs. 2,40,000/-. They also stated they were provided receipts containing details of the jeweller and were asked to deliver the gold to the said jeweller. They also stated that the earlier statements were recorded under threat and coercion and hence they wanted to retract.

12. On 07.02.2023, the statement of the appellant was recorded under section 108 of the Customs Act while he was in judicial custody. He stated that he was not aware of the 12kg of gold carried by Manish Kumar and Naresh Kumar and that they were not carrying the said gold on his instructions.

13. On 17.02.2023, the appellant, Manish Kumar and Naresh Kumar were enlarged on bail by the Additional Sessions Judge, Patiala House Court, New Delhi.

14. On 25.04.2023, the appellant answered to the summons dated 17.04.2023 and his statement was also recorded. He reiterated that the gold seized from Manish Kumar and Naresh Kumar did not belong to him and that they were not carrying the same on his instructions. He also stated that the gold seized from Subhash Tukaram Karan and from the premises of M/s. Bikaner Jewellers, New Delhi did belong to him and that he had valid supporting documents. He also stated that the gold jewellery weighing 20756.3 gms recovered from Subhash Tukaram Karan was taken on approval basis for marketing purposes and was manufactured by one M/s. Swamini Creations.

15. On 27.04.2023, the appellant made a request for de-sealing of his shop premises on the ground that he required documents to present them to the DRI.

16. On 03.05.2023, pursuant to the request of the appellant for the de-sealing of his shop premises, DRI Officials in the presence of pancha witnesses removed the seal affixed to the shop premises after the first search. A finding of tampering of the seal was not recorded. It is stated that prior to entry, the DRI Officials also searched the person of the appellant through physical frisking. During the search of the shop premises carried out thereafter, 19 bills, vouchers and delivery/approval challans were found and seized by the DRI, which documents, the DRI alleges, were 'planted' by the appellant.

17. On 18.05.2023, summon dated 11.05.2023 was issued to Manish Kumar by DRI under section 108 of the Customs Act, to which he

responded and his statement was recorded. The statement did not record anything incriminating against the appellant.

18. It is, thereafter, on 17.07.2023, that a show cause notice dated 17.07.2023 was issued to 10 noticees, including the appellant (Noticee No. 1). The appellant was asked to show cause why he should not be treated to be the owner of the seized gold, including the 12 gold bars, and why penalty should not be imposed him.

19. On 03.08.2023, Mukesh Kumar Soni made a representation by email to the adjudicating authority claiming ownership of the seized 12 kg gold bars recovered from the person of Manish Kumar and Naresh Kumar. In the said representation, Mukesh Kumar Soni claimed that the said gold bars had been given to Prem Singh through a job work order dated 02.11.2022 by his late brother Mahesh Kumar Soni for making jewellery.

20. On 14.08.2023, the appellant replied to the show cause notice and also furnished supporting documents.

21. On 18.11.2023, a supplementary show cause notice dated 18.11.2023 was issued to Mukesh Kumar Soni, who had claimed ownership of the seized 12kg gold bars.

22. On 04.12.2023, an application was made by the appellant for cross-examination of the four pancha witnesses. This application was rejected by the Principal Commissioner on the ground that the proceedings/factual status of the referred panchnamas had not been challenged by the noticees.

23. The adjudicating authority, by order dated 25.06.2024, upheld the confiscation of the articles which were the subject of the show cause

notice and the supplementary show cause notice and imposed a penalty of Rs. 3 crores on the appellant.

24. The relevant portions of the order concerning the appellant need to be examined.

25. In respect of 12 gold bars weighing 12000 gms and currency of Rs. 2,37,410/-, the following findings have been recorded:

**"143.5** On the basis of above statements of Sh. Manish Kumar, Sh. Naresh Kumar and Sh. Bharat Shantilal Shah recorded under Section 108 of The Customs Act, 1962. **I observe that Sh. Bharat Shantilal Shah was the owner of smuggled Foreign marked 12 Gold Bars weighing 12000 grams having Tariff value as Rs. 5,98,48,560/-. I also observed that Sh. Bharat Shantilal Shah had not provided any document for licit possession of smuggled Gold Bars and hence, failed to discharge the burden of Section 123 of The Customs Act, 1962 lying on him to prove that recovered Gold Bars were not smuggled.**

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**143.7** Thus, in the instant case, Sh. Manish Kumar, Sh. Naresh Kumar and Sh. Bharat Shantilal Shah failed to prove licit possession of 12 Gold bars weighing 12000 Grams. In addition, the 12 Gold Bars had Foreign Marking, hence, the said Gold Bars are of foreign origin and the said Gold Bars can only be imported into India through Smuggling activity as the import of Gold is regulated by Government through Import Policy Regime and Foreign Trade(Development and Regulation) Act and the Noticee Sh. Bharat Shantilal Shah have failed to produce any licit document for the import of the said gold/bars. **Therefore, on the basis of above findings, I hold that the 12 Gold Bars collectively weighing 12000 Grams recovered from the possession of Sh. Manish Kumar & Sh. Naresh Kumar and owned by Sh. Bharat Shantilal Shah was smuggled in India.**

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**143.15** Therefore, from the above discussion, I find that 12 Gold Bars weighing 12000 Grams seized from Sh. Manish Kumar and Sh. Naresh Kumar and owned by Sh. Bharat Shantilal Shah were prohibited and hence, **liable for confiscation under Section 111(b) and 111(d) of the Customs Act, 1962 which reads as under:-**

- (b) any goods imported by land or inland water through any route other than a route specified in a notification issued under clause (c) of section 7 for the import of such goods;
- (d) any goods which are imported or attempted to be imported or 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, shall be liable to confiscation;

**143.16** Further, I find that the Indian Currency amounting to Rs. 1,17,590/- recovered and seized from the possession of Sh. Manish Kumar and Rs. 1,19,820/- recovered and seized from the possession of Sh. Naresh Kumar is none other than the monetary consideration for delivery of the foreign origin gold bars from Chennai To New Delhi. From the above discussion, I find that 12 foreign origin gold bars were illegally imported and Sh. Manish Kumar and Sh. Naresh Kumar were knowingly acting as a carrier to transport the said 12 foreign origin gold bars from Chennai To New Delhi via train and they both received the amount seized from them vide seizure memo dated 19.01.2023 as a monetary consideration. **Hence, I find that the Indian Currency amounting to Rs. 1,17,590/- recovered and seized from the possession of Sh. Manish Kumar and Rs. 1,19,820/- recovered and seized from the possession of Sh. Naresh Kumar is liable for confiscation under Section 121 of the Customs Act, 1962 and I hold accordingly.**

**143.17** xxxxxxxxxxxx. In view of the above discussion, it is already established that all 12 Gold Bars weighing 12000 Grams carried by them were of foreign origin and smuggled and hence, liable for confiscation under Section 111(b) and 111(d) of The Customs Act, 1962.

**148.** I also find that Sh. Mukesh Kumar Soni has not produced any licit document showing legal import of the said gold bars of foreign origin into India. Therefore, from the above discussion and findings, I hold that Sh. Bharat Shantilal Shah, Sh. Manish Kumar, Sh. Naresh Kumar and Sh. Mukesh Kumar Soni had submitted forged documents for licit possession of 12 Gold Bars by Sh. Mukesh Kumar Soni, hence, 12 Gold Bars having Tariff value as Rs. 5,98,48,560/- and Rs. 2,37,410/- seized from the possession of Sh. Manish Kumar and Sh. Naresh Kumar which pertained to Sh. Bharat Shantilal Shah is liable for confiscation under Section 111(b) and 111(d) of the Customs Act, 1962 and Section 121 of The Customs Act, 1962 respectively."

**(emphasis supplied)**

26. In respect of gold jewellery weighing 20756.3 gms seized from Subhash Tukaram Karan, the Commissioner considered the statements made by Subhash Tukaram Karan and the appellant under section 108 of the Customs Act, the reply submitted by the appellant with Appendix 'A' containing the breakup of Jewellery received from job workers, and observed:

"**149.12** xxxxxxxxxxxx. I hold that Sh. Bharat Shantilal Shah and Sh. Anand Dasmal Shah were hand in glove in the business of manufacture/dale of Gold Jewellery covered under Invoice no. SG0460 dated 17.01.2023 used to cover up the other Gold Jewellery is also liable for confiscation under Section 119 of The Customs Act, 1962.

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**149.14.1** Therefore, I hold for confiscation of Gold Jewellery weighing 18035.26 grams recovered from the possession of Sh. Subhash Tukaram Karan and owned by Sh. Bharat Shantilal Shah under Section 111(a)/111(b) and Section 111(d) of The Customs Act, 1962. I also hold for confiscation of Gold Jewellery covered in Invoice nos SG0460 dated 17.01.2023 and SG-160 dated 18.01.2023 collectively weighing 2721.04 grams used to cover up the other Gold Jewellery weighing 18035.26 grams (manufactured out of smuggled Gold and confiscated under Section 111 of Customs Act, 1962) under Section 119 of The Customs Act, 1962.

**149.15** I also find that Gold Jewellery collectively weighing 20756.3 Grams recovered from the possession of Sh. Subhash Tukaram Karan was packed and concealed in the baggage carried by him. I find that Sh. Subhash Tukaram Karan packed and concealed the said Gold jewellery in baggage carried by him on 19.01.2023 in the manner as described in Para 5.5 to 6.1 supra. As per provisions of the Section 123 of the Customs Act, 1962, Sh. Bharat Shantilal Shah and Sh. Subhash Tukaram Karan failed to provide licit duty paying documents for procurement of the said gold from which the seized jewellery was made. **As from the above discussion, Gold Jewellery collectively weighing 20756.3 grams having tariff value as Rs. 8,31,54,318/- carried by him was already confiscated under Section 111(a)/111(b) and 111(d) of The Customs Act, 1962 and Section 119 of The Customs Act, 1962. xxxxxxxxxxxx."**

**(emphasis supplied)**

27. The Commissioner, thereafter, discussed penalty to be imposed on the appellant under sections 112(a), 112(b) and 114AA of the Customs Act and observed:

**"156.2** Hence, I find that Sh. Bharat Shantilal Shah knowingly and intentionally indulged himself in the prejudicial activity of purchasing, transporting, carrying, selling and dealing with foreign origin

smuggled gold bars from Chennai to New Delhi. He also knowingly and intentionally indulged himself in the prejudicial activity of carrying, selling and dealing with gold jewellery manufactured from smuggled gold bars having foreign markings from Mumbai to Delhi. I find that he is the mastermind in the case who managed all the activities since its inception from procurement of foreign origin smuggled gold and gold jewellery/articles made/manufactured from foreign origin smuggled gold till sale to local market in cash. **Therefore, I hold that for his acts of omission and commission of procurement, dealing, transporting and selling of gold bars / coins or gold jewellery / articles made with smuggled foreign origin gold, Sh. Bharat Shantilal Shah is liable for penalty under Section 112(b)(i) of the Customs Act, 1962.**

**156.3** I also find that Sh. Bharat Shantilal Shah was also involved knowingly and intentionally in arranging tickets for the carriers, concealment, planting forged documents, managing coordinating the smuggling of gold and converting foreign gold bars into jewellery/articles. I also find that Sh. Bharat Shantilal Shah managed forged/ fraudulent documents and fraudulent deposition certificates with the help of other persons involved in the trade of Gold and Gold Jewellery and submitted the same during the reply of SCN for proving licit possession of Gold Jewellery, **therefore I hold that Sh. Bharat Shantilal Shah is also liable for penal action under Section 114AA of the Customs Act, 1962."**

**(emphasis supplied)**

28. Accordingly, a penalty of Rs. 1.50 crores was imposed on the appellant under section 112(b)(i) of the Customs Act and a further penalty of Rs. 1.5 crores was imposed on the appellant under section 114AA of the Customs Act.

29. Shri Rupesh Kumar, learned senior counsel for the appellant assisted by Shri Subas Chandra Acharya and Shri Vaibhav Jain made the following submissions:

- (i)** The appellant has no concern or connection with the 12 gold bars recovered and seized from Manish Kumar and Naresh Kumar on 19.01.2023. In such a situation, the onus to prove that the said goods do not belong to the appellant will not lie on the appellant in terms of section 123 of the Customs Act. The finding recorded to the contrary by the Commissioner is, therefore, not correct;
- (ii)** The finding recorded by the Commissioner against the appellant for confiscation of the said 12 gold bars is in the teeth of section 123 of the Customs Act. The appellant is neither the person from whose possession the goods were seized nor is he the person claiming to be the owner of the said goods. In fact, one Mukesh Soni claimed that he was the owner of the goods, though this fact has been disbelieved by the Commissioner;
- (iii)** The Commissioner committed an error in placing reliance upon the statements made under section 108 of the Customs Act as the procedure contemplated under section 138B of the Customs Act was not followed. In this connection, reliance has been placed on certain decisions, to which reference shall be made at the appropriate stage;

- (iv)** In any case Manish Kumar, Naresh Kumar and the appellant retracted their statements and stated that the gold bars did not belong to the appellant;
- (v)** The gold jewellery/ ornaments weighing 20756.3 gms recovered and seized from Subhash Tukaram Karan were carried by Subhash Tukaram Karan on the instructions of the appellant;
- (vi)** Gold jewellery weighing 11,224.4 gms and gold cut pieces weighing 2818.5 gms recovered and seized from the shop premises of M/s. Bikaner Jewellers were left in the shop premises of M/s. Bikaner Jewellers at the instructions of the appellant. This jewellery was brought on behalf of the appellant to Delhi on approval basis for marketing purpose. All the aforesaid jewellery was manufactured out of gold bars purchased from bullion dealers based in Mumbai. The gold cut pieces are owned by R.K. Jewellers which were given to M/s. Mahalaxmi Chains & Jewellers (firm belonging to the appellant) for the job work through Karigar Issue Vouchers for manufacturing Delhi design ornaments/jewellery out of them. It has, therefore, been wrongly held in the impugned order that they were owned by the appellant. To support this case, the appellant had produced various documents and affidavits, which affidavits have been rejected for arbitrary reasons;
- (vii)** In any view of the matter, it is not the case of the department that the said gold jewellery/ornaments were imported by the appellant. They could not,

therefore, have been confiscated under any of the clauses of section 111 of the Customs Act. The Commissioner, therefore, committed an error in extending the scope of section 111 of the Customs Act to the goods manufactured in India;

- (viii)** The provisions of section 120 of the Customs Act have neither been invoked in the present proceedings nor the same could have been invoked as there is nothing on the record to show that it was the appellant who had smuggled the gold bars out of which the seized gold jewellery/ornaments had been manufactured;
- (ix)** The appellant had placed on record charts as Appendix 'A', 'B' and 'C' showing the ownership and records pertaining to the gold jewellery/ornaments/cut pieces but they have not been considered;
- (x)** The allegation that the appellant had tried to plant 19 documents at the time de-sealing of the shop premises of M/s. Mahalaxmi Chains & Jewellery on 03.05.2023 is without any basis. In any view of the matter, there could not have been any occasion of carrying any document surreptitiously by the appellant as prior to entering into the premises both the appellant and the departmental officials offered themselves for search as has also been stated in the reply dated 14.08.2023 submitted by the appellant; and
- (xi)** Penalties under sections 112 (b)(i) and 114 AA of the Customs Act could not have been imposed on the appellant.

30. Shri Gurdeep Singh, learned special counsel appearing for the department and Shri Rakesh Kumar, learned authorised representative of the department, however, supported the impugned order and made the following submissions:

- (i) The burden of proof in the present case clearly shifts to the appellant as outlined in section 123 of the Customs Act. The facts surrounding the seizure strongly suggest a reasonable belief on the part of the customs officers that the seized goods were smuggled;
- (ii) Manish Kumar and Naresh Kumar, initially denied possession of the gold items when intercepted at Hazrat Nizamiddin Railway Station. Further, the method of concealment of gold items clearly indicates of an attempt to evade detection and strongly raises a suspicion of smuggling. In this connection, reliance was placed on the judgment of the Supreme Court in **State of Gujarat vs. Mohanlal**<sup>5</sup>;
- (iii) It is undisputed that 12 gold bars, each weighing 1 kg, containing foreign-origin markings were seized from Manish Kumar and Naresh Kumar, both employees of Bharat Shantilal Shah. No licit documents were provided to establish the lawful possession of the seized gold, thereby raising significant suspicion regarding its origin. Furthermore, gold jewellery and articles, amounting to 2,818.5 gms of gold cut pieces and 11,224.4 gms of gold jewellery, were seized from Subhash Tukaram Karan, another employee of the Bharat Shantilal Shah, at Nizamiddin Railway Station on

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5. **1987 (29) E.L.T. 483 (S.C.)**

January 19, 2023. Upon questioning, Subhash Tukaram Karan failed to produce any licit import documents, such as GST e-invoices, GST approval challans, or delivery challans, as required under section 31(7) and section 143 of the Central Goods and Services Tax Act, 2017<sup>6</sup>, read with Rule 55 of the CGST Act;

- (iv)** Additionally, during search of the premises of M/s. Bikaner Jewellers, located in Chandni Chowk, 2818.05 gms of gold and 11,224 gms of gold jewellery were recovered. Some of these items bore foreign-origin markings. When questioned, Pawan Soni could not provide any licit documents for the gold items, further reinforcing the suspicion of illegal acquisition. Similarly, during the search of M/s. Khandelwal Chain Co., also in Chandni Chowk, 19 gold coins/bars and unaccounted cash amounting to Rs. 50,50,000 were seized;
- (v)** The fact that all the recovered gold and jewellery lacked valid documentation and were connected to Bharat Shantilal Shah (either through employees or business associates) raises a presumption that these goods were smuggled;
- (vi)** The retraction of statements made by Bharat Shantilal Shah and his employees does not diminish the strength of the case. The retraction is indicative of an attempt to build false stories to evade liability;
- (vii)** The ingredients under section 111 of the Customs Act have been met in this case. The seized goods, being prohibited goods under section 2(33) of the Customs

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**6. 2017 CGST Act**

Act, are subject to absolute confiscation under section 111 of the Customs Act. In support of the aforesaid contention reliance was placed on the decision of the Tribunal in **Brooks International vs. Commissioner of Customs, New Delhi**<sup>7</sup>; and

**(viii)** The statements of employees confirmed that the gold was under the control of Bharat Shantilal Shah and was being transferred through his employees.

31. The submissions advanced by the learned senior counsel for the appellant and the learned special counsel appearing for the department have been considered.

32. The first issue that arises for consideration is regarding confiscation of 12 gold bars, out of which 7 gold bars were recovered from Manish Kumar and 5 gold bars were recovered from Naresh Kumar. The impugned order has treated of the appellant to be the owner of these bars and to arrive with this conclusion reliance has been placed on the statements made by the appellant, Manish Kumar and Naresh Kumar under section 108 of the Customs Act.

33. The contention of the appellant is that the appellant has no concern and connection with these 12 gold bars and to support this contention of the appellant has placed reliance on the communication dated 30.01.2023 sent by the appellant while he was in judicial custody to the Chief Metropolitan Magistrate, New Delhi, wherein he has retracted this statement. The appellant has also placed reliance upon the reply dated 14.08.2023 submitted by the appellant to the show cause notice as also the statement made by the appellant on

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7. **2008 SCC OnLine CESTAT 415**

07.02.2023 before the DRI officer under section 108 of the Customs Act. The appellant also contends that the statements made under section 108 of the Customs Act cannot be considered as relevant as the procedure contemplated under section 138B of the Customs Act was not complied with.

34. It would, therefore, have to be seen whether the statements made under section 108 of the Customs Act can be considered as relevant if the procedure contemplated under section 138B of the Customs Act has not been followed.

35. Section 108 of the Customs Act deals with power to summon persons to give evidence and produce documents. It provides that any Gazetted Officer of customs shall have the power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making under the Customs Act.

36. Section 138B of the Customs Act deals with relevancy of statements under certain circumstances and it is reproduced below:

**"138B. Relevancy of statements under certain circumstances.**

**(1)** A statement made and signed by a person before any Gazetted Officer of customs during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, —

- (a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the

circumstances of the case, the court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the court and the court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

**(2)** The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a court, as they apply in relation to a proceeding before a court.”

37. It would be seen section 108 of the Customs Act enables the concerned Officers to summon any person whose attendance they consider necessary to give evidence in any inquiry which such Officers are making. The statements of the persons so summoned are then recorded under these provisions. It is these statements which are referred to in section 138B of the Customs Act. A bare perusal of sub-section (1) of this section makes it evident that the statement recorded before the concerned Officer during the course of any inquiry or proceeding shall be relevant for the purpose of proving the truth of the facts which it contains only when the person who made the statement is examined as a witness before the Court and such Court is of the opinion that having regard to the circumstances of the case, the statement should be admitted in evidence, in the interests of justice, except where the person who tendered the statement is dead or cannot be found. In view of the provisions of sub-section (2) of section 138B of the Customs Act, the provisions of sub-section (1) of the Customs Act shall apply to any proceedings under the Customs Act as they apply in relation to proceedings before a Court. What, therefore, follows is that a person

who makes a statement during the course of an inquiry has to be first examined as a witness before the adjudicating authority and thereafter the adjudicating authority has to form an opinion whether having regard to the circumstances of the case the statement should be admitted in evidence, in the interests of justice. Once this determination regarding admissibility of the statement of a witness is made by the adjudicating authority, the statement will be admitted as an evidence and an opportunity of cross-examination of the witness is then required to be given to the person against whom such statement has been made. It is only when this procedure is followed that the statements of the persons making them would be of relevance for the purpose of proving the facts which they contain.

38. Section 9D of the Central Excise Act is almost identical to section 138B of the Customs Act.

39. It would now be appropriate to examine certain decisions interpreting section 138B of the Customs Act and section 9D of the Central Excise Act.

40. In **Ambika International vs. Union of India**<sup>8</sup> decided on 17.06.2016, the Punjab and Haryana High Court examined the provisions of section 9D of the Central Excise Act. The show cause notices that had been issued primarily relied upon statements made under section 14 of the Central Excise Act. It was sought to be contended by the Writ Petitioners that the demand had been confirmed in flagrant violation of the mandatory provisions of section 9D of the Central Excise Act. The High Court held that if none of the circumstances contemplated by clause (a) of section 9D(1) exist, then

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8. **2018 (361) E.L.T. 90 (P&H)**

clause (b) of section 9D(1) comes into operation and this provides for two steps to be followed. The first is that the person who made the statement has to be examined as a witness before the adjudicating authority. In the second stage, the adjudicating authority has to form an opinion, having regard to the circumstances of the case, whether the statement should be admitted in evidence in the interests of justice. The judgment further holds that in adjudication proceedings, the stage of relevance of a statement recorded before Officers would arise only after the statement is admitted in evidence by the adjudicating authority in accordance with the procedure contemplated in section 9D(1)(b) of the Central Excise Act. The judgment also highlights the reason why such an elaborative procedure has been provided in section 9D(1) of the Central Excise Act. It notes that a statement recorded during inquiry/investigation by an Officer of the department has a possibility of having been recorded under coercion or compulsion and it is in order to neutralize this possibility that the statement of the witness has to be recorded before the adjudicating authority. The relevant portions of the judgment are reproduced below:

"**16.** Section 9D of the Act came in from detailed consideration and examination, by the Delhi High Court, in J.K. Cigarettes Ltd. v. CCE, 2009 (242) E.L.T. 189 (Del.). Para 12 of the said decision clearly holds that by virtue of sub-section (2) of Section 9D, the provisions of sub-section (1) thereof would extend to adjudication proceedings as well.

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**22. If none of the circumstances contemplated by clause (a) of Section 9D(1) exists, clause (b) of Section 9D(1) comes into operation. The said clause prescribes a specific procedure to be followed before the statement can be admitted in**

**evidence.** Under this procedure, two steps are required to be followed by the adjudicating authority, under clause (b) of Section 9D(1), viz.

- (i) the person who made the statement has to first be examined as a witness in the case before the adjudicating authority, and
- (ii) the adjudicating authority has, thereafter, to form the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

**23. There is no justification for jettisoning this procedure, statutorily prescribed by plenary parliamentary legislation for admitting, into evidence, a statement recorded before the gazetted Central Excise Officer, which does not suffer from the handicaps contemplated by clause (a) of Section 9D(1) of the Act. The use of the word "shall" in Section 9D(1), makes it clear that, the provisions contemplated in the sub-section are mandatory.** Indeed, as they pertain to conferment of admissibility to oral evidence they would, even otherwise, have to be recorded as mandatory.

**24. The rationale behind the above precaution contained in clause (b) of Section 9D(1) is obvious. The statement, recorded during inquiry/investigation, by the gazetted Central Excise Officer, has every chance of having been recorded under coercion or compulsion.** It is a matter of common knowledge that, on many occasions, the DRI/DGCEI resorts to compulsion in order to extract confessional statements. **It is obviously in order to neutralize this possibility that, before admitting such a statement in evidence, clause (b) of Section 9D(1) mandates that the evidence of the witness has to be recorded before the adjudication authority, as, in such an atmosphere, there would be no occasion for any trepidation on the part of the witness concerned.**

**25. Clearly, therefore, the stage of relevance, in adjudication proceedings, of the statement, recorded before a gazetted Central Excise Officer during inquiry or investigation, would arise only after the statement is admitted in evidence in accordance with the procedure prescribed in clause (b) of Section 9D(1).** The rigour of this procedure is exempted only in a case in which one or more of the handicaps referred to in clause (a) of Section 9D(1) of the Act would apply. **In view of this express stipulation in the Act, it is not open to any adjudicating authority to straightaway rely on the statement recorded during investigation/inquiry before the gazetted Central Excise Officer, unless and until he can legitimately invoke clause (a) of Section 9D(1).** In all other cases, if he wants to rely on the said statement as relevant, for proving the truth of the contents thereof, he has to first admit the statement in evidence in accordance with clause (b) of Section 9D(1). For this, he has to summon the person who had made the statement, examine him as witness before him in the adjudication proceeding, and arrive at an opinion that, having regard to the circumstances of the case, the statement should be admitted in the interests of justice.

**26.** In fact, Section 138 of the Indian Evidence Act, 1872, clearly sets out the sequence of evidence, in which evidence-in-chief has to precede cross-examination, and cross-examination has to precede re-examination.

**27. It is only, therefore, -**

- (i) after the person whose statement has already been recorded before a gazetted Central Excise Officer is examined as a witness before the adjudicating authority, and**
- (ii) the adjudicating authority arrives at a conclusion, for reasons to be recorded in writing, that the statement deserves to be admitted in evidence,**

**that the question of offering the witness to the assessee, for cross-examination, can arise.**

**28. Clearly, if this procedure, which is statutorily prescribed by plenary parliamentary legislation, is not followed, it has to be regarded, that the Revenue has given up the said witnesses, so that the reliance by the CCE, on the said statements, has to be regarded as misguided, and the said statements have to be eschewed from consideration, as they would not be relevant for proving the truth of the contents thereof."**

**(emphasis supplied)**

41. The Punjab and Haryana High Court in **Jindal Drugs Pvt. Ltd. vs. Union Of India**<sup>9</sup> that was decided on 21.06.2016 also held that unless and until one of the circumstances contemplated by clause (a) of section 138B(1) of the Customs Act applies, the adjudicating authority is bound to strictly follow the procedure contained in clause (b) of section 138B(1) of the Customs Act, before treating a statement recorded under section 108 of the Customs Act as relevant.

42. In **Hi Tech Abrasives Ltd. vs. Commissioner of C. Ex. & Cus., Raipur**<sup>10</sup> decided on 04.07.2018, the Chhattisgarh High Court also examined the provisions of section 9D of the Central Excise Act. The allegation against the appellant was regarding clandestine removal of goods without payment of duty and for this purpose reliance was placed on the statement of the Director of the Company who is said to have admitted clandestine removal of goods. The contention of the appellant before the High Court was that the statement of the Director could be admitted in evidence only in accordance with the provisions of section

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9. **2016 (340) E.L.T. 67 (P & H)**

10. **2018 (362) E.L.T. 961 (Chhattisgarh)**

9D of the Central Excise Act. After examining the provisions of sub-sections (1) and (2) of section 9D of the Central Excise Act, and after placing reliance on the judgment of the Punjab and Haryana High Court in **Ambika International**, the Chhattisgarh High Court held:

**"9.3 A conjoint reading of the provisions therefore reveals that a statement made and signed by a person before the Investigation Officer during the course of any inquiry or proceedings under the Act shall be relevant for the purposes of proving the truth of the facts which it contains in case other than those covered in clause (a), only when the person who made the statement is examined as witness in the case before the court (in the present case, Adjudicating Authority) and the court (Adjudicating Authority) forms an opinion that having regard to the circumstances of the case, the statement should be admitted in the evidence, in the interest of justice.**

**9.4 The legislative scheme, therefore, is to ensure that the statement of any person which has been recorded during search and seizure operations would become relevant only when such person is examined by the adjudicating authority followed by the opinion of the adjudicating authority then the statement should be admitted. The said provision in the statute book seems to have been made to serve the statutory purpose of ensuring that the assessee are not subjected to demand, penalty interest on the basis of certain admissions recorded during investigation which may have been obtained under the police power of the Investigating authorities by coercion or undue influence.**

**9.5 \*\*\*\*\* The provisions contained in Section 9D, therefore, has to be construed strictly and held as mandatory and not mere directory.** Therefore, unless the substantive provisions contained in Section 9D are complied with, the statement recorded during

search and seizure operation by the Investigation Officers cannot be treated to be relevant piece of evidence on which a finding could be based by the adjudicating authority. A rational, logical and fair interpretation of procedure clearly spells out that before the statement is treated relevant and admissible under the law, the person is not only required to be present in the proceedings before the adjudicating authority but the adjudicating authority is obliged under the law to examine him and form an opinion that having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice. **Therefore, we would say that even mere recording of statement is not enough but it has to be fully conscious application of mind by the adjudicating authority that the statement is required to be admitted in the interest of justice. The rigor of this provision, therefore, could not be done away with by the adjudicating authority, if at all, it was inclined to take into consideration the statement recorded earlier during investigation by the Investigation officers.** Indeed, without examination of the person as required under Section 9D and opinion formed as mandated under the law, the statement recorded by the Investigation Officer would not constitute the relevant and admissible evidence/material at all and has to be ignored. **We have no hesitation to hold that the adjudicating officer as well as Customs, Excise and Service Tax Appellate Tribunal committed illegality in placing reliance upon the statement of Director Narayan Prasad Tekriwal which was recorded during investigation when his examination before the adjudicating authority in the proceedings instituted upon show cause notice was not recorded nor formation of an opinion that it requires to be admitted in the interest of justice.** In taking this view, we find support from the decision in the case of *Ambica International v. UOI* rendered by the High Court of Punjab and Haryana.”

**(emphasis supplied)**

43. In **Additional Director General (Adjudication) vs. Its My Name Pvt. Ltd.**<sup>11</sup> decided on 01.06.2020, the Delhi High Court examined the provisions of sections 108 and 138B of the Customs Act. The department placed reliance upon the statements recorded under section 108 of the Customs Act. The Delhi High Court held that the procedure contemplated under section 138B(1)(b) has to be followed before the statements recorded under section 108 of the Customs Act can be considered as relevant. The relevant paragraphs of the judgment of the Delhi High Court are reproduced below:

**"76. We are not persuaded to change our view, on the basis of the various statements, recorded under Section 108 of the Act, on which the Learned ASG sought to rely. Statements, under Section 108 of the Act, we may note, though admissible in evidence, acquire relevance only when they are, in fact, admitted in evidence, by the adjudicating authority and, if the affected assessee so chooses, tested by cross-examination. We may, in this context, reproduce, for ready reference, Section 138B of the Act, thus : \*\*\*\*\***

**A Division Bench of this Court has, speaking through A.K. Sikri, J. (as he then was) held, in J & K Cigarettes Ltd. v. Collector of Central Excise [2009 (242) E.L.T. 189 (Del.)] that, by virtue of sub-section (2), Section 138B(1) of the Act would apply, with as much force, to adjudication proceedings, as to criminal proceedings.**

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We express our respectful concurrence with the above elucidation of the law which, in our view, directly flows from Section 138B(1) of the Act - or, for that matter, Section 9D of the Central Excise Act, 1944.

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**11. 2021 (375) E.L.T. 545 (Del.)**

77. The framers of the law having, thus, subjected statements, recorded under Section 108 of the Act, to such a searching and detailed procedure, before they are treated as relevant in adjudication proceedings, we are of the firm view that such statements, which are yet to suffer such processual filtering, cannot be used, straightaway, to oppose a request for provisional release of seized goods. **The reliance, in the appeal before us, on various statements recorded during the course of investigation in the present case cannot, therefore, in our view, invalidate the decision, of the Learned Tribunal, to allow provisional release of the seized 25400.06 grams of gold jewellery, covered by Bill of Entry No. 107190, dated 20th April, 2019."**

(emphasis supplied)

44. In **M/s. Drolia Electrosteel P. Ltd. vs. Commissioner, Customs, Central Excise & Service Tax, Raipur**<sup>12</sup> decided on 30.10.2023, a Division Bench of the Tribunal examined the provisions of section 9D of the Central Excise Act and after placing reliance upon the decision of the Punjab and Haryana High Court in **Jindal Drugs**, observed that if the mandatory provisions of section 9D(1)(b) of the Central Excise Act are not followed, the statements cannot be used as evidence in proceedings under Central Excise Act. The relevant portions of the decision of the Tribunal are reproduced below:

**"14.** Evidently, the statements will be relevant under certain circumstances and these are given in clauses (a) and (b) of subsection (1). There is no assertion by either side that the circumstances indicated in (a) existed in the case. **It leaves us with (b) which requires the court or the adjudicating authority to first examine the person who made the statement and form an opinion that having regard to the circumstances of the case, the statement should**

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**12. Excise Appeal No. 52612 of 2018 decided on 30.10.2023**

**be admitted in evidence. Of course, the party adversely affected by the statement will have to be given an opportunity to cross examine the person who made the statement but that comes only after the statement is, in the first place, after examination by the adjudicating authority, admitted in evidence.** This has not been done in respect of any of the 35 statements. Therefore, all the statements are not relevant to the proceedings.

**15. It has been held in a catena of judgments including Jindal Drugs Pvt. Ltd. versus Union Of India [2016 (340) E.L.T. 67 (P&H)] that section 9D is a mandatory provision and if the procedure prescribed therein is not followed, statements cannot be used as evidence in the proceedings under Central Excise Act. \*\*\*\*\***

**16. Therefore, the 35 statements relied upon in the SCN are not relevant and hence also not admissible.”**

**(emphasis supplied)**

45. It, therefore, transpires from the aforesaid decisions that both section 138B(1)(b) of the Customs Act and section 9D(1)(b) of the Central Excise Act contemplate that when the provisions of clause (a) of these two sections are not applicable, then the statements made under section 108 of the Customs Act and under section 14 of the Central Excise Act during the course of an inquiry under the two Acts shall be relevant for the purpose of proving the truth of the facts contained in them only when such persons are examined as witnesses before the adjudicating authority and the adjudicating authority forms an opinion that the statements should be admitted in evidence. It is thereafter that an opportunity has to be provided for cross-examination of such persons. The provisions of section 138B(1)(b) of the Customs Act and section 9D of the Central Excise Act have been held to be mandatory

and failure to comply with the procedure would mean that no reliance can be placed on the statements recorded either under section 108 of the Customs Act or under section 14D of the Central Excise Act. The Courts have also explained the rationale behind the precautions contained in the two sections. It has been observed that the statements recorded during inquiry/investigation by officers has every chance of being recorded under coercion or compulsion and it is in order to neutralize this possibility that statements of the witnesses have to be recorded before the adjudicating authority, after which such statements can be admitted in evidence.

46. A division bench of the Tribunal in **M/s Surya Wires Pvt. Ltd. vs. Principal Commissioner, CGST, Raipur**<sup>13</sup> followed the aforesaid decisions of the High Courts.

47. It is, therefore, not possible to accept the submission made by the learned special counsel for the department that the statements made by the appellant, Manish Kumar and Naresh Kumar should be considered and that the retraction of these statements would have no impact on the admissions made in the statements given under section 108 of the Customs Act.

48. It has, therefore, to be held that the Commissioner could not have drawn a conclusion from the statements made by the appellant, Manish Kumar and Naresh Kumar under section 108 of the Customs Act that the appellant was the owner of the 12 gold bars. It also needs to be noted that the appellant, Manish Kumar and Naresh Kumar had retracted their earlier statements on 30.01.2023 in the letter submitted to the Chief Metropolitan Magistrate, while they was in judicial custody.

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**13. Excise Appeal No. 51148 of 2020 decided on 01.04.2025**

The appellant also, in reply to the show cause notice, categorically stated that he was not the owner of the 12 gold bars. In the statement made by the appellant on 07.02.2023 before DRI officers, the appellant also clearly stated that he was not the owner of goods.

49. In this view of the matter, the finding recorded by the Commissioner that the appellant is the owner of the 12 gold bars cannot be sustained.

50. The Commissioner has placed reliance upon section 123 of the Customs Act to hold that as the goods were smuggled goods the burden was on the appellant to show that they were not smuggled goods since the appellant was the owner of the goods that were seized. If the appellant is not treated as the owner of the goods than the burden would clearly not lie on the appellant to prove that the goods were not the smuggled goods. In this view of the matter the 12 gold bars could not have been held liable to confiscation under section 111 of the Customs Act. The decision of the Supreme Court in **Mohanlal**, which had been relied upon by the learned special counsel appearing for the department would, therefore, not come to the aid of the department.

51. There is also nothing on the record which may conclusively establish that the currency recovered from Manish Kumar and Naresh Kumar was liable to confiscation. The Commissioner has merely on surmises and conjectures recorded a finding that the currency recovered from Manish Kumar and Naresh Kumar was towards the monetary consideration for carrying the 12 gold bars.

52. Penalty has been imposed upon the appellant, both under sections 112(b)(ii) and 114AA of the Customs Act. As the 12 gold bars could not have been held liable to confiscation, penalty under section 112(b)(ii) of

the Customs Act could not have been levied upon the appellant. Penalty under section 114AA could also not have been imposed upon the appellant as he had not signed any document, much less knowingly or intentionally concerning the transaction of any business.

53. The next issue that arises for consideration is regarding the gold jewellery/ornaments weighing 20756.3 gms recovered and seized from the possession of Subhash Tukaram Karan and the gold jewellery weighing 11,224.4 gms and gold cut pieces weighing 2818.5 gms recovered and seized from the shop premises of M/s. Bikaner Jewellers.

54. The case of the appellant is that the gold jewellery/ornaments were carried by Subhash Tukaram Karan on the instructions of the appellant and that the said gold jewellery was brought on behalf of the appellant to Delhi on approval basis for marketing purpose either by himself or by other jewellery manufacturers namely M/s. Swamini Creations, M/s. Falcon Gold House Pvt. Ltd., M/s. Anand Shah Jewels LLP, Khandelwal Chain Co. and R.K. Jewellers. All the said jewellery was manufactured out of gold bars purchased from bullion dealers based in Mumbai.

55. The appellant had produced **Invoice No. SG-160 dated 18.01.2023** (covering gold jewellery weighing 745.250 gms) by the M/s. Mahalaxmi Chains & Jewellery (a firm of the appellant) in the name of M/s. Khandelwal Chain Co., Delhi, **Invoice No. SG-460 dated 17.01.2023** (covering gold jewellery weighing 1975.79 gms) and **Invoice No. SG-465 & 466 both dated 18.01.2023** (covering gold jewellery weighing 4145.190 gms) in the name of Vikash Chain Jewellery, Delhi by M/s. Anand Shah Jewellers, which pertains to the gold jewellery/ornaments forming part of the seizure from Subhash

Tukaram Karan. These three invoices were rejected by the Commissioner only on assumptions and presumptions. Each the invoices were on record and the department could have checked and verified the authenticity, but that was not done.

56. Similarly, it is also the case of the appellant that the gold jewellery and gold cut pieces found in the shop premises of M/s. Bikaner Jewellers were kept on the instructions of the appellant and that the gold cut pieces were owned by R.K. Jewellers which were given to M/s. Mahalaxmi Chains & Jewellers (a firm belonging to the appellant) for job work through karigar issue vouchers for manufacturing the Delhi design ornaments/jewellery out of them which was wrongly held to be owned by the appellant in the impugned order. To support the case, the appellant had produced various documents namely, approval vouchers/delivery challans as well as tax invoices which were duly reflected in the GST portal before the Commissioner. Penalty, therefore, could not have been imposed upon the appellant.

57. The appellant had also, during the adjudicating proceedings, filed affidavits of manufacturers of gold jewellery/ornaments whose goods were also forming part of the said gold jewellery/ornaments seized from Subhash Tukaram Karan. The affidavits are of:

- (i) **Bhavik Kirti Soni** – Proprietor M/s. Swamini Creations with regard to 6179.49 gms to gold jewellery/ornaments, given to appellant on trade approval basis, forming part of the seizure;
- (ii) **Ashok Kumar Lalchan Sancheti** of M/s. Falcon Gold House Pvt. Ltd. with regard to 12204.81 gms jewellery given to the appellant on trade approval basis, forming part of seizure;

- (iii) **Sanjay Khandelwal** – Parner – M/s Khandelwal Chain Company with regard to purchase of gold jewellery/ornaments weighing 745.250 gms from M/s Mahalaxmi Chains & Jewellery (a firms of the appellant) against Tax Invoice No. SG-160 dated 18.01.2023 for Rs. 40,73,296/-; and
- (iv) **Raj Kapoor Lalata Prasad Gupta** - Proprietor – M/s R.K. Jewellery, with regard to gold cut pieces collectively weighing 2818.5 gms given to M/s Mahalaxmi Chains and Jewellery (a firm of the appellant) for job work i.e. for manufacturing the Delhi design ornaments/jewellery out of them, issued under karigar issue vouchers.

58. The contention of the learned counsel for the appellant is that the Commissioner failed to appreciate the aforesaid facts and further that the Commissioner could not have rejected the affidavits without valid reasons. In case the Commissioner had any doubts, he could call the deponents of the affidavits for cross-examination or verify the same.

59. This contention of learned counsel for the appellant deserves to be accepted in view of the judgment of the Bombay High Court in **Subhash Chandarnishat vs. Union of India and Another**<sup>14</sup>. The relevant observation of the High Court are as follows:

“10. xxxxxxxxxxxx. Coming to the question as to how these products were known in trade or commerce parlance, in my view, **the most important evidence is furnished by the affidavits produced by the petitioner before respondent No. 2.** xxxxxxxxxxxx. **There is no finding that the correctness of these affidavits has not been accepted by respondent No. 2. It appears very doubtful as to whether respondent No. 2 could have rejected these affidavits without calling upon the Petitioners to produce the deponents for being cross examined**

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14. 1979 (4) E.L.T. (J 212) (Bom.)

or without the correctness of the affidavits being tested in some other manner. In this regard it may be pointed out that a somewhat similar question arose in **M. Parikh & Co. v. I.T. Commissioner** (AIR 1956 S.C. 554). The observations of the Supreme Court in paragraph 13 of the aforesaid report clearly suggest that where affidavits are filed before an officer, normally speaking, if he desires to challenge the correctness of the averments made in these affidavits, he should call the deponents for being cross-examined or test the correctness of the averments by any other means open to him, and it would not be proper for the said Officer to arbitrarily reject these affidavits as incorrect. xxxxxxxxxxxx.”

**(emphasis supplied)**

60. It also needs to be noted that the evidence to justify an inference of smuggling should be one which is relevant for providing the unauthorized importation of goods and not the unauthorized possession of the goods. This view was taken by this Tribunal in **V. Muniyandi vs. Commissioner of Customs, Chennai**<sup>15</sup> and **Commissioner of Cus. (Preventive), Mumbai vs. Shailesh N. C. Shah**<sup>16</sup>.

61. The Supreme Court in **Radha Kishan Bhatia vs. Union of India and Others**<sup>17</sup> held that a mere finding of fact that a person is in possession of smuggled goods does neither imply that the Collector of customs has considered the question of person being concerned in the commission of the offence of illegal importation of the goods nor in any way justifies the conclusion that the person must have been so concerned. Other circumstances indicating that the person had some connection with the importation of the goods prior to their actual import

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15. (2004) 167 E.L.T. 215 (Tri.- Chennai)

16. 2007 (218) E.L.T. 377 (Tri.- Mumbai)

17. AIR 1965 SC 1072

have to be established. The relevant observations of the Supreme Court are as follows:

**"12. We therefore hold that a mere finding of fact that a person is in possession of smuggled goods does neither imply that the Collector of Customs had considered the question of the person's being concerned in the commission of the offence of illegal importation of the goods nor in any way justifies the conclusion that the person must have been so concerned. Other circumstances indicating that the person had some connection with the importation of the goods prior to their actual import have to be established.** In the present case no such circumstances have been alleged which would connect the appellant with the importing of the smuggled gold recovered from his person. There is no mention of any such circumstances in the order of the Collector or even in the reply affidavit filed in the High Court by the Assistant Collector of Central Excise and Land Customs, New Delhi, though the appellant had said in Ground C of the writ petition that there was absolutely no material before Respondent 3 on which he could have come to a finding that the petitioner had imported the said gold."

**(emphasis supplied)**

62. Neither the show cause notice nor the impugned order hold that the appellant had any connection with the importation of the gold bars/ gold prior to the actual imports. It was for the department to have established conclusively, without shifting burden on the appellant, that the imported goods were smuggled or had been manufactured out of smuggled imported gold. The case of the department is based on the statements made under section 108 of the Customs Act, which statements, as noticed above, cannot be considered as relevant as the

procedure contemplated under section 138B of the Customs Act had not been followed.

63. It also needs to be remembered that it is not the case of the department that the gold jewellery/ornaments were imported by the appellant. The said gold jewellery/ornaments cannot, therefore, be confiscated under section 111 of the Customs Act, which section is applicable to goods brought from a place outside India. The Commissioner could not have held that the jewellery was manufactured out of illegally imported smuggled gold as Subhash Tukaram Karan and the appellant failed to provide licit possession of gold jewellery under section 123 of the Customs Act.

64. Section 120 of the Customs Act has not been invoked in the present case and nor could it have been invoked as there is nothing on the record to establish that the appellant had smuggled the gold bars out of which the seized gold jewellery/ornaments were manufactured. This is what was observed by a division bench of the Tribunal in **Deepak Handa vs. Principal Commissioner of Customs**<sup>18</sup>. The relevant observations are:

"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."

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18. (2022) 20 GSTR-OL 378 (Tri.- New Delhi)

65. The Commissioner has placed emphasis on the non-production of e-way bills for the purpose of transfer of gold jewellery from Mumbai to Delhi, for not accepting the stand of the appellant that the gold jewellery meant for trading on approval basis on behalf of various jewelers. This finding is not correct as the issuance of e-way bills for the purpose of transport of jewellery was not prescribed as a mandatory document by the Central Board of Indirect Taxes and Customs in the Circular dated 12.09.2022.

66. The Commissioner has also placed emphasis on the fact that when the shop premises of M/s. Mahalaxmi Chains & Jewellery was de-sealed on 03.05.2023, the appellant had tried to plant 19 documents surreptitiously.

67. This finding has been recorded without any basis. Some of the documents are those which were already reflected on the GST portal. One document is the invoice no. SG 160, the original of which was found by the department at the time of search of Subhash Karan on 19.01.2023. The other documents were reflected in the ledgers of the parties claiming ownership of the goods. These, facts had been stated by the appellant in the reply to the show cause notice, but without conducting any verification a finding has been recorded that they were surreptitiously planted. It is also important to notice that at the time of entering the premises, the appellant had offered himself for search and, therefore, the documents said to have been planted by the appellant surreptitious would have been noticed at the time of search.

68. The inevitable conclusion that would follow from the aforesaid discussion is that the Commissioner could not have imposed penalty

upon the appellant under sections 112 (b)(i) and 114AA of the Customs Act.

69. Accordingly, the impugned order dated 25.06.2024 passed by the Commissioner of Customs in so far as it imposes of penalty upon the appellant under section 112(b)(i) and section 114AA of the Customs Act is set aside and the appeal is allowed.

(Order pronounced on **08.12.2025**)

**(JUSTICE DILIP GUPTA)**  
**PRESIDENT**

**(HEMAMBIKA R. PRIYA)**  
**MEMBER (TECHNICAL)**

Jyoti