

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA**

REGIONAL BENCH - COURT NO.2

Customs Appeal No.75010 of 2021

(Arising out of Order-in-Appeal No.KOL/CUS(CCP)/AKR/387/2020 dated 07.07.2020 passed by Commissioner(Appeals) of Customs, Kolkata.)

Commissioner of Customs(Preventive), Kolkata

(15/1, Strand Road, Customs House, Kolkata-700001.)

...Appellant

VERSUS

Shri Prabhash Kumar Jalan

.....Respondent

(Proprietor of M/s.JALAN Jewellers, 72, Manohar Das Street, Sonapatty, P.O.Burrabazar, P.S. Poosta, Kolkata-700007.)

APPEARANCE

Shri M.P.Toppo, Authorized Representative for the Appellant (s)

Shri Amit Awasti, Advocate for the Respondent (s)

CORAM: HON'BLE SHRI P.K. CHOUDHARY, MEMBER(JUDICIAL)

HON'BLE SHRI RAJU, MEMBER(TECHNICAL)

FINAL ORDER NO. 75500/2021

DATE OF HEARING : 30 July 2021

DATE OF DECISION : 27 August 2021

P.K. CHOUDHARY :

This appeal has been filed by the revenue against the Order-in-Appeal No. KOL/CUS(CCP)/AKR/387/2020 dated 07/07/2020 passed by the Commissioner Of Customs (Appeals), Kolkata.

2. Briefly stated, the facts of the case are that acting on a specific information, the Officers of the Headquarters P & I , Commissionerate of Customs (Preventive) W.B searched the business premises of the respondent at 72 Manohar Das Street , Sonapatty P.O Burrabazar P.S Posta , Kolkata on 04/06/2018. The premises which was searched was one room situated on the 4th Floor at the above mentioned address. At the time of search there were two persons present who were

identified as Rajendra Kumar Dhuriya and Vikram Kumar. On search, in the presence of the above named 2 persons and 2 Independent witnesses, the Customs Officers recovered 6 Pcs of Yellow metal in rectangular bar form weighing 6000 Gms valued at Rs 1,86,60,000 and Indian Currency amounting to Rs 4,09,50,000. At the time of search, the respondent was not present. Since the said 2 persons could not produce any documents in support of acquisition/possession of the yellow metals and Indian Currency under recovery, the Officers seized the said 6 pcs yellow metal which were believed to be Gold of Foreign Origin U/s 110 of the Customs Act 1962 on the reason to believe that the same were smuggled and illicitly imported into India rendering them liable to confiscation U/s 111b and 111d of the Customs Act 1962. The Indian Currency was seized U/s 110 of the Customs Act 1962 on the reasons to believe that the same was the sale proceeds of smuggled gold, being liable to confiscation U/s 121 of the Customs Act 1962. Apart from the aforesaid 6 pcs of yellow metal and the Indian Currency featuring at Sl no 1 and 2 of the search list dated 04/06/2018, other items at Slnos 3, 4, 5 and 6 of the search list were also seized by the officers.

3. Statements of Sri Rajendra Kumar Dhuriya and Sri Vikram Kumar were recorded U/s 108 of the Customs Act 1962. Sri Rajendra Kumar Dhuriya stated inter alia in his statement dated 04/06/2018 that he was not the owner of the recovered Gold and Indian Currency and that Sri Rinku Verma, Prop. of M/s Aman Jewellers of Allahabad sent him to Kolkata to receive gold from one Sri Pappu Jalan alias Praveen Jalan, Ganesh Jewellers, Kolkata with Rs 78,00,000 in cash which belonged to his employer Sri Rinku Verma and that he has handed over the said Rs 78,00,000 to M/s Ganesh Jewellers, Kolkata. Sri Vikram Kumar had in his statement dated 04/06/2018 stated inter alia that he was a resident of Gaya and came here on 01/06/2018 to meet his uncle named Sri Satendra Ram who used to stay in that room and that he did not know who was the actual owner of the said 6 Pcs yellow metals and Indian Currency. Both Sri Rajendra Kumar Dhuriya

and Sri Vikram Kumar were arrested U/s 104 of the Customs Act 1962 on 04/06/2018 and produced before the Court of Learned Chief Metropolitan Magistrate on 05/06/2018. Sri Vikram Kumar was released on bail by the Court on 07/06/2018. Sri Rajendra Kumar Dhuriya was released on bail on 26/06/2018 by the Court. While in custody, statements dated 18/06/2018 and 25/06/2018 of Sri Rajendra Kumar Dhuriya were recorded in jail as per the order of the Learned CMM Kolkata.

4. Follow up investigation was carried out by the Revenue. During investigation a statement dated 31/07/2018 of Sri Rinku Verma was recorded by the Officers of Varanasi Customs Division. In the said Statement dated 31/07/2018 Sri Rinku Verma stated inter alia that his shop Aman Jewellers was closed for the last 6 months and he had surrendered the registration and that he had no business with Sri PapuJalan / PrabhashJalan / Praveen Jalan of Ganesh Jewellers, Kolkata or with JalanJewellers of 72 Manohar Das Street, Sonapatty P.O Burrabazar P.S Posta, Kolkata. On being asked, he specifically denied that the said seized Rs 78,00,000 belonged to him and that he did not know any person named Rajendra Kumar Dhuriya.

5. Sri Prabhash Kumar Jalan, Prop of JalanJewellers at 72 Manohar Das Street, Sonapatty P.O Burrabazar P.S Posta, Kolkata submitted a petition dated 11/06/2018 claiming ownership of the seized 6 yellow metals believed to be Gold and Indian Currency amounting to Rs 3,31,50,000. Along with the said claim petition, the respondent submitted GST returns , Certificate of the Auditor certifying the stock and cash balances in the books of accounts etc. The said Sri Prabhas Kumar Jalan appeared in person in response to Summons on 08/08/2018 before the Officers of the P and I. In his statement Sri Prabhash Kumar Jalan stated inter alia that he was the Proprietor of JalanJewellers of 72 Manohar Das Street, Sonapatty P.O Burrabazar P.S Posta, Kolkata and that he was the rightful owner of the 6 kgs Gold and Indian Currency of Rs 3,31,50,000 that he did not know

Rajendra Kumar Dhuriya or Sri Rinku Verma and Aman Jewellers of Allahabad. The respondent vide his letter dated 22/06/2018 submitted further documents running into 418 pages. By the said documents the respondent supported his claim for release of the Seized Gold and Indian Currency.

6. Six representative samples were drawn from the seized 6 pcs yellow metals believed to be gold of Foreign Origin. On chemical examination by the Chemical Examiner, Customs House, Kolkata it was found that 5 samples were having purity of 99.50% and the rest 1 sample was having purity of 99.60%. 7. As the investigation could not be completed within the mandatory period of 6 months from the date of seizure, the Principal Commissioner Of Customs (preventive), Kolkata extended the time for issuance of Show Cause Notice for another 6 months in terms of proviso to Section 110(2) of the Customs Act 1962, which was communicated to the respondent on 30/11/2018.

8. Further, the respondent submitted 300 nos of sale invoices for the period from 01/05/2018 to 04/06/2018 along with the ownership document of the room from which the goods were recovered vide his letter dated 05/12/2018. The respondent appeared further in response to summons and his statement was recorded on 14/12/2018 in which he had inter alia stated that he had no claim for Rs 78,00,000 under seizure which belonged to Sri Rajendra Kumar Dhuriya whom he had no relation with and that being a chronic patient of heart and undergone an operation of Bypass surgery, he was not able to attend his office regularly and that since bank was closed from 01/06/2018 to 03/06/2018, the sale proceeds in cash was scheduled to be deposited with bank on 04/06/2018 but those were seized by the Officers who visited the premises on 04/06/2018.

9. After investigation, including examination of the documents submitted by the respondent, a Show Cause Notice dated 28/05/2019 was issued to Sri Rajendra Kumar Dhuriya (Noticee 1) and the

respondent Sri Prabhash Kumar Jalan (Noticee 2). In the Show Cause Notice the respondent was asked to show cause as to why the seized gold weighing 6 kgs valued at Rs 1,86,60,000 which appeared to be illegally imported into India through unauthorised route and manner and kept without any proper/valid documents, should not be confiscated U/s 111(b) and 111(d) of the Customs Act 1962 and why the seized Indian Currency amounting to Rs 3,31,50,000 which appeared to have been procured by sale of smuggled gold should not be confiscated U/s 121 of the Customs Act 1962. It was also proposed in the Show Cause Notice as to why penalty u/s 112(b) and 114AA of the said Act should not be imposed on the respondent.

10. Reply dated 01/06/2019 to the SCN was submitted by the respondent to the Additional Commissioner of Customs (Preventive) Customs House Kolkata, who was the adjudicating authority. The said adjudicating authority passed the OIO No. 85(ADCP)/CUS/WB/19-20 dated 28/01/2020 by which the seized gold was ordered to be absolutely confiscated U/s 111(b) and 111(d) of the Customs Act 1962 while Indian currency amounting to Rs 3,31,50,000 was ordered to be absolutely confiscated U/s 121 of the Customs Act 1962. It was also ordered that Indian Currency amounting to Rs 78,00,000 procured by the respondent from the Noticee 1 Sri Rajendra Kumar Dhuriya to be absolutely confiscated u/s 121 of the said Act. The said lower adjudicating authority imposed a penalty of Rs 2 crores on the respondent u/s 112(b) of the Customs Act 1962 for his act of omission and commission as discussed in the order and also imposed a penalty of Rs 3.5 crores on the respondent u/s 114AA of the Customs Act 1962.

11. Being aggrieved and dissatisfied with the said Order dated 28/01/2020 passed by the lower adjudicating authority, the respondent filed appeal before the Commissioner Of Customs (Appeals), Customs House, Kolkata u/s 128 of the Customs Act 1962. The Commissioner Of Customs (Appeals) passed the OIA no

KOL/CUS(CCP)/AKR/387/2020 dated 07/07/2020 by which he held that absolute confiscation of the 6 pcs of gold bars weighing 6 kgs valued at Rs 1,86,60,000 and Indian Currency amounting to Rs 3,31,50,000 is not warranted in the facts and circumstances of the case. He also held that imposition of penalty of Rs 2,00,00,000 on the respondent u/s 112(b) of the Customs Act 1962 was not sustainable. He also held that imposition of penalty of Rs 3.5 crores on the respondent u/s 114AA of the Customs Act 1962 was not maintainable. This order dated 07/07/2020 passed by the Commissioner (Appeals) is under challenge by the Revenue.

12. The matter was first heard on 12/02/2021, when the Learned Authorized Representative for the Appellant Revenue prayed for time for procuring documents like copy of Show Cause Notice, copy of statement of the respondent dated 07/08/2018 tendered to the investigating Customs Officer and the copy of the Gold Ledger. Accordingly, time was allowed and the next date for final hearing was fixed after two weeks i.e after 01/03/2021 as and when the Division Bench could be available. The matter came up for final hearing before this bench on 30/07/2021. The respondent had filed his written submissions dated 21/07/2021 which was reiterated by the Learned Advocate on behalf of the Respondent. During the course of hearing the Learned DR for the Appellant Revenue raised certain issues as under:

1. Whether the presumption u/s 123 of the Customs Act 1962 goes in favour of the revenue or not.
2. The claim petition in respect of the seized gold and Indian Currency was filed after 2 months from the date of seizure.
3. The Commissioner of Customs (Appeals) failed to appreciate the fact that as per the documents submitted i.e gold ledger wherein it was found that the closing

balance shows 6114.523 gms pure silver instead of pure gold.

13. Accordingly, the Learned Advocate appearing on behalf of the respondent was directed to file counter submissions if any. In response to the said direction, the respondent filed further written submissions on **02/08/2021** through his advocate on the said 3 issues raised by the Learned Authorised Representative for the Appellant Revenue. It is the submission of the Respondent that the claim petition dated 11/06/2018 along with documents was received by the Customs on 13/06/2018. Documents running into 418 pages were submitted further on 22/06/2018. This fact of submission of the required documents has been acknowledged by the department in the Summon dated 16/07/2018. The respondent further submitted in his Written Submission dated 02/08/2021 that the formation of reasonable belief as mentioned in Section 123 of the Customs Act 1962 must be raised on acceptable materials. It is therefore imperative that as per Section 123 when there is reasonable formation of belief only then the burden is cast upon the person from whose possession goods have been seized to prove that the seized goods are not smuggled. However the respondent has submitted all the required documents like GST returns, Stock Ledger, Cash book, Purchase register, Sales Register etc in support of his claim that the Gold bars are not smuggled. It was therefore the contention of the Respondent that the presumption under Section 123 of the Customs Act 1962 does not go in favour of the Revenue.

14. Regarding the closing balance shown as 6114.532 gms of Pure Gold which was wrongly mentioned by the Revenue as Pure Silver, the learned advocate for the respondent referred to the Item Register of Gold Bar showing the closing balance of gold as on 04/06/2018 of 6114.532 Pure Gold recorded in the column meant for Closing Quantity of Gold. During argument, the learned advocate for the respondent further submitted that the said closing quantity of Pure Gold included

51.3 gms of Pure Silver shown in the column meant for Inwards Quantity of the said Item Register of gold bar because as per business practice the respondent firm was mixing very small quantity of silver to the gold.

15. Another query was raised by the learned DR that one of the bills (Voucher No GST/0321/18-19) pertaining to cash sales amounting to Rs 1,09,270 has been entered on 31/05/2018 instead of 30/05/2018. To this, it was the submission of the Respondent in Para 12 of his written submission Dated 02/08/2021 that it was a bona fide inadvertent clerical mistake in the tabulation of the voucher.

16. Heard both sides through video conferencing and perused the appeal records.

17. Now we turn to the grounds taken by the Revenue in its Appeal against the Order In Appeal dated 07/07/2020 passed by the Commissioner Of Customs (Appeals), Kolkata. The revenue has taken the following four grounds:

1. The Commissioner of Customs (Appeals) failed to appreciate the statement dated 07.08.2018 tendered by Sri Prabhash Chandra Jalan proprietor of M/s JalanJewellers that he is a "Bullion Merchant" involved into purchasing of gold having gold content not below 99.5% embossed with having serial number/batch number/make/brand/trade mark/country of origin from nominated banks or nominated agencies and also used to sale as such either full sized or by cutting thereof but not sold melted gold. However, in the instant case the seized gold has no serial number/batch number/make/brand/trade mark/coo etc. which is in contrary to the statement furnished by him.

2. The CCA failed to appreciate the fact that as per the documents submitted i.e Gold Ledger wherein it was found that the closing balance shows as 6114.523 grams PURE SILVER instead of PURE GOLD. However, in the instant case the seized

Gold is clearly not mentioned in their stock register. Hence, the gold seized is illegal without proper documents which is liable for confiscation under Section 111 of the Customs Act, 1962. Gold is notified under Section 123 of Custom Act, 1962 and the burden of proof that the same is not smuggled is on the person from whose possession the gold is seized. In this case, the same has not been adequately discharged by above those alleged appellants by not submitting relevant invoices indicating details of the gold so seized by the department. Hence, Shri Prabhas Kumar Jalan has failed to discharge the burden of proof u/s 123 of the Customs Act, 1962.

3. The CCA failed to appreciate the fact that out of 269 invoices submitted 206 invoices involved sale of bullion only which are normally purchased by firms engaged in the manufacturing of Jewellery business. Further, all the 206 invoices were raised during the period 02.05.18 to 04.06.18 having transactional value less than Rs 2,00,000/- in the name of Misc Party without having the name and address of the buyers. It is crystal clear that the modus operandi followed in the instant case is to create hindrance to carry out the investigation as well as an eye wash to carry out illicit transactions. The modus operandi followed goes against the principle of business practice followed as the Assessee in the instant case won't be able to take input tax credit benefit. Further, in the instant case the seized cash amounting to value Rs 3,31,50,000/- claimed is not as per the cash shown in the cash book i.e. Rs 3,35,76,215/-. However in the instant case the seized cash is the sale proceeds of the smuggled gold and liable to confiscation u/s 121 of the Customs Act, 1962.

4. The CCA failed to appreciate the fact the amount of Rs 78,00,000/- was recovered from the rented premises of M/s JalanJewellers at 79,Manohar Das

Street, Sonapatty, Burrabazar, Kolkata-07. Owing to the quantum of money involved, it cannot be denied that there has been an on-going illegal business transaction between Sri PrabhasJalan and Sri Dhuriya of Allahabad.

18. Coming to the First Ground, we find that there is no mention of the statement dated 07/08/2018 of the respondent Sri Prabhash Kumar Jalan in the list of Relied Upon Documents enclosed with the Show Cause Notice and that the respondent in his reply to the Show Cause Notice requested for providing the RUDs. We also find that the name of Respondent has been wrongly mentioned as Prabhash Chandra Jalan. However no copy of the said statement or any other statement of the Respondent has been produced during the hearing by the Revenue. However we find that there is mention of two statements of Sri Prabhash Chandra Jalan in Para 16/E and Para 22/C of the Show Cause notice. It is apparent that the name of the Respondent has been wrongly mentioned in all these places. However In the statements so appended in the said two paragraphs 16/E and Para 22/C there is no mention that the respondent stated that he was involved in purchasing gold having serial no/batch no/make/brand/trademark/country of origin from nominated banks or nominated agencies and that he did not sell melted gold. We find that in Para 23/C of the Show Cause Notice, it is mentioned that "on the issue of no marks, brand, country of origin and serial nos on the Gold bars, Sri Prabhash Kumar Jalan stated that as there were no marks mentioned in the tax invoices so received by his firm issued by the suppliers, his firm also not mentioned any marks and serial nos during their sale". From the Para 35 of the Respondent's Reply dated 01/06/2019 to the Show Cause Notice we find that in reply to the questions put forth by the department, the respondent replied that - (a) 'we received gold 99.50 instead of 999.50 from various Bullion Dealers who procured/purchased directly from banks under proper tax invoices'. (b) 'Bar nos were mentioned while received gold in 1 Kg bar form and mentioned in Incoming Tax Invoices and were written by hand due to

not formatting in the Tally System'. (c) 'we also used/mentioned bar nos while delivered/sold gold in 1 kg Bar form'. In view of the above, there is nothing contrary to the statement of the Respondent.

19. As far as the Second ground is concerned, the issue already stands clarified by the respondent as mentioned above. We find that the learned Commissioner (Appeals) has also dwelt on this issue of closing balance of 6114.523 gms of Gold which the Revenue mentioned as Pure Silver instead of Pure Gold. We find from the opening and closing balances of the Item Register of Gold Bar that the respondent mixes a very small quantity of silver with the gold. We also find that Pure Silver of 51.300 gms shown in the Column for Inward quantity of the Item Register for Gold as on 04/06/2018 is matching with the outward quantity of 0.051 kgs as shown in the Pure Silver Item Register on 04/06/2018. Therefore there is no reason to believe or contend that the closing balance of 6114.523 gms as shown in the column meant for Closing Quantity in the Item Register of Gold bar was Pure silver instead of Pure Gold and that the seized gold was not mentioned in the Stock Register (i.e Item Register of Gold Bar). In the instant case we find that the documents i.e Purchase Register, Sales Register, Balance Sheet, Bank Account details etc submitted by the respondent during investigation which were examined/scrutinized by the department and it was revealed as mentioned in Para 18 and 30 of the Show Cause Notice and the Order In Original, respectively, that all purchases and sales were under proper tax invoices. The learned Commissioner of Customs (Appeals) has also made discussions in Paragraph 20,21,22,23,24,26,27,36 and 37 of his order dated 07/07/2020. Considering the fact that the respondent submitted all documents which were asked for by the department during investigation and no discrepancy being found on examination of them, we feel inclined to hold that the gold bars were domestically purchased under legal documents and the respondent has discharged the burden U/s 123 of the Customs Act 1962 to prove that the gold bars were not smuggled.

20.

1. In the first part of the third ground, it is found that the learned Commissioner of Customs (Appeal) had dealt with this issue of 206 nos of GST sales invoices raised by the appellant (respondent herein) in Para 32 of the Order in Appeal, wherein it has been inter alia held that all this 206 nos of GST sales invoices were reflected in the books of accounts on page nos 65,66,67,69,70,71 and 72 of the Item Register of Gold bar for the Period from 02/05/2018 to 04/06/2018 submitted during investigation to the department and supported by GST Returns. It was further held by him that these 206 GST sales invoices with specific nos and dates were undoubtedly raised prior to seizure of the claimed Indian Currency in question and that there is no contrary evidence to prove that those were generated afterwards to cover the said claimed amount. It was further held that when there are admitted documentary evidences that the Appellant (Respondent herein) has purchased the gold and sold them in domestic market under proper tax invoices, prudence demands the theappalant does not have any reason to believe that he transacted in/or dealt with the smuggled gold. All these transactions involving 206 nos of invoices were retail sales for amount below Rs 2,00,000 and as such no illegality can be said to have been committed by the respondent to create an eye wash to carry out illicit transactions when each and every transaction has been supported by proper tax invoices which were examined and scrutinized by the department without any anomalies found therein.

2. The closing balance shown in the cash book of Rs 3,35,76,215.00 is more than the seized cash amount of Rs 3,31,50,000.00. Therefore it is not understood what the Appellant Revenue wants to say in this regard. When the closing cash balance is greater than seized cash amount and hence

covers the seized amount, there cannot be any question raised regarding non accountal of the seized cash amount.

3. In the last part of the third ground it is mentioned that in the instant case the seized cash is the sale proceeds of smuggled gold and liable to confiscation u/s 121 of the Customs Act 1962. But we find that no specific reasons are adduced in support of this. It is an admitted position that the respondent submitted all the documents as and when asked for by the Department. It is also an admitted position that those documents were examined and scrutinized by the department, which revealed that the purchases and sales were under proper tax invoices. It therefore leads us to believe that the Gold bars were not smuggled into the country. It is not established that there were sales of smuggled Gold. The identity of seller and purchaser is also not established by evidence. The respondent has duly accounted for the claimed amount of cash of Rs 3,31,50,000 by submitting documents including GST Sales Invoices of gold which were examined and scrutinized during investigation and found to be under proper tax invoices reflected in the Cash book showing a closing balance of Rs 3,35,76,215.85 as on 04/06/2018. The learned Commissioner of Customs (Appeal) has also discussed in Para 28,30,31,32 of his order before coming to his conclusion in Para 33 that the currency cannot be considered to represent the sale proceeds of the smuggled goods and therefore the no violation of Section 121 of the Customs Act 1962 has been laid out.

21. In the case of Ramachandra Vs Collector of Customs, reported in 1992 (60) ELT 277 (Tribunal), in para 5 whereof it was held that before violation of Sec 121 is established the following ingredients must be satisfied :

1. There must be a sale.

2. The sale must be of smuggled goods.
3. The sale must be by a person having knowledge or reason to believe that the goods were of foreign origin.
4. The seller and purchaser and the quantity of gold must be established by the Customs Authorities.

22. This decision was relied upon by the Tribunal in the case of Commissioner Of Customs (Prev) Kolkata vs Atiquer Rahman, reported in 2010 (252) ELT (Tri-Kolkata) while dismissing the appeal filed by the Revenue. In this case the Tribunal had inter alia held that:

“5) I find that in the present case the Revenue wants to confiscate the Indian currency on the ground that the same is sale proceeds of smuggled gold. I find that the Tribunal in the case of Ramachandra (supra)” relied upon by the respondent held that for violation of Sec 121 of the Customs Act, the ingredients must be satisfied. Sec 121 of the Customs Act provides as under:

“where any smuggled goods are sold by a person having knowledge or reason to believe that the goods are smuggled goods, the sale proceeds thereof shall be liable to confiscation.”

6) I find that in the present case there is no evidence that there is sale of any smuggled goods, the sale is by a person having knowledge or reason to believe that the goods are being smuggled in nature and the seller and purchaser and quantity of smuggled goods is not established. In these circumstances I find no infirmity in the impugned order and the appeals are dismissed.”

23. In so far as the fourth ground is concerned, we find that the respondent has not made any claim in respect of Rs.78,00,000. Respondent was also not present in the premises at the time of search. Rajendra Kumar Dhuriya has stated in his statements as mentioned in Para 6, 11/A and 11/C of the SCN that the said amount of cash belonged to his employer RinkuVerma of Allahabad and that he

handed over the said cash Rs 78,00,000 to M/s Ganesh Jewellers , Kolkata. We find that no investigation has been made regarding Ganesh Jewellers to find corroboration of the statement of Rajendra Kumar Dhuriya. However investigation was done with regard to Sri RinkuVerma and the findings of investigation done by the Varanasi Customs are mentioned in Para 14/D of the Show Cause Notice, from which we find that Sri RinkuVerma stated that he had no business relation with Sri PappuJalan/PrabhashJalan/Praveen Jalan of Ganesh Jewellers, Kolkata or JalanJewellers at 72 Manohar Das Street, Sonapatty , Kolkata. He also denied having any relation with the said recovered amount of Rs 78,00,000. He specifically denied that he knew any person named Rajendra Kumar Dhuriya. Thus we find that no connection by evidence could be established between the said Rs 78,00,000 and the respondent Sri Prabhash Kumar Jalan, who was not present at the time of search and who had steadfastly denied ownership of the said amount of Rs 78,00,000.

24. The department has failed to prove in the first place that there were valid grounds for presumption at the time of seizure that the seized 6000 gms gold was of foreign origin and smuggled into India. Evidently the seized 6kgs of gold did not bear any foreign markings. No evidence could be adduced by the department in its subsequent investigation that the seized gold was of foreign origin and smuggled into the country. But the respondent Sri Prabhash Kumar Jalan has submitted all relevant documents including GST purchase and sales invoices and GST returns, Purchase and Sales registers etc covering both the Gold and Indian Currency, which have been admittedly examined by the department revealing no discrepancies as in Para 18 of the SCN, corresponding to Para 30 of the OIO.

25. In the case of Shanti Lal Mehta- 1983 (14) E.L.T 1715 (S.C) it was held by the Hon'ble Supreme Court that "the reasonable belief is a prerequisite condition of the power of seizure that the statute confers on the officer. The reasonable belief as required by Sec 110 refers to

the point of time when the goods in question are seized not to a stage subsequent to the act of seizure". In the said case, the apex court also held that in order to attract the provisions of Sec 123 it is essential that the goods must be smuggled goods. The term 'smuggled' means goods of foreign origin and imported from abroad. There must be something suggesting their foreign origin and their recent importation from abroad. It cannot, from unaccounted goods, be inferred that they are smuggled goods, for they may be stolen goods.

26. We find that the Commissioner (Appeals) has dealt with all the relevant issues involved in the instant case at length in his Order. While making submissions the Learned Advocate for the respondent also referred to the Final Order No. A/70269-70271/2020-SM [BR] dated 07/12/2020 passed by the Hon'ble CESTAT, Regional Bench, Allahabad in the case of Sri Lokesh Kumar Chaudhary in which it was inter alia held –

"13. Having held that the gold in question cannot be concluded to be of foreign origin and smuggled , I intend to refer to some of the leading judgements on the said issue. Reference can be made to Tribunals decisions in the case of Nitya Gopal Biswas Vs. Commissioner Of Customs (Prev) Kolkata reported in [2016(344) ELT 209 (Tri-Kolkata)] laying down that when the appellants had produced legal documents of the licit acquisition of the foreign origin gold, he can be said to have discharged the burden and the department cannot be said to have established the smuggled nature of the seized foreign origin gold. In the present case, I observe, even at the cost of repetition, that the gold in question was not marked with foreign marking.

14. In the case of Nand Kishore Sumani Vs CCE reported in [2016(333) ELT 448(Tri-Kolkata)] the issue of the gold bars not having foreign markings and no evidence of defacing of foreign origin mark was discussed. Hon'ble Calcutta High Court in the case of Commissioner Of Customs, Excise and Service tax, Siliguri vs Nand Kishore Somani reported in [2016(337) ELT

10(CAL)] observed that foreign origin cannot be established based upon the certificate from a jeweller certifying that the purity of the gold is more than 99.50%. To the same effect is another decision of the Calcutta High Court reported as MadhukarSonabaBhagat Vs. Commissioner Of Customs (Prev), West Bengal [2019(368) ELT 990(Tri-Kolkata)]. In the case of Ram Naresh Chaurasiya vs. Commissioner Of Custom (Prev) , Patna reported in [2019(365) ELT 940 (Tri-Kolkata)], it was held that there been no foreign markings and no investigations made by the Department producing evidence of smuggled nature of the Two old bars, the presumption U/s 123 Of the Customs Act 1962 is not invocable. In fact the list is unending and it is almost established law that Revenue is required to prove its case by sufficient and positive evidence and not on the basis of assumption and presumption.

15. In view of the foregoing, I set aside the impugned order and allow both the appeals filed by Sri Lokesh Kumar Choudhary and Sri Karan Soni with consequential relief to them. In as much as the individual's appeals are allowed, the Revenue's appeal has become infructuous. The same is accordingly rejected."

27. In light of the above decisions of the Hon'ble Supreme Court and the Tribunal, we may at the cost of repetition say that there were no grounds for reasonable belief at the time of seizure that the gold bars were of foreign origin and smuggled. Subsequent investigation has also not established that the gold bars were smuggled and therefore the provisions of Sec 123 of the Customs Act is not invocable. However we find that the respondent has submitted all relevant documents in support of his domestic licit acquisition supported by GST Purchase Invoices. Regarding the Indian Currency, we find that the ingredients to invoke Sec 121 of the Customs Act is not established to prove that the Indian Currency is the sale proceeds of smuggled goods.

28. Having regard to the facts of the case and the evidences on record, we find ourselves in agreement with the findings of the Commissioner (Appeals) that the confiscated gold was not of Foreign origin and smuggled into India. We are also in agreement with the findings of the Commissioner (Appeals) that the confiscated Indian Currency amounting to Rs 3,31,50,000 which has been claimed by the respondent is not established or proved to be the sale proceeds of smuggled Gold. Agreeing with the reasons put forth by the learned Commissioner (Appelas) in para 41,42,43 and 44 of his order dated 07/07/2020 we hold that there is no justification for imposition of penalty on the Respondent u/s 112(b) and 114AA of the Customs Act 1962.

29. Accordingly we pass the order in terms of the above with the direction to release the 6 pcs confiscated gold bars and Indian Currency amounting to Rs 3,31,50,000 to the Respondent being the rightful owner of the goods. The appeal filed by the Revenue accordingly stands dismissed.

(Order pronounced in the open court on 27 August 2021.)

Sd/
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/
(RAJU)
MEMBER (TECHNICAL)