IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA

Customs Appeal No.76862 of 2018

(Arising out of Order-in-Original No.33/Cus/CC(P)/WB/2017 dated 20.02.2018 passed by Commr. of Customs (Preventive), Kolkata, West Bengal)

M/s Ankit Agarwal
S/o Shri Prabhas Kumar Agarwal,
B-201,Ganpati Apartment, 2nd Floor, Dhobatand East, Dhanbad, Jharkhand
Appellant

VERSUS

Commr. of Customs (Preventive), Kolkata
15/1 Strand Road, Kolkata-700001
Respondent

Appearance:

Shri H.K.Pandey, Advocate for the Appellant
Shri S.S.Chattopadhyay, Authorized Representative for the Respondent

CORAM:
HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER
HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER

FINAL ORDER NO.75504/2020

DATE OF E-HEARING : 07.10.2020
DATE OF PRONOUNCEMENT : 16.10.2020

Per P.Anjani Kumar :

Brief facts of the case are that the officers of Commissioner of Customs (Preventive), Kolkata, apprehended a person by name Shri Ankit Agarwal, at Platform No 9, Howrah Railway station, on 22-1-2016. Officers found that the said person was carrying 3 pieces of Gold of 1 Kg each. Shri AnkitAgarwal was brought to Custom House; gold pieces were found to be of foreign origin and were seized along with a C-5212 Model Samsung Mobile phone (Having No 9234776772); statement was recorded and Shri Agarwal was arrested and produced before Chief Metropolitan Magistrate, Bankhall Court, Kolkata on 23.01.2016; He was released on Bail. A Show Cause Notice, dated 18-07-2016, was issued proposing confiscation of the seized Gold and imposing Penalty on Shri Agarwal. The same was confirmed by OIO

No. 33/CUS/CC (P)/WB/2017 DT 20.02.2018. Hence this appealNo C/76862/2018.

2. Learned Counsel for the appellant, Shri H. K. Pandey, submits that the appellant visited Kolkata on 22.01.2016 with 3 Kgs of Primary Gold; gets it embossed with certain fictitious marking with the help of Shri Anil Kumar Agarwal @ Anil Kathuria; at about 18.45 Hrs; both of them were apprehended by Customs Officers in plain clothes and were brought to Custom House, Kolkata; three pieces of gold bars were taken from him; he and said Anil were kept in separate rooms; he was constantly threatened and subjected to mental torture by the staff; on 23.01.2016, he was asked to put his signature on a few pre-printed papers and also compelled to write as per their dictation with the assurance that his bail would not be opposed; he was produced before the Metropolitan Magistrate, Kolkata and was granted bail and left for home traumatised.

2.1. Vide letter dated 30.3.2016**,** in reply to summons dated 23.02.2016 from the Superintendent of Customs, the Appellant submitted that his statement recorded on 22.01.2016 was obtained under coercion and threat; he was not allowed to write the source of the gold found from his possession; the seized gold was melted out of old jewellery inherited by their joint family on death of his grandmother; as advised by Shri Anil Kumar Agarwal @ Anil Kathuria, he brought those pieces to Kolkata for getting those embossed with lookalike marking of foreign brand with a motive that it would fetch better price.; he also submitted valuation report dated 31.03.2013 prepared by a registered valuer Sunil Kumar Mookim; he received copies of relied upon documents on 14.02.2017 and submitted a reply dated 27.11.2017, to the SCN along with print out retrieved from respective websites of similar foreign brand gold, their shapes, weight etc. ;copies of the Valuation report of the jewellery belonging to the grandmother and the suit filed by the family members of the deceased grandmother before the jurisdiction Court at Dhanbad; they requested for cross examination of the seizure witnesses and the chemical examiner was sought for since the samples were drawn behind the back of the appellant.

2.2. They received OIO, dated 20.02.2018, on 06.03.2020; commissioner only relied upon his statement dated 23.01.2020; none of their submissions including citations were given cognizance; request for cross examination of the seizure witness, chemical examiner and the only Spot Witness Anil Agarwal @ Anil Kathuria not allowed;

3. Learned Counsel further submits that the search of the person was conducted in violation of the provisions of Section 102 of the Customs Act, 1962 in as much as the accused was not asked to exercise his right as to whether he wishes to be searched in presence of Gazetted Officer of Customs or wishes to be taken before nearest Magistrate for such search; therefore search is illegal; no evidence was adduced by Revenue to establish that accused was in any way instrumental in illegal import of gold or had knowledge that gold recovered from his possession/residence was liable for confiscation; he places reliance in the case of UOI Vs Jasmine Jayantilal Thadeshwar 2020 (372) ELT 817 (Bom).

3.1. Learned Counsel further submits that Panchnama not drawn and procedure under Section 100 of the Cr PC was not followed; Inventory drawn in term of Section 110 (1B) of the Customs Act, 1962- does not contain vital information like name, parentage, address of the search witness, place and time of search, place of recovery and recovery of other goods along with contraband; this proves that there was no reasonable believe formed that it was liable to confiscation as no sample was drawn or any preliminary test was caused before effecting the seizure; initial burden to prove smuggled nature of the gold being not there, the Department failed to shift the burden as contemplated under Section 123 of the customs act, 1962 upon the owner; he relies on UOI VsImtiazIqbal Pothiawala 2019 (365) E.L.T. 167 (Bom) and on CC(P), WB Vs Raj Kumar Jaiswal 2006 (204) E.L.T. 561 (Cal.).

3.2. Learned Counsel further submits that the appellant has adduced documentary evidence in support of his legal possession of the seized gold which is nothing but the melted and refined form of old jewellery; it is a well-known fact that Kolkata is the best market place of goldsmiths in eastern India; there are a number of melting houses operating over in the city; some sort of foreign marking made to get a better acceptance by the buyer, does not prove smuggled nature of the gold; He relied upon the following decisions by Tribunal :

(i). Nand Kishore SumaniVs CCCE & ST, Siliguri [2016 (333) ELT 448 (Tri. – Kol)]
(ii). MadhukarSonabaBhagatVs CC CC (P), West Bengal 2019 (368) ELT 990 (Tri - Kol)
(iii). Sultan DharaniVs CC (P), Mumbai [2007 (220) ELT 820 (Tri - Mumbai)]

4. Learned Authorised Representative, appearing for the Respondents, submits that appellant claimed that the search was illegal; no such claim was made by the appellant at any time before the present hearing; the same cannot be entertained at this stage. The gold bars were seized in the reasonable belief that these were smuggled into India and hence, liable for confiscation under the Customs Act; the said belief was founded on the presence of foreign marks on the gold bars and absence of any evidence/explanation of their licit possession by the appellant. Learned AR, further submits that Gold being a notified item under Section 123 of the Customs Act; in case of seizure of any notified item in the reasonable belief that these were smuggled into India, the burden of proving is on the possessor/owner of the item that the item was not a smuggled one.

4.1. Learned Authorised Representative also submits that the appellant initially admitted that the gold bars were purchased from Sonapatty, Kolkata; later, he came up with the claim that these were made from his grandmother's jewelries by melting and casting and inscribing fake foreign marks; no evidence on record supports this claim; the appellant also claimed that Shri Anil Kumar Agarwal aka Anil Kumar Kathuria helped him to make fake foreign marks on such gold bars; but Shri Anil Kumar Agarwal aka Anil Kumar Kathuria denied his involvement; the appellant's reliance on the decree of the Civil Court is misplaced because the suit was filed long after the seizure in which the Customs Authority was not made a party, and there is no evidence that the confiscated gold bars were made from the items of jewelries mentioned in the suit/decree; it is a settled law that the burden, of proving a fact by evidence, lies on the party which claims its existence. Learned Authorised Representative submits that on the other hand, it has been clearly established that the purity of the confiscated gold bars is 99.5% as marked on them; the foreign markings and logos are distinct; the appellant admitted that one of the gold bars is an exact replica; appellant's reliance on website information is unacceptable; case laws cited by the appellant are not applicable to the facts of this case and therefore, appeal is liable to be rejected.

5. Heard both sides and perused the records of the case. Learned counsel for the appellants submits that in the instant case, the appellant was apprehended at Howrah Railway station and was taken to Customs Office. There 3 pieces of Gold was seized from him. He alleges that the procedure for personal search as per Section 62 of the Customs Act, 62 was not followed and no Panchnama was drawn. Though the Panch witnesses signed on the seizure memo, their particulars like age, parents name, address etc. were not noted. The sanctity of search and seizure is vitiated as proper procedure was not followed; moreover, as the cross examination of the panch witnesses was not accorded, a serious doubt is cast on the reliability of the entire proceedings. The Learned Authorised Representative for the department in turn submits that the appellant has not taken these pleas before the adjudicating authority and is taking these pleas for the first time at the appellate stage and hence, inadmissible. We find that these are not facts of the case but the basic legal issues involved in the case. Even though it is a departmental proceeding, appellant's right to raise legal issues cannot be taken away. However, we also find that the appreciation of the case would not solely hinge on these issues, disregarding the merits of the case.

6. Brief issues involved in the present case, which require consideration by the Bench,are :

(i) Whether the Revenue establish the existence of reasons to believe that the impugned gold was smuggled ;

(ii) Whether the impugned gold is liable to be categorized as gold of foreign origin ;

(iii) Whether the Customs have followed correct procedure vis-à-vis search and seizure of the gold.

7. Coming the issue at Sl.No. (i), we find that in terms of show-cause notice (in Para 1), it is seen that on being notified/identified by the informer, the Officers intercepted the appellant, at Howrah Railway Station, waiting to board the train to Dhanbad; on inspection, the Officers found that he was carrying foreign origin gold; on visual inspection, it was found that the gold bars had marks of foreign origin and that the appellant could not produce any documents for the gold. Whereas the 2nd Paragraph of the show-cause notice, records that on reaching Customs House at 8.00 PM on 22nd January, 2016, the appellant was searched in person and during the process, three pieces of yellow metal bars believed to be gold of foreign origin were recovered; a plain reading of the Show Cause notice itself raises doubt about the place wherein the appellant was found to carry gold. Department appeared to have entertained reason to believe that the impugned gold was of foreign origin only on the basis of markings on the gold bars and based on the fact that the appellant could not show any documents; department also believed that as gold was notified under Section 123 of the Customs, Act, 1962 and therefore, the burden of proof that the same are not smuggled is with the appellant and not with the Department. It also appears that the Department has not conducted any further worthwhile enquiry;the allegation against the appellant was that he initially stated that he purchased the said yellow metal from SonapattiBurrabazar from a person, namely, Mr.Rajesh at a place near Tiwari Sweets at Kalakar Street; in response to the summon issued by the Department, the appellant vide letter dated 30.03.2016 replied that his earlier statement was obtained under coercion and threat and he was not allowed to write the source of the gold found in the possession on 22.01.2016; he further submitted that the gold under seizure was melted out of old jewellery inherited by the joint family on demises of his grandmother; as per the advise of Shri Ankit Kumar Agarwal @ Anil Kathuria, he brought those pieces to Kolkata to get the fake marks embossed on the pieces so as to fetch better prices ; he also submitted a valuation report dated 31.03.2013 and papers relating to inheritance dispute in a Court of Dhanbad.

7.1. On-going through the case papers, it is seen that the Department has not pursued the investigation to verify the veracity of the claim of the appellant though show-cause notice came to be issued on 18.07.2016, after a clear four weeks from the claim by the appellant. It is interesting to note that the show-cause notice while alleging that the initial claim of the appellant that the impugned gold was purchased from one Mr Rajesh at SonapattiBurra bazar was false, the investigation does not specify steps taken to locate the said Mr Rajesh except showing that the inquiries conducted in this regard were not successful and hence the claim of the appellant was incorrect. However, while recording the statement of the appellant on 29.03.2016 for reason best known to them, the officers did not even countered the appellant with any question pertaining the said Shri Rajesh; even a faint attempt to prove that the appellant's claim was wrong, was not made. Similarly, no action appears to have been taken on the claim of the appellant that family gold was melted, except stating that this is an afterthought. It is interesting to note that the search of appellant's house was attempted only after three weeks of the arrest and by that time, the appellant is stated to have changed his address. We find that the in spite of a claim being made by the appellant, no enquiries seem to have been conducted to show some proof to dis-believe the claim of the appellant. Under the circumstances, the appellant's assertion that this claim dated 30.03.2016 is accepted in silence, appears to be correct. It appears that the Department was in a fallacy that once foreign marks have been found on the gold, it is the end of investigation on their part and nothing more requires to be proved by them. We find that this is not the correct appreciation of law. It was incumbent upon the Department to prove the smuggled nature of the gold also. The only effort revenue seems to have made is to mention in the show-cause notice that as no valid import documents could be produced by the person carrying the gold, the same are deemed to be smuggled goods. Show cause mentions that 'it seems settled fact that the seized gold were illegally brought into India from abroad by any route other than the route specified under Clause (c) of Section 7 of Customs Act, 1962. No meaningful inquiry and investigation appear to have undertaken to prove the smuggled nature of the gold; it is also not mentioned at least from which foreign country, the impugned golds have been illegally imported. Going by various judicial pronouncements,we find that Revenue needs to prove the smuggled nature of goods also. It was not the intention of the Government to bring back Gold Control Act, albeit by a backdoor entry, by notifying Gold under Section 123 of the Customs Act, 1962. The Revenue requires to prove that the gold is of smuggled nature even when it is notified under Section 123. The Hon'ble High Court of Bombay in the case of Union of India Vs. ImtiazIqbalPothiawala reported in 2019 (365) ELT 167 (Bom.), held as under :

*"**7.** Secondly, the questions which arise for our consideration in this case is in the context of the application of Section 123 of the Act in respect of the goods notified therein. Gold is an item which is notified under Section 123 of the Act and it provides that burden of proof in case of notified goods, would be upon the person from whose possession and/or the person who claims ownership of the goods to prove that the seized goods are not smuggled goods. However, before the aforesaid burden could be cast upon the person who claims to be the owner of the seized goods, the Revenue should be able to establish that the goods seized under Section 110 of the Act, was on a reasonable belief that the imported goods were smuggled goods. Therefore, where seizure is a subject of challenge on the ground of absence of reasonable belief then, the question of burden of proof on the person, claiming to be the owner of the goods, would arise only when the challenge to seizure is, negatived. In the facts of the present case, neither before us nor before the authorities under the Act, has the respondent No. 1 challenged the seizure for absence of reasonable belief that the seized gold was smuggled goods. Thus, the burden of proof in this case is upon the respondent to establish that the seized gold bars are not smuggled."*

The Honourable High Court further observes that

(B) **Reg. Question (b) :-**

(i)

(ii)

(iii). We are of the view that in the absence of evidence in the form of regular books of account, registration under the income-tax and Sales Tax, etc., cannot ispo facto lead to the conclusion that the seized gold bars, are smuggled gold bars. These may lead to proceedings for breaches of other Acts but it does not follow from it that the gold bars are smuggled goods. In fact, if a person in possession of the stolen gold is able to establish that it had come into India after a proper declaration and compliance of the Act, no confiscation under the Act, can arise. Proceedings under the Indian Penal Code may be initiated by the police for theft, but it would not by reason of theft become smuggled goods. Moreover, smuggling as defined under Section 2(39) of the Act, is an act or omission which will render goods liable to confiscation under Section 111 of the Act for import and 113 of the Act for exports. On reading of Sections 111 and 113 of the Act, not keeping proper books of account or not being registered with the income-tax and/or Sales Tax Authorities, is not an omission which renders the goods liable for confiscation i.e. smuggled goods."

7.2. It is seen that the appellant contested the allegation that the impugned gold bars were of foreign origin; he submitted before the adjudication authority that a perusal of the inscriptions on the gold bars would indicate that the markings of unauthentic for the following reasons:-

- None of the impugned gold bars contained any unique serial number; as per international standards and as can be seen from the websites of PAMP and Valcambi. All gold bars should contain unique serial numbers for use of identification.
- PAMP do not sell gold bars having purity less than 99.9% purity whereas the impugned goods bear the mark 99.5% purity. The style of description of purity is also different.
- There are spelling mistakes in the description and dimensions are also different.

7.3. We find that learned Commissioner has not at all addressed the discrepancies, as above,raised by the appellant. On a perusal of the Websites (like https://www.ibma.org.ukhttps://www.mmtcpamp.com), we find that as per LBMA (London Bullion Merchants Association) Rules, gold bars are required to have unique serial number. We also find that one PAMP gold bars have following qualities :-

- Gold bars contains one kilogram, or 32.15 ounces of .9999 fine gold.
- Unique serial number.
- Includes Assay Certificate.

7.4. We find that it was incorrect to brush aside the submissions saying that submissions based on websites are not authentic to be accepted or relied upon. Particularly, in the days of internet, such an averment is not convincing. In view of the above, we find that there is at least some reason in the claim of the appellant. We find that the department was happy just to carry the preliminary contention that the gold pieces recovered from the appellant are of foreign origin as they had foreign markings. We find that department has neither pursued the case vigorously to arrive at a logical conclusion nor has bothered to counter the assertions/submissions of the appellants at least to reinforce the initial belief that the department entertained that the gold seized was of foreign origin. There is no whisper in the entire show cause notice about the origin of the gold bars seized from the appellant. It is not mentioned as to where, how and by whom the said gold was smuggled into India. Therefore, the smuggled nature of the impugned gold is far from established. In such circumstances, the department appears to have attempted to cover up the inadequacies in the investigation with not so convincing reasons. No reference was made to experts in the field. Though Chemical examiners report indicated the purity of the Gold, it did not conclude that the impugned gold was of foreign origin. Under the circumstances, we find that department has not established that the seized gold is of foreign origin and has also not established that the same was smuggled in to India. As the reasons to believe that the impugned Gold is of foreign origin and is smuggled, benefit of doubt or benefit of any shortcomings in the investigation should accrue to the appellant and not to the Revenue.

8. In this context the other issues relating to the contention of the appellant as regards to the manner of search, drawl of samples, re-testing of samples, cross-examination of the witnesses etc. will come into play. Learned Counsel for the appellants submits that Hon'ble High Court at Bombay in the case of Union of India Vs. Jasmine JayantilalThadeshwar [2020 (372) E.L.T. 817 (Bom)] had observed as follows:-

> ***"11.*** *The provisions of Section 102 Customs Act, 1962 (" of thethe said Act") accord a protection to the suspect prior to a search being taken under Section 100 or 101 of the said Act. Such protection is with the view to ensure that such search is taken with good cause and to lend credence to the evidence derived from such search. The expression "if such person so requires" in Section 102 necessarily implies that to enable him to exercise his legal rights under Section 102, he should be made aware of such rights. It is the obligation of the officer of customs to apprise the suspect of the rights available to him under Section 102, viz. to be taken to the nearest Gazetted Officer of Customs or magistrate. This is a necessary sequence to be complied with for enabling the suspect exercise his rights; and the failure to do so will render such valuable rights conferred to the suspect under Section 102 illusory and a mere farce. The choice, whether to be taken to the nearest Gazetted Officer of Customs or a magistrate, lies with the suspect and in the event such choice is made known by him to the officer of customs, he shall be searched only in that manner. It is not up to the officer of customs to make this choice or elect before whom the accused is to be taken. Therefore, even assuming that the officer taking the search is a Gazetted Officer, it is still imperative for him to comply with his obligation to apprise the suspect of the legal rights available to him under Section 102. Also because, upon exercise by the suspect of his right to be taken before a Gazetted Officer or magistrate, the provisions of Section 102(3) come into play, which, in my opinion, is a check on the misuse of power and also provides an additional measure of protection to the suspect. Section 102(3) provides that once the suspect is taken either before the Gazetted Officer or the magistrate, whichever the case may be, such Gazetted Officer or magistrate is empowered to forthwith discharge the person if he sees no reasonable ground for search, or otherwise direct that the search be made. In my opinion, the suspect will be denied of this additional degree of protection/opportunity if a Gazetted Officer himself takes search and does not apprise the suspect of his rights under Section 102 thereby the procedural requirements of Section 102(3) not being complied with."*

8.1. We find that no proper search of the appellant was conducted at the Railway station. As per the show cause notice, pieces of gold were found with the appellant at the Railway station as well as the Customs House. The reasons for summoning a person, instead of searching and seizing on the same spot and taking him to the Customs House for detailed search etc. has not been properly explained in the show cause notice and in the order-in-original. However, the learned authorized representative for the department submitted that as it was a public place and lot of commotion is likely to develop, the appellant has been summoned to the Customs House for seizure and recording statement etc. However, we do not find the same to be mentioned in the show cause notice. Moreover, no Panchnama appears to have been drawn either at the Railway station or at the Customs House. Such method of investigation not only vitiates the proceedings but also casts reasonable doubt on the reliability of the narrative of the department. We find that that the signatures of two persons, appearing to be Ratan Seal and Bhishor Singh (not legible), were taken at place meant for the signatures of witnesses, on the inventory; It is also not clear whether the same is a seizure memo. However, as alleged by the appellants name of the father, age, address of the witnesses is not mentioned. This is a very unusual for the investigating agencies. We fail to understand as to why the officers did not draw a Panchnama in an important case like the present one. As Panchnama is an account of proceedings by the witnesses, the absence of Panchnama takes away the sanctity of the proceedings. It has been submitted by the appellant that initially, he and Shri Kathuria were apprehended from the railway station and were brought to Customs House and were kept in two separate rooms, the Show Cause Notice mentions that only the appellant was apprehended. In his statement Shri Kathuria is stated to have told that he did not have any dealings with the appellant, though he knew the appellant.

9. The appellant claims that he did not get any opportunity to cross-examine Shri Anil Kr. Agarwal @ Anil Kathuria; though he was involved from the day one, Shri Kathuria stated that he had no business connection with the notice and had not visited Kolkata on 22.01.2016; the appellant claims that call records provided show that Anil Kathuria was using the mobile of his family members; Shri Anil Kathuria called several times between 01.01.2016 to 26.02.2016; he alleged that Customs authorities have not probed all the phones used by Anil Kathuriaand the CDR of the same; he also claims that gold found with Shri Kathuria was not seized and he was not arrested. The claim of the appellant can be brushed aside as an afterthought. However, in the entire scheme of things in the case, we find that Shri Anil Kathuria has a role which was not brought out very clearly by the investigation. It gives certain substance to the claim of the appellant that the role of, Shri Anil Kathuria had not been investigated,deliberately and willfully. However, as this is not the subject of our discussion, we need not go in to the matter more deeply.

10. Non-drawl of Panchnama at the Railway station as well as at the Customs House, the absence of details of the witnesses along with their signatures in the inventory prepared, non-pursuit of the whereabouts of Shri Raju of Sonapatty, Burrabazar, delay in the search of house premises of the appellantetc certainly go a long way to lend less credence to the investigation and make it difficult for us to rely upon their findings. In addition to this, as discussed above, the origin of the gold was not investigated to a logical conclusion and smuggled nature of the same is not established. The claim of the appellant that gold bars of foreign origin contain unique serial number and that the markings on the gold seized from him differ in form and style with the real foreign ones was brushed aside. However, as we observed above, one Kg Gold Bars manufactured by PAMP SUISSE or Valcambi need to have unique number as per LBMA. Revenue just got the purity measured from chemical examiner. No report on the gold being foreign origin was give. No assay was gold got done. No expert opinion was taken. This is not a correct and maintainable approach. We find this Bench in the case of **RAM NATH SAH 2007 (219) E.L.T. 546 (Tri. – Kolkata)** held that

> *"I find that the seizure report does not indicate any foreign marking on the gold. The purity is also not of 999 generally found with the foreign origin gold. The seizure report also does not indicate the individual weight of the gold pieces. As such, this is a case where the benefit of doubt requires to be extended to the appellants as there is no conclusive proof that the gold is of foreign origin and smuggled."*

11. One argument which is relentlessly taken by the department in the case is of afterthought by the appellant. It is more as a matter of convenience than conviction. It was claimed by the Revenue that there was no coercion, threat etc to the appellant and his initial statement that the gold was purchased from one Mr Raju was voluntary; his later averment that the gold was melted and manufactured out of the gold inherited by the family from their grandmother was an afterthought as the property suit was initiated well after seizure; assuming this act is an afterthought also may not affect the proceedings but the fact remains that the initial statement of the appellant was also not to the effect that it was of foreign origin and smuggled. His claim of purchase from one Shri Raju is not investigated logically so as to support the case. It was only stated that discreet enquiries conducted did not yield any result. Interestingly, in the subsequent statement the appellant was not even questioned about the whereabouts of Raju at least to call his bluff. Therefore, it cannot be presumed that the appellant has initially accepted the nature of the impugned gold either being of foreign origin or being smuggled. We find that in the case of Jasmine JayantilalThadeshwar (supra), Hon'ble High Court at Mumbai have set aside the seizure of gold even when the accused initially admitted that the pieces of gold seized from him were made from smuggled foreign marked gold biscuits. In the instant case even such acceptance is not there and therefore seizure is not maintainable. As held by various courts and Tribunal, Section 123 is applicable not just to any gold but to that gold of foreign origin and there to smuggle gold. We find that this Bench of the Tribunal in the case of RamprasadVsCC(P), Patna (Final Order A-680-751/Cal/96 dated 09.10.1996) held that -

> *"Revenue did not prove that the seized goods were of smuggled nature. The Department has thus not succeeded in proving that the impugned goods are not proved to be of foreign origin, their confiscation under Section 111(d) of the Customs Act cannot be upheld."*

12. In the facts and circumstances of the case as per our discussion above, we find that the Revenue did not establish that the impugned gold was of foreign origin and was smuggled. Therefore, we find that the seizure of the impugned gold is not maintainable. In view of the same, the appeal is allowed with consequential relief, if any, as per law.

(Pronounced in the open court on 16.10.2020)

Sd/

(P. K. Choudhary)
Member (Judicial)

Sd/
(P. Anjani Kumar)
Member (Technical)

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