

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL,
KOLKATA**

REGIONAL BENCH – COURT NO.1

Customs Appeal No,79455 of 2018
Customs Appeal No,79458 of 2018
Customs Appeal No,79459 of 2018
Customs Appeal No,79460 of 2018
Customs Appeal No,79461 of 2018
Customs Appeal No,79463 of 2018

(Arising out of Order-in-Original No.15/Cus/CC(P)/WB/2018-19 dated 31.08.2018 passed by Commissioner (Appeals) of Customs, Kolkata)

- (1) Subham Verma**
- (2) Golu Verma**
- (3) Rajendra Kumar Dhuriya**
- (4) Shri Sourabh**
- (5) Shri Rinku Verma**
- (6) Pradeep Kumar Bothra**

Appellant

VERSUS

Commissioner of Customs (Port), Kolkata
15/1, Strand Road, Kolkata-700001

Respondent

APPEARANCE :

Shri N.K.Chowdhury, Advocate for the Appellant
Shri M.P.Toppo, Authorized Representative for the Respondent

CORAM:
HON'BLE MR.ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR.RAJEEV TANDON, MEMBER (TECHNICAL)

Interim Order No. 1-6/2023

DATE OF HEARING : 08 .05.2023
DATE OF PRONOUNCEMENT : 29.08.2023

Per Ashok Jindal :

The appellants are in appeals against the impugned order for confiscation of 6 kg gold recovered on 19.05.2015 from Appellant No.(1) to (4) and imposition of penalty on all the appellants.

2. The facts of the case are that on specific information received by P & I Branch, CC (P), WB, Kolkata on 19.05.2015, the Appellant Nos. (1) to (4) were intercepted at Howrah Railway Station. They were brought to the Customs House after issuing spot summon on them. 6 pcs. of gold bars believed to be of foreign origin having inscription "PMAP SUISSE 1 KILO GOLD 995.0 PMAP ESSYEUR FONDEUR" with tampered SI.No. were recovered from the packets in the bag with them. The value of the goods was assessed as Rs.1,68,58,500/-. The said gold was seized on the same day on a reasonable belief that the gold bars had been smuggled into India through an unauthorized channel and is liable for confiscation. In the statement recorded in the said date, the Appellant Nos. (1) to (4) stated that they were gold carriers of Appellant No.(5) and the impugned gold has been obtained by them on 18.05.2015 from Shri Sashikant Patil @ Banti at Dhanalaxmi Bullion Pvt. Ltd., 43 Nalini Seth Road, 1st Floor, Room No.101, Sona Patty, Kolkata-700007. They proceeded for Howrah Station on 19.05.2015 to Board the Chambal Express. At the time of search, they were not having any documents with regard to ownership of the gold. It is stated that the said gold is to be handed over to Appellant No (5). They were arrested and produced before the CMM, Bankshal Court on 20.05.2015 and bail was rejected.

2.1 On 19.05.2015, the Customs officials visited the premises of Shri Sashikant Patil, but did not find any contraband goods at the said premises. Shri Sashikant Patil was not present, but his cousin brother, Shri Ashish Patil stated that he does not know the Appellant No.(1) to (4) intercepted by the Customs Officers from

Howrah Station. Thereafter, on 23.06.2015, summon was issued in the name of Shri Sashikant Patil for his appearance and letter was received by Shri Jiban Ghosh stated that Shri Sashikant Patil was not attending the shop for a few days.

2.2 On 3rd July, 2015, the Hon'ble High Court of Calcutta granted bail to Appellant No.(2) and subsequently, the Appellant Nos. (1), (3) & (4) were also granted bail.

2.3 Again, on 09.07.2015, summon was issued to Shri Sashikant Patil for appearance on 17.07.2015, but he could not appear on the said date as summon was received by him on 23.07.2015. Voluntary statements of Appellant No.(1) to (4) were recorded, who gave contradictory statement in respect of taking delivery of the gold from M/s Dhanlaxmi Bullion Pvt. Ltd.. Thereafter, summon was issued to Appellant No. (5) on 23.09.2015 to appear on 05.10.2015 before the Customs Authorities, but he did not appear.

2.4 On 30.09.2015, the notice of pre-trial disposal of the seized gold, was given by the Customs authorities to Appellant Nos. (1) to (4). On the basis of the said Notice, on 12.10.2015, the said Appellants opposed and objected to the pre-trial disposal of the seized gold and prayed to return the same to the original owner i.e. Appellant No.(5). The Appellant No.(5) also made a prayer for release of the seized gold.

2.5 On 16.10.2015, the statement of Shri Sashikant Patil was recorded, who denied having relation with the Appellant No.(5) and also denied having sold any gold of Appellant Nos. (1) to (4). The Appellant No.(5) also tendered his statement on 26.10.2015 stating that he was engaged in the business of purchase and sale

of the gold jewellery at Delhi, Mumbai & Kolkata. He also stated that he knew the Appellant No.(1) to (4), who worked for him. The seized gold was also actually purchased by the Appellant No.(5) from Shri Prodeep Kumar Bhathra of M/s Snehal Gems Pvt. Ltd., Mumbai, Appellant No.(6), against the invoices. The statements of the Directors of said Appellant Companies were recorded on 08.01.2016, who stated that they know the Appellant No. (5) and also accepted that he has sold 6 kgs of gold to Appellant No.(5) against the invoices and tendered the payment related documents.

2.6 On 15.02.2016 and 16.02.2016, the Appellant No. (1) to (4) stated before the Superintendent of Customs that the seized gold were given to them by Appellant No.(5) at Allahabad for the purposes of getting gold jewellery in exchange of the said gold from Kolkata and the statements given by them on 19.05.2015 is not proper and not voluntary. Thereafter, a show-cause notice was issued to all the Appellants on 28.04.2016 for confiscation of the seized gold and imposition of penalty under Section 112 (b) and 114AA of the Customs Act, 1962. The said show-cause notice was contested by all the Appellants, but the adjudicating authority passed the following orders :

(i) I order for absolute confiscation of the seized 06 (six) pieces of smuggled gold bars of foreign origin having total weight of 6 (six) kgs. and valued at Rs.1,68,54,000/- under Section 111 (b) and Section 111 (d) of the Customs Act, 1962.

(ii) I order for confiscation of the 03 (three) clothen pockets especially designed for carrying smuggled gold bars of foreign origin, of cream color (dirty), Ash color & Violet color along with torn papers and brown adhesive tape under seizure, having no commercial value, under Section 119 of the Customs Act, 1962.

(iii) I order confiscation of the 05 (five) old and used mobile phones (1) Micromax Mobile Phone Model No.X258 bearing IMEI No.911335303708505 & 911335303708513, (2) Intex Aqua Star 5.0 Mobile Phone bearing bearing IMEI No.911403851549273 & 911403851599278, (3) Samsung Mobile Phone Model No.SM-G355H bearing IMEI No.356894061942096 & 356895061942093, (4) Samsung Mobile Phone Model No.GT-C3322i bearing IMEI No.35432206582382501 & 35432306582382301 and (5) IRIS Fuel 60 Mobile Phone bearing IMEI No.911417050367444 & 91417050367451 under seizure, under Section 111 (b) and Section 111 (d) of the Customs Act, 1962.

(iv) I impose a penalty of Rs.5,00,000/- on Shri Raghendra Kumar Dhuriya, Noticee No.1 under Section 112 (b) of the Customs Act, 1962.

(v) I impose a penalty of Rs.5,00,000/- on Shri Sourabh, Noticee No.2 under Section 112 (b) of the Customs Act, 1962.

(vi) I impose a penalty of Rs.5,00,000/- on Shri Subham Verma, Noticee No.3 under Section 112 (b) of the Customs Act, 1962.

(vii) I impose a penalty of Rs.5,00,000/- on Shri Golu Verma, Noticee No.4 under Section 112 (b) of the Customs Act, 1962.

(viii) I impose a penalty of Rs.10,00,000/- on Shri Rinku Verma, Noticee No.5 under Section 112 (b) of the Customs Act, 1962.

(ix) I impose a penalty of Rs.10,00,000/- on Shri Raghendra Kumar Dhuriya, Noticee No.1 under Section 114AA of the Customs Act, 1962.

(x) I impose a penalty of Rs.10,00,000/- on Shri Sourabh, Noticee No.2 under Section 114AA of the Customs Act, 1962.

(xi) I impose a penalty of Rs.10,00,000/- on Shri Subham Verma, Noticee No.3 under Section 114AA of the Customs Act, 1962.

(xii) I impose a penalty of Rs.10,00,000/- on Shri Golu Verma, Noticee No.4 under Section 114AA of the Customs Act, 1962.

(xiii) I impose a penalty of Rs.50,00,000/- on Shri Rinku Verma, Noticee No.5 under Section 114AA of the Customs Act, 1962.

(xiv) I impose a penalty of Rs.50,00,000/- on Shri Pradeep Kumar Bothra, Noticee No.6 under Section 114AA of the Customs Act, 1962.

Against the said order, the appellants are before us.

3. The Id.Counsel appearing on behalf of the appellants, submitted that the ownership of the impugned gold has been claimed by the Appellant No.(5), who has purchased the said gold from Appellant No. (6) through proper Invoices and also placed the copies of invoices issued by Appellant No. (6) on record. The Appellant No. (6) also joined the investigation and submitted all records of purchase, sale invoice, bank statements etc., which certifies that the impugned gold has been sold by the Appellant No.(6) and the payment of the same was made by

Appellant No.(5) through proper channel. Therefore, the Appellant No.(5) has also discharged the burden in terms of Section 123 of the Customs Act, 1962 as it has been disclosed the source of procurement of impugned gold and also payment particulars, which was made by through banking channel. He further submitted that initially, the Appellant Nos. (1) to (4) have submitted that they have acquired the possession of the said gold from Mr.Sashikant Patil, but later on, they have stated that they have received the said gold from the Appellant No.(5), Shri Rinku Verma and the revenue proceeded to investigate the matter further to reveal the truth. During investigation, it has come on record that the Appellant No.(5) has acquired the gold through proper channel from Appellant No. (6) and also placed documents were on record, which are not denied any cogent evidence by the adjudicating authority. As the burden in terms of Section 123 of the Customs Act, 1962, has been discharged, in that circumstances, the impugned proceedings are not sustainable. He further submitted that the adjudicating authority failed to give any finding to controvert the transactions between the Appellant No.(5) & Appellant No. (6), but only held that the Appellant No.(1) to (4) altered their version on the direction of Appellant No.(5) in a futile bid to conceal the smuggled nature of the seized gold. The adjudicating authority without establishing the fact, has given the finding that the Appellant Nos. (1) to (4) are habitual offender without ascertain the fact whether the Appellant Nos. (1) to (4) are involved in such activity in the past. In that circumstances, the gold is not liable for confiscation under 111 (b) & (d) of the Customs Act, 1962 and therefore,

the impugned gold is to be released and penalties on the Appellants are not imposable. To support his contention, he relied on following decisions of the Tribunal as well as the Hon'ble High Court, in the cases of

(i) Nitya Gopal Biswas : 2016 (344) ELT 209 (Tri.-Kol.),
(ii) Ratan Kumar Saha : 2012 (275) ELT 435 (Tri.Kol.),
(iii) Impiaz Ikbar Pohiwala : 2019 (365) ELT 167 (Bom.),
(iv) Gopal Prasad : 2018 (362) ELT 309 (Kol.) which has been affirmed by the Hon'ble Patna High Court as reported in 2020 (371) ELT 243 (Patna).

(v) Nand Kishore Somani : 2016 (333) ELT 448 (Tri-Kol), which has been affirmed by the Hon'ble Calcutta High Court as reported in 2016 (337) ELT 10 (Cal.).

(vi) M/s Hari Manthan Jewellery House Pvt. Ltd. vide Final Order No.75480-75484/2022 dated 17.08.2022.

4. On the other hand, the Id.A.R. appearing on behalf of the Revenue, supported the impugned order and submitted that initially when the gold was recovered from the possession of Appellant Nos.(1) to (4), they have stated that they acquired the possession of gold from Shri Patil and later on, at the time of pre-trial disposal notice, they have changed their version to cover illicit possession of gold. He also submitted that the Appellant No.(5) has procured the invoices from Appellant No.(6) to make legalized the transactions and the possession of the seized gold is afterthought. Therefore, the said documents cannot be relied upon. To support his contention, he relied upon the decision of the Hon'ble Patna High Court in the case of Md.Akhtar Vs. Commissioner of Central Excise, Customs & Service Tax, Patna

Vs. 2015 (323) ELT 136 (Pat.), which was upheld by the Hon'ble Apex Court as reported in 2015 (323) ELT A-27 (SC). He also relied on the decision the Tribunal in the case of R.K.Angangbi Singh Vs. Commissioner of Customs (Prev.), Shillong reported in 2018 (361) ELT 1062 (Tri.-Kolkata). He also relied on the decision of the Hon'ble High Court Kerala in the case of Commissioner of Customs, Cochin Vs. Om Prakash Khatri reported in 2019 (366) ELT 402 (Ker.) He also submitted that the Appellant Nos. (1) to (4) were failed to discharge their onus in terms of Section 123 of the Customs Act, 1962. He, therefore prayed that the impugned order is to be upheld.

5. Heard the parties in detail and considered the records placed before us.

6. We find in this case, initially at the time of investigation on 19.05.2015, 6 kgs. of gold bars were recovered from the possession of Appellant Nos.(1) to (4), who stated that they acquired the possession of gold from Shri Sashikant Patil. Although, the premises of Shri Sashikant Patil was visited on the same day, but Shri Sashikant Patil was not available. No summons were issued to Shri Sashikant Patil to join investigation at that time. Further, we find that at the time of pre-trial notice for disposal of the seized gold, the Appellant Nos.(1) to (4) claimed that the impugned gold pertains to Appellant No.(5) and the Appellant No.(5) also joined the investigation. The investigating team also investigated the Appellant No.(5) to find out whether the Appellant No.(5) is the true owner of the seized gold or not and continued to investigate the matter. The Appellant No.(5) has produced the invoices of seized gold

purchased from Appellant No.(6) and the Appellant No.(6) also joined investigation, who produced all the records for verification of the impugned transactions with regard to possession of the seized gold of Appellant No.(5). The said documents have not been rejected by the adjudicating authority or the investigating team during investigation itself and did not discard the same. It is further found out that source of procurement of the impugned gold by licit means by the Appellant No.(6). As the Appellant No.(5), who claims to be the owner of the seized gold, has discharged his burden under Section 123 of the Customs Act, 1962 by producing purchase invoices and the Appellant No. (6) has supported the same. In that circumstances, we are of the view that the Appellant No.(5) has discharged his onus in terms of Section 123 of the Customs Act, 1962 in the light of the decision of the Tribunal in the case of Nitya Gopal Biswas (cited supra), wherein this Tribunal has observed as under :

"6.It is observed from the case records that Smt. Chhabi Biswas and Shri Joy Gopal Biswas were intercepted on 5-9-2000, moving in a Tata Sumo vehicle near Doltala with 60 foreign marked gold biscuits in their possessions. None of those two persons could furnish any document regarding licit possession of the gold biscuits at the time of interception and the said gold biscuits were seized on the ground that they were smuggled when read with Section 123 of the Customs Act, 1962. Both Smt. Chhabi Biswas & Shri Joy Gopal Biswas also stated that these gold biscuits are believed to have come from Bangladesh. Shri Joy Gopal Biswas in his first statement also stated that these foreign marked gold biscuits were obtained from one Joynal for the fourth time. By another statement dated 22-9-2000 of Shri Joy Gopal Biswas, recorded by the investigation in Judicial custody, it was stated that these 60 gold biscuits were

handed over to him by his younger brother Shri Nitya Gopal Biswas. Shri Nitya Gopal Biswas also lodged his claim and produced a purchase Bill No. 422, dated 29-8-2000 from one Shri Laljibhai K. Soni, a gold dealer of Ahmedabad. Investigation accepted the statement and followed the Ahmedabad trail by carrying out the investigation at Ahmedabad in detail to refute the claim of Shri Nitya Gopal Biswas. Department never took any initiation to carry out any investigation to trace out whereabouts of Joynal named by Shri Joy Gopal Biswas in his statement dated 5-9-2000 which Revenue is claiming it in their favour. The very fact that the present consignment was the fourth one received from Joynal by Shri Joy Gopal Biswas, investigation should have taken further details about the correct address, mobile number, etc. of Joynal to know as to how Shri Joy Gopal Biswas was contacting Joynal regularly. Simultaneously, following this trail could have easily established the true nature of origin of 60 foreign marked gold whether smuggled or otherwise. Having not done that the whole effort of the department was concentrated to deflate refute the authenticity of purchase bill No. 422, dated 29-8-2000 produced by claimant Shri Nitya Gopal Biswas.

6.1.....

6.2.....

6.3.....

6.4*Adjudicating authority in his finding is also giving a finding in the order-in-Original that there is no legal requirement to mention the details of gold bars in the register but in the same breath continues to say that it is a normal business requirement for proper accounting of stock register, which is astonishingly not done by Gold and Silver ornament merchants. It is observed that If there is no legal requirement to mention details of foreign marked gold bars in the stock register maintained by M/s. Laljibhai K. Soni*

then neither the seller nor buyer of such gold bars in the present transaction can be held responsible for not mentioning the details of gold markings in the bill. On this issue CESTAT, Mumbai in the case of S.K. Chains v. Commr. of Customs (Prev.), Mumbai [2000 (09) LCX 0202 = [2002 \(127\) E.L.T. 415](#) (Tri. - Mumbai)] made following observations in paras 4 to 7 of this order :-

Section "4. 123 of the Act is an exception to the normal rule of the burden being upon the prosecution to establish the guilt of the accused. Ordinarily every element that constitutes the offence has to be proved by the prosecution and this burden never shifts. But the burden shifts on the accused when Section 123 of the Act is invoked. After the initial burden of acquiring reasonable belief is discharged by the Customs, it is the offender who has to establish the lawful importation and acquisition of the gold. The appellants in this case have not questioned the existence of reasonable belief. They, however, consistently claimed that the gold was legally acquired.

Gold occupies a special position in the Indian psyche. Gold is the most liquid investment capable of being encashed at any time in any society or locality. Gold is routinely presented to temples and to relatives on ceremonial occasions. It is customary, even mandatory that a bride is given away with gold ornaments. The demand for gold in India is perennial. There was only one gold mine operating at Kolar near Mysore which would produce about 2 tons of gold every year. That has also stopped functioning. The gap between rising demand and scant supply was invariably filled by smuggling. Estimates vary but it is expected that during the 80s on an average 250 Tons of gold was smuggled into India every year. Any smuggling is bad for the economic health of the country as it would defeat the very purpose behind imposition of restriction on import. The case of gold is more acute. Unchecked smuggling of gold would threaten the very

stability of the country's currency. There was a time when the paper currency in the country was backed fully by the gold held by the Govt. Over the last century the basis and the support for the currency has shifted from Gold reserves to the country's assets. But every Central Bank still keeps a gold reserve called Monetary Reserve. Thus, gold in the hands of the Central Govt. would make the currency strong and conversely the gold in the hands of the public would weaken the currency. To wean away the Indian public from the craze of the gold and also to ensure stability of the currency the Gold (Control) Act, 1968 was enacted. In fact, the provisions had existed earlier in the Defence of India Rules also. Notifications were issued prohibiting entirely import of gold except by the Govt. Provisions such as Section 120 were incorporated in the Customs Act which continued the liability to confiscation of any gold illegally imported notwithstanding any change in its composition and identity. Provisions of Gold (Control) Act restricted the activity of refining of gold limiting it to the Govt. of India Mint. Making of gold of purity higher than 995 was also prohibited since the imported gold generally is of the purity of 999. This prohibition would make it easy to establish the imported character of the gold. The combined effect of all the acts and prohibitions was to prevent smuggling, to make disposal of the smuggled gold difficult and to make it difficult for smugglers to defend themselves. In those days seizure of gold with foreign marking and of purity of 999 would generally suffice to establish the smuggled nature of the gold. Certain exceptions were made in the early 80s to these rigours. Licences were given to the manufacturers of gold jewellery for import of gold for manufacture into jewellery for export. At a later date, the rigidity of administration of these exemptions was reduced substantially. The banks were permitted to import and sell gold. At a later date passengers of Indian origin arriving into India after a prescribed period of stay abroad were permitted to import 5 kgs. of gold. Gold can also be imported on Special Import Licences. No restrictions were

placed upon the disposal of gold so imported on payment of duty. According to official statistics the legal import of gold through these Schemes was of the following magnitude :

<i>• Year</i>	<i>• Import of Gold in Metric tones</i>			
<i>•</i>	<i>• OGL</i>	<i>• BAGGAGE</i>	<i>• SIL</i>	<i>•</i>
				<i>TOTAL</i>
<i>• 1996</i>	<i>• -</i>	<i>• 256</i>	<i>• 42</i>	<i>• 298</i>
<i>• 1997</i>	<i>• 62</i>	<i>• 398</i>	<i>• 68</i>	<i>• 548</i>
<i>• 1998</i>	<i>• 532</i>	<i>• 93</i>	<i>• 19</i>	<i>• 644</i>
<i>• 1999</i>	<i>• 513</i>	<i>• 39</i>	<i>• 18</i>	<i>• 570</i>
<i>• 2000</i>	<i>• 158</i>	<i>• 2</i>	<i>• 1</i>	<i>• 163</i>
<i>• (Up to</i>	<i>•</i>	<i>•</i>	<i>•</i>	<i>•</i>
<i>June)</i>				

6. As a result of such liberalisation there was ample availability of foreign marked gold in the market. In the absence of any serial numbers on the gold bars it became impossible to distinguish the gold imported legally and that imported illegally.

7. Thus, today there exists a very peculiar situation. On the one hand the Customs Act considers it necessary to ask a person to establish the legality of the origin of the gold seized from him while on the other hand in pursuance of the relaxations made in the Import Policy and the Baggage Rules framed under that very Act, there is a flood of foreign marked gold in the town. Such gold changes hands several times on importation. Since the repeal of the Gold (Control) Act in 1968, there is no legal requirement for the buyers and sellers of gold to maintain any registers nor is there any requirement to issue invoices under any Central Act.”

6.5*CESTAT, Kolkata in the case of Giridhari Dubey v. C.C. (P), Kolkata [2001 (11) LCX 0215) = [2002 \(149\) E.L.T. 427](#) (Tri. - Mumbai)] also made following observations in para 3(c) of this order :*

In “(c) view of our findings we would set aside the order of confiscation of 32 pcs. of gold also relying at the findings

of this Tribunal in the case of S.K. Chains reported in [2001 \(127\) E.L.T. 415](#) wherein in Para 10 of the reported decision the Tribunal has considered the effects of the liberalized policy as regards import and dealing in gold and thereafter concluded that that onus as placed under Section 123 was discharged in the facts of that case. We would also considering the onus under Section 123 has been discharged in the facts of this case by the appellants. If the Revenue wants that the gold dealers indulging in sale and purchase of foreign marked gold in India, should indicate the brand names and that discharge under Section 123 shall be only with respect to each brand then foreign marked gold should have been declared as one of the items under Chapter IVA of the Customs Act. We find that no such notification of placing foreign marked gold exists. Therefore the confiscation of the foreign marked gold for non satisfactory brandwise accounting as arrived at in the facts of this case was not called for.”

6.6*In view of the above observations and the settled proposition of law claimant appellant has discharged the onus of licit acquisition of foreign marked gold biscuits by producing a bill. It is also observed from the first statement dated 5-9-2000 of Smt. Chhabi Biswas and Shri Joy Gopal Biswas that it was only their belief that said gold biscuits were from Bangladesh. It is also not coming out of the investigation as to how both of them believed that gold in their possession was of Bangladesh origin. As already observed trace leading to Joynal, mentioned by Shri Joy Gopal Biswas in his very first statement dated 5-9-2000, was not followed by investigation to establish that seized foreign marked gold biscuits were in fact smuggled into India. Reasonable doubt of smuggled nature of foreign marked gold may be sufficient for the purpose of seizure of gold, by virtue of Section 123 of the Customs Act, 1962, but the same is not sufficient for confiscation under Section 125 of the Customs Act, 1962 when appellant has produced legal document of their licit acquisition. Accordingly, it is*

held that department is not able to establish the smuggled nature of seized foreign marked gold whereas claimant appellant has been able to discharge his burden by providing licit document of the purchase of 60 foreign marked gold biscuits. In the light of liberalized policy of the Central Government it cannot be held that all the foreign marked gold being bought and sold in India is of smuggled nature. Retraction of the earlier statement of Shri Joy Gopal Biswas by a second statement, recorded by investigation in judicial custody, has to be seen in the light of Supreme Court case law of Vinod Solanki v. U.O.I. [[2009 \(233\) E.L.T. 157](#) (S.C.)]. Hon'ble Apex Court made following observations on the issue where retraction can be accepted.

A "34.person accused of commission of an offence is not expected to prove to the hilt that confession had been obtained from him by any inducement, threat or promise by a person in authority. The burden is on the prosecution to show that the confession is voluntary in nature and not obtained as an outcome of threat, etc. if the same is to be relied upon solely for the purpose of securing a conviction. With a view to arrive at a finding as regards the voluntary nature of statement or otherwise of a confession which has since been retracted, the Court must bear in mind the attending circumstances which would include the time of retraction, the nature thereof, the manner in which such retraction has been made and other relevant factors. Law does not say that the accused has to prove that retraction of confession

made by him was because of threat, coercion, etc. but the requirement is that it may appear to the court as such."

In the present case the statements of both Smt. Chhabi Biswas and Shri Joy Gopal Biswas were written by one of the panch witnesses Shri Chandan Dey. Even their first statements dated 5-9-2000 only convey that they believed that foreign marked gold came from Bangladesh. The trail

of Joynal was not pursued by investigation. It was not existing in the statements of Smt. Chhabi Biswas & Shri Joy Gopal Biswas as to how the seized gold was brought into India and by whom. In the above factual matrix, subsequent statement of Shri Joy Gopal Biswas dated 22-9-2000 recorded in Judicial Custody was more detailed, authentic and the trail given by Shri Joy Gopal Biswas and Shri Nitya Gopal Biswas was followed by investigation. Shri Laljibhai K. Soni confirmed to have sold the said 60 gold biscuits to the claimant appellant. In view of the above observations made, the findings arrived at by the Adjudicating authority, can only raise strong suspicion about the smuggled nature of seized gold but suspicion howsoever grave cannot take the place of evidence when appellant has discharged his onus. It is accordingly held that statements recorded on 5-9-2000 were not reflecting the correct facts of the case. Accordingly, issue framed at para 5(i) above is decided in favour of the claimant appellant and against the Revenue.”

6.1 Further, in the case of Ratan Kumar Saha (supra), this Tribunal again held that there was a transaction between buyer and seller of the gold, which was claimed and accepted. Therefore, the burden under Section 123 of the Customs Act, 1962, have been discharged.

6.2 Further, in the case of Imtiaz Iqbal Pothiawala (supra), the Hon’ble Bombay High Court has observed as under :

“(ix) The impugned order dated 3rd June, 2005 has held that the respondent No. 1 has discharged the burden of proof under Section 123 of the Act. This as the respondent No. 1 had explained the source of his purchase namely from [M/s. Paras

Bullion and M/s. Pavan Jewellers]. In fact, the person running two firms viz; - Mr. Bhupendra Thakkar has himself admitted in his statements to the Office of DRI that the seized gold has been sold by him to respondent No. 1. In fact, on 9th March, 2000, employee of Mr. Bhupendra Thakkar i.e. Mr. Devang Patel, in his statements had shown copies of the invoices to the Officers of DRI, evidencing sale of gold by [M/s. Paras Bullion and M/s. Pavan Jewellers] to respondent No. 1. Besides, the bills showing the acquisition of gold from [M/s. Paras Bullion and M/s. Pavan Jewellers] were also produced with the bail application on 10th March, 2000 filed by respondent No. 1;”

Thereafter, the Hon’ble High Court has held that the burden under Section 123 of the Customs Act, 1962, has been discharged.

6.3 Further in the case of Gopal Prasad, the Tribunal has found that the documents produced for procurement of impugned gold were not found to be false and seller of the gold confirmed the sale, the burden under Section 123 of the Customs Act, 1962, has been discharged.

6.4 In the case of Nand Kishore Sumani (supra), the Tribunal held that when the purchase bills were furnished and the same was confirmed by the seller, the burden under Section 123 of the Customs Act, 1962, has been discharged.

6.5 Further we find that this Tribunal in the case of Hari Manthan Jewellery House Private Limited (supra), has held that when the purchase bills were produced, which were confirmed by the seller of the gold, the burden under Section 123 of the

Customs Act, 1962, has been discharged and the gold is not liable to be confiscated.

7. We further take note of the fact that the Id.A.R. for the Revenue has relied upon the decision in the case of Md.Akhtar (supra), the facts of the said case are distinguishable. In the said case, the seller of the gold was found to be bogus on enquiry. Therefore, it was held that the onus was not discharged in terms of Section 123 of the Customs Act, 1962, which is not in the case in hand.

8. Further, in the case of R.K. Angangbi Singh (supra), it was the investigation report that the purchase invoices and transit challans submitted at the time of seizure, are not conformity. It was also found that no sale was actually effected by the dealer whose invoices were produced, but concerned persons of the dealer has given duplicate invoices. In that circumstances, it was held by the Tribunal that the burden is not discharged, which is not the case in hand.

9. We also take note of the fact that in the case of Om Prakash Khatri (supra), the issue before the Hon'ble High Court of Kerala, was that whether the onus of legitimate possession of gold lies on the Revenue under Section 123 of the Customs Act, 1962, wherein the Hon'ble High Court has held that the onus is on the person whose possession of the gold has been recovered, but in this case, the person from whom, the gold has been recovered and claimed to be owner of the seized gold and has produced the purchase invoice, which has been confirmed by the

seller of the said gold. Therefore, the onus under Section 123 of the Customs Act, 1962, has been discharged.

10. In view of the above discussions and findings, we hold that the Appellant No.(5) has discharged the onus under Section 123 of the Customs Act, 1962. Therefore, the seized gold is not liable for confiscation. Consequently, no penalties are imposable on all the appellants.

11. In view of the above observation, we set aside the impugned order and allow the appeals with consequential relief, if any.

(Pronounced in the open court on.....29.08.2023....)

Sd/-
(Ashok Jindal)
Member (Judicial)

mm

PER:RAJEEV TANDON

12. The primary question in the present appeals at its very root concerns the evaluation of evidence tendered by the appellants towards discharge of their obligation and onus cast upon them under Section 123 of the Customs Act¹, 1962, in respect of the seized/confiscated foreign marked gold; ownership of which has been rather at a much belated stage, claimed by the appellant No. 5- Rinku Verma, of Allahabad.

13. The Hon'ble brother Member (Judicial) in view of the invoices tendered by appellant No. 5 (Rinku Verma) towards his claim of the said seized/confiscated gold showing its purchase from appellant No. 6 –Pradeep Kumar Bothra, who also has at a rather quite belated stage joined the investigations and submitted to the authorities the purported records of sale/purchase/payments etc. towards the seized gold for perusal and necessary action by the authorities and based on the decisions in the following cases :-

1. Nitya Gopal Biswas vs. Commissioner of Customs (Prev.)Kolkata²
2. Ratan Kumar Saha vs. Commissioner of Customs, Patna³

1. The Act

2. [2016 (344) ELT 209 (Tri.-Kol.)]

3. [2021 (375) ELT 435 (Tri.-Kol.)]

3. Union of India vs. Imtiaz Iqbal Pothiawala⁴
4. Gopal Prasad vs. C.C.E., Customs & S.T., Patna⁵
5. Nand Kishore Sumani vs. Commr. Of Cus., C.Ex& S.T., Siliguri⁶

has held satisfactory discharge of the onus in law cast upon the appellants.

14. The Hon'ble Member (Judicial) has therefore arrived at a finding that the said seized and confiscated gold is not liable to confiscation. As a consequence he has set aside the impugned order and allowed the appeals with consequential relief.

15. With reference to the aforesaid order of the learned Hon'ble Member (Judicial) in paragraph 11 above, and in respectful disagreement therewith, I am of the view that before arriving at the said conclusion, a far deeper quest, analysis and examination of the various documents tendered by the appellants towards discharge of the onus cast upon them has to be gone into and therefore record my separate order. Further, the timing of surfacing of the said documents, their production and submission to the authorities and all attendant circumstances vis-à-vis the initial statements tendered by the various noticees before the authorities under Section 108 of the Customs Act and their subsequent change of stance (after

4. [2019 (365) ELT 167 Bom.]

5. [2018 (362) ELT (309) (Tri.-Kol.)]

6. [2016 (333) ELT 448 (Tri.-Kol.)]

an inordinately large interval of time) in certain cases, the timing of joining of investigations by key accused-claimant of the foreign marked gold and the purported seller all need to be considered closely in a holistic and comprehensive manner, interlinking these stray bits of evidence in the spatiotemporal context and the timelines of the case.

FACTUAL RECAP

16. For a quick factual recap, suffice to state that on 19.05.2015, the four appellants 1-4, namely Rajendra Kumar Dhuria, Saurabh, Golu Verma and Shubham Verma were nabbed by the authorities at Howrah railway station with 6 pieces of 1 kg. gold bar each. The said gold was foreign marked of Swiss origin and 995.0 purity. The inscription on the gold bars being "PMAPSUISSE PMAP ESSAYEUR FONDEUR" While Rajendra Kumar Dhuria and Shubham Verma were found to be in possession of two such gold bars of foreign origin of 1 kg. each, one piece of such foreign marked 1 kg. gold bar was recovered from the possession of each of Golu Verma and Saurabh. The total seized gold was thus 6 kgs. Their interdiction, with the foreign marked gold in their possession, by the authorities is stated to be in pursuance of a specific information available with the authorities, with the accused being pointed out to the authorities by the informant, leading to the recovery of the said 6 kg. of foreign marked gold. The accused, in their initial statement recorded at the time of seizure of gold on 19.05.2015 (all 4 of them) have tendered an almost identical version about the said possession and recovery of foreign marked gold. Thus in the initial

statements only, all four of the accused appellants 1-4, namely Golu Verma, Saurabh, Shubham Verma, Rajendra Kumar Dhuriya, have divulged the name of one Rinku Verma of Allahabad for whom they acted as carriers, with all of them admitting to have worked for Rinku Verma multiple times in the past. Of these Rajendra Kumar having acted as a carrier for Rinku Verma for the maximum length of time i.e. upto 20-25 times in the past, from Kolkata. The four accused intimated that they had collected the said gold bars from one Shashi Kant Patil @ Banti at Dhanlakshmi Bullion Pvt. Ltd., Sonapati, Kolkata on 18.05.2015 and were returning to Allahabad to hand over the said gold to Rinku Verma. All of them hough have intimated to have worked as carriers in the past as well for Rinku Verma, ranging from 6 months to about 4 years. There is thus complete unanimity in material particulars as well as in substance in the information furnished in the initial statement of all the four accused as recorded before the authorities as regards the source of procurement of gold, the person for whom they acted as carriers, the amount paid to each of them per trip per kg. of gold and this material piece of evidence is of immense significant importance having a direct bearing to the facto legal matrix of the case. As, these aspects having a direct bearing in the matter, they cannot be overlooked and would be required to be considered and examined appropriately.

TIME CHART

17. Before proceeding further with the analysis of evidence it would be appropriate and important to draw out the time lines concerned in the case. These are:

Date	Action
19.05.2015	Interception of 4 accused appellant at Howrah railway station and on the spot admission of possession of foreign origin gold, by each of the accused. Accused moved over to Customs House and recovery of 6 pieces of foreign marked gold from their possession. Statement of 4 accused appellants recorded under Section 108 of Customs Act wherein admitting that they worked as a carrier of foreign marked gold for Rinku Verma for which they were paid Rs. 1500 each. Further admitting that the said gold was procured from Shashi Kant Patil of Dhanlakshmi Bullion Pvt. Ltd Kolkata. (note the perfect unison in the statements of the 4 accused as to the source of procurement of gold the name of the owner for whom they worked as carriers). The accused also indicate the amounts of cash they carried to the shop of Shashi Kant Patil of Dhanlakshmi Bullion Pvt. Ltd. – admission of Ashish Patil cousin of Shashi Kant Patil that they deal in sale and purchase of foreign marked gold. Shashi Kant Patil was at the shop between 1230 p.m. to 5.30 p.m.
20.05.2015	All the 4 accused arrested, to be later released on bail only on 3 July 2015 and 7th July 2015 (after nearly 45 days of arrest)
23.06.2015 & 09.7.2015	Shashi Kant Patil fails to appear each time against the summons issued to him.
28.07.2015	Statements of 4 appellants Rajendra Kumar Dhuria, Saurabh, Golu

	Verma and Shubham Verma rerecorded after release from captivity. They reiterate their earlier version and confirm the original statement of 19.05.2015 and admit of carrying gold for Rinku Verma, having made payments in cash given by Rinku Verma to Shashi Kant Patil towards the said seized gold from Shashi Kant Patil (note thee arlier statements stand re-confirmed and there is not an iota of change in the admissions made even after over two months of the date of seizure and arrest of the 4 accused).
14.08.2015	Shashi Kant Patil fails to honour the summons issued for the third time
23.09.2015	Rinku Verma, who later claims ownership of the said seized gold fails to appear before the authorities despite service of summons each time and over 4 months of the seizure of the gold to which he claims ownership.
12.10.2015	The four carriers in response to a communication issued under Section 150 of Customs Act for pretrial disposal of gold under Section 110((1A) of the Customs Act, submits that the same be returned to Rinku Verma. Rinku Verma for the first time claims the seized gold vide his letter dated (not on records and not known).(It is for the first time that Rinku Verma has claimed ownership of the seized confiscated 6 kg. of gold, valued at Rs. 1,68,54,000/-, after nearly 5 months of the seizure. It is therefore of interest to note that claiming ownership of such high valued property (6 kg. of gold),is for the first time emanating from Rinku Verma after nearly 150 days of deprivation and seizure. Except for a mere bland submission of claim for ownership no other documentary evidence in support of ownership and licit acquisition of foreign marked gold has been tendered by the claimant, despite significant lapse of time. It further be noted, that there is only a mention of this letter and the same is nowhere on record

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	in the appeal papers. In the absence, thus the first date of staking claim to seized gold shifts to a communication dated 12.10.15, i.e. five months post seizure.
16.10.2015	Shashi Kant Patil, the person from whom each of the 4 carriers alleged procurement of gold, in their first statement and reconfirmed in their second statement spread over approx.2 months, appears before the authorities for the first time after nearly 4 months of the date of seizure, dis-regarding repeated earlier summons (total three) issued to him on/for 23 June 2015, 9 July 2015 and 14 August 2015.
26.10.2015	Rinku Verma, the subsequent claimant of this confiscated gold appears before the authority for the first time, post seizure, (well over 5 months of the seizure/confiscation) and submits 4 invoices towards purchase of gold from Snehal Gems Pvt. Ltd., tenders a statement without any explanation of repeated disregard of summons and his non-appearance before the authorities all this while.
14.12.2015	Summons issued to Director/Partner/Proprietor of Snehal Gems-not honoured
08.01.2016	Pradeep Kumar Bothra, Director of Snehal Gems Pvt. Ltd, appears before the authorities for the first time, violating earlier summons issued to him for 30.10.2015 and 30.11.2015. While admitting that he has sold the 6 kg. gold to Rinku Verma against the 4 bills tendered by him, he, however, [could not confirm the description, inscription and origin of the gold purchased by him and allegedly sold to Rinku Verma. He further could not confirm that the goods sold by him was the same gold that was seized and could not answer for the Sl. No. of the gold printed on the gold bars being tampered. He further could not confirm the relevant payments towards the sale of the said gold set to be received by him.]
15.2.2016 &16.02.2016	The 4 carriers namely Rajendra Kumar Dhuria, Saurabh, Golu Verma and Shubham Verma vide their letter dated 15/2 & 16/2/2016 state that their earlier statements tendered on 19.05.2015 and 28.07.2015

	were incorrect. They also claim lack of knowledge about Pradeep Kumar Bothra or Snehal Gems Pvt. Ltd. They denied having knowledge of the source of the seized gold (note the contrary stand taken by the 4 carriers for the first time vis-à-vis their earlier statements tendered). It is also to be noted that there is near unanimity again this time around in the statements of each of the 4 accused. The letter submitted in this regard is suggestive of the contents thereof rendered upon advice and tutorship. Also there is no explanation/reason whatsoever, for the grossly delayed change in version/retraction. And an imperfect retraction made after nearly 9 months of seizure.
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18. From the aforesaid chronology and the flow of events in the matter, it is amply clear that the course of action and conduct of all accused has thereafter proceeded, post seizure, in a manner so as to cover up for the time required for assemblance of documents evidencing legal possession of the foreign marked gold. **The conduct of Rinku Verma as also others in repeatedly dishonouring summons and the deafening silence maintained all through for initial five months of the investigations, was merely to buy time, inhibit expeditious conduct of enquiry and in the interregnum enable them shop for a procurement source of documentation in order to justify their legal possession of seized gold.** *It is fairly well unexplained and a complete silence is maintained over the fact that goods valued at over Rs. One and a half crore are not claimed any ownership, at all by the so called alleged owner of the foreign marked gold for several months, nor is there a word in the matter from him till he learns of the department's intention to dispose off the gold several months after the impugned seizure. The gross delay for such unexplained length of time is*

not only perplexing and intriguing but is a clear pointer and also suggestive and indicative of attempting at manouvering and creating a room in time and space, sourcing for alleged manipulation and cover up for the legal possession of gold. It may be noted that both Rinku Verma and Shashi Kant Patil did not honour any of the summons during the intervening period, repeatedly issued to them, and it was only at the stage of pre-trial disposal of the gold initiated by the Department after nearly five months of the seizure, that Rinku Verma introduces himself to the Department for the first time by way of a letter objecting to the said disposal of gold under Section 110(1A) of the act *ibid.* In fact the repeated issue of summons not being honoured by the key conspirators, for the initial four-five months of enquiry, certainly tantamounts to non-co-operation, from which adverse inference can safely be drawn. As discussed, in subsequent paras this non-co-operation is with a certain objective creating space to buy time in the intervening period to manipulate the documentation process to provide a safe cover up operation to their misdeeds.

STATEMENTS CONFIRMATION& CHANGE OF STANCE

19. As for accused appellant 1-4, namely Rajendra Kumar Dhuria, Saurabh, Golu Verma and Shubham Verma, they have not only stated once, but also for a second time confirmed their initial statement regarding the acquisition of the said foreign marked gold, procured from Shashi Kant Patil for and on behalf to be delivered to Rinku Verma. They did not allege even a whisper, before the Magistrate or any other authority, about being subjected to any duress, coercion, threat, intimidation etc.

by the authorities or any such action as could cast a shadow of doubt on the spontaneity and veracity, bonafides and truthfulness of their statements. The said fact is also recorded in the order of the Magistrate. This undisputedly upholds and sanctifies the voluntary nature of the statement recorded by the authorities at the time of seizure of 6 kgs of foreign marked gold and its reiteration at a later date. The initial statement dated 19.05.2015 and its reconfirmation statement, were however given a twist, stating that the initial statements were wrong. All this came to be done well beyond a reasonable length of time after nearly nine months and without any plausible explanation for the same. The said change in instance are therefore clearly discountable as being tutored, managed, involuntary and an afterthought and therefore hold no evidentiary value. Also it is established law that statement tendered before a Customs Officer is in the nature of substantive evidence and culpability of the accused can even be based solely thereupon. The contradiction in the testimonies of Shashi Kant Patil and Rinku Verma is self evident. Thus when quizzed for telephonic calls between him and Rinku Verma, as obtained from CDR, Shashi Kant Patil expresses his complete ignorance and ascribes it to be one of the many telephone calls that he gets from people/customers enquiring about the gold rate. On the contrary Rinku Verma in his statement tendered before the authorities has maintained that he holds business dealings with Shashi Kant Patil amongst others. Specifically stated, Rinku Verma admits in his statement dated 26/10/2015 that he had been doing business for last one year with Shashi Kant Patil of Dhanlaxmi Bullion Pvt. Ltd.

20. The irony of contradiction is further aggravated by the fact that while Rinku Verma alleges that he had sent the four carriers appellant 1-4 viz. Golu Verma, Saurabh, Shubham Verma, Rajendra Kumar Dhuriya, to exchange foreign marked gold in lieu of jewellery and claims to have business relations with Shashi Kant Patil, the latter however refuses to even recognize his carriers, least of all know them. This is despite the fact that, some of those carriers have been working for Rinku Verma for several years and all of them have made multiple visits to Kolkata in the past. The fact that Shashi Kant Patil, lied on this aspect and refused to identify the four accused, before the authorities is evident, as it was on the basis of details furnished by the four carriers that the business premises of Shashi Kant Patil were identified. The testimony of Shashi Kant Patil's brother further, who was at the shop at the time of visit by the officers, confirms that he was present at the shop on the day of the seizure. The testimony of Rinku Verma, specifically brings out the name of Shashi Kant Patil, as regards business dealings and not that of the latter's father or brother who were also associated with the business of Dhanlaxmi Bullions in various capacities.

21. It is of interest to note that the admission made in the first statement by the four accused in their voluntary statement tendered on 19.05.2015, did not change a wee bit even more than two months after the date of seizure, the appellants 4 accused namely 1-4, viz. Rajendra Kumar Dhulia, Saurabh, Shubham Verma and Golu Verma, having spent considerable time in judicial custody. In fact the voluntary statement recorded on 28.07.2015 of the four accused aforesaid, reaffirms that they

worked as carriers of gold for Rinku Verma appellant herein, and used to procure the gold for Rinku Verma from Shashi Kant Patil. The reiteration of this statement tendered well after their release from judicial custody of nearly two months which certainly would have had its own psychological, moral, physical and financial toll on the four accused therefore displays a sense of conviction, a sense of truthfulness, a sense of honesty and above all a sense of the actual happening. The original statement duly reinforced can therefore not be washed off or its impact lessened in any degree of reliance, by a plain and significantly delayed improper retraction tendered perhaps on the basis of legal advice received and may be a certain kind of pressure/inducement put forth by Rinku Verma on the four of the said accused appellants.

22. It is further of interest to note that as the four accused – appellants 1-4, viz. Rajendra Kumar Dhulia, Saurabh, Shubham Verma and Golu Verma, were mere gold carriers, they obviously did not have any locus to object to the pretrial disposal and seek the return of the seized gold to Rinku Verma and what is noteworthy herein that such correspondence is taking place nearly five months after the seizure of 6 kg of foreign marked gold, valued at Rs. 1.68 crore, the person claiming to be the owner of the said gold is still invisible having not surfaced in person nor having appeared before the authorities to tender his statement, or in any which way except for the utterance by the four accused appellants 1-4, viz. Rajendra Kumar Verma, Saurabh, Shubham Verma Golu Verma.

CHANGE IN STANCE

23. It also baffles imagination to ascertain, as to how it is that the 4 appellants no. 1-4 viz. Golu Verma, Saurabh, Shubhram Verma, Rajendra Kumar Dhuriya, who nine months later have denied knowledge about Shrikant Patil could in the first place, tender exact details of the business premises of the latter and wherefrom they had admitted to have procured the gold and could lead the investigators to his premises as a follow up on 19.05.2016. They even informed the authorities of his alias as "Bunti." This establishes the falsehood and concocted, fabricated and tutored version of the statements of the 4 accused, as revised later. While stating in the statement of- 15.02.16/16.02.16 that they had been given the gold by Rinku Verma for its exchange for jewellery from Sonapatty, it need to be noted here, that the specifics of shop name/dealer, design of jewellery, nature of jewellery whether bangles or necklace or rings etc. are missing unlike the initial two statements (later touted as not proper or voluntary) wherein all the 4 accused appellants No. 1-4, had tendered precise information about the acquisition of gold from Shashi Kant Patil.

BURDEN OF PROOF

24. Section 123 of the Customs Act is an onerous piece of legislation and is an exception to the normal principle. Viewed in this backdrop its rigors and enforcement are all also very strict. In the said circumstance, the burden of proof after initial vesting of reason to believe the smuggled nature of seized goods, is not upon the authorities, but shifts onto the person claiming ownership of the said goods. Section 123 of the Customs Act for ready reference is reproduced here under:

"SECTION 123. — Burden of proof in certain cases. [(1)

Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be -

(a) in a case where such seizure is made from the possession of any person, -

(i) on the person from whose possession the goods were seized; and

(ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other person;

(b) in any other case, on the person, if any, who claims to be the owner of the goods so seized.]

(2) This section shall apply to gold, [and manufactures thereof,] watches, and any other class of goods which the Central Government may by notification in the Official Gazette specify".

25. This rule being in the nature of an exception as carved in law, goes without saying as to be thus construed with the rigors it deserves and any proof tendered thereto has to be evaluated in terms of all the elements and connected, co-ordinated and co-related with stray pieces of evidence as mentioned in earlier paragraphs. After the initial burden of acquisition of reasonable belief has been discharged by the prosecution, it is for the accused to establish lawful importation and acquisition of the foreign marked gold, recovered from their possession or the claimant thereof.

DOCUMENT ANALYSIS

26. Further, it be noted that the purchase of said 6 kg. of seized/confiscated gold, as imputed by Rinku Verma, made against 4 bills dated 02.05.2015 for 1 kg., dated 05.05.2015 for 2 kg., 09.05.2015 for 2kg and dated 12.05.2015 for 1 kg are devoid of several vital and materials particulars. While it may not be mandatory, it is certainly observable that the said bills, if were at all point of time available with the noticee (particularly Rinku Verma or the four carriers), what prevented them from being presented before the authorities and in modern days of strengthened channels of faster mode of communication and technology, for a moment if it is presumed that the said bills were not available with the carriers, at the point of interception at Howrah railway station, the same could be presented by way of a facsimile transmission, Email, whatsapp copy or any other form of digitalized transmission, and produced before the authorities in support of the bonafide purchase, as well as to demonstrate the innocence of the accused. Moreover, the fact that this being a case of no small seizure, the collective value of seized gold is close to Rs. 1.7 crore. Although the fact that Rinku Verma has consciously abstained himself from appearing before the authorities has come out too well from the investigations, it cannot be lost sight of and need be noted particularly that all the while for nearly five months and for unexplained and muted reasons, the out of scene picture and the silence is clearly demonstrative of the fact that Rinku Verma was not in possession of any document evidencing licit procurement of the seized gold. It further evidences and establishes that the process of

manipulating and managing a scandal and sourcing of invoices/papers artificially and attempts at procurement of fictitious and fabricated sale/purchase vouchers was actually going on behind the scenes.

27. It is interesting to note the extent of care and caution devoted in preparing the documents as a cover up for seized gold. Rinku Verma has gone to great lengths in doing so. Thus, it be noted that while the seized gold is 6 kg (6 pieces of 1kg bar each), the same was recovered from 4 persons viz.

<u>From Quantity(in Kgs. as well as</u>	<u>number of bars)</u>
1. Sourabh	- 1(One)
2. Golu Verma	- 1 (One)
3. Rajendra Kumar Dhuriya	- 2 (Two)
4. Shabham Verma	- 2 (Two)

and what is the number of purported invoices furnished and quantity as per the said invoices. The following table indicates the same, viz.

<u>Invoice No. & Date</u>	<u>Quantity (in kgs. as well as number of bars.)</u>
1. GOLD/MAY/1/2015-16 – 02.05.16	- 1 (One)
2. GOLD/MAY/2/2015-16 – 05.05.16	- 2 (Two)
3. GOLD/MAY/3/2015-16 - 09.05.16	- 2 (Two)
4. GOLD/MAY/4/2015-16 - 12.05.16	- 1 (One)

Thus is it sheer coincidence or it has been so planned based on the wisdom of Rinku Verma and advice as he may have received from various corners that the purported invoicing is done in a manner as could camouflage the recovery made. The sequencing of the invoices as No. 1, 2, 3 and 4 between 2.5.16

and 12.5.16, establishes that there were no sales of gold in between to any other customer and designed so as to conveniently fit the four entries in the ledger records in the end.

28. It certainly cannot be the case that Snehal Gems Pvt. Ltd. have not made sale of gold to other customers during a 10 day period between May 2 and May 12. Thus it was all so managed to sort of sanitize the books of accounts of Snehal Gems so as to forsee minimalistic enquiries into the matter. The fact that no evidence of any previous sale of gold by Snehal Gems to Rinku Verma is tendered by either of the two sides, as to buttress their proposition of regular trade and business relations between the two is a pointer towards a massive cover up hatched by Rinku Verma in collusion with Snehal Gems towards attempted legitimizing of the gold seized. This one time documentation is an exercise in securing legitimacy and overcome the onus as cast upon Rinku Verma – the claimant of the seized/confiscated gold. Also it is interesting to note that prior to the purported sale and even thereafter, there has been no other sale to Rinku Verma at least till the completion of enquiries spread nearly over a one year period. The imputed sales over a ten day period carrying sequential invoice numbers leave nothing to imagination towards a concocted sale documentation and completely give up the edifice surreptitiously built upon.

29. Also it is a facton record, that Snehal Gems Pvt. Ltd., Mumbai, the alleged seller of the 6 kg. of gold to Rinku Verma, did not honour the summons issued to him on more than one occasion. He only chose to appear before the authorities when both he and Rinku Verma were obviously convinced that book

keeping and manipulation/preparation of bills and vouchers has been duly acknowledged and completed in their records and at all other places as may be put to questioning by the authorities. Such despicable conduct to not join the investigations on part of both Rinku Verma and Pradeep Bothra can, and is certainly not mere coincidence, but a well thought out, mischievously planned and carefully crafted strategy as all along for nearly 4-5 months post seizure Rinku Verma was not in possession of alleged documents for licit importation of gold and was working on soliciting of a licit cover for the seized foreign marked gold by procuring backdated and fabricated invoices. The fact that Pradeep Kumar Bothra, Director Snehal Gems Pvt. Ltd. could not confirm either the description or the inscription and origin of the gold purchased by him and sold to Rinku Verma establishes the fact of fabrication of the documents. There is not even a faint attempt by Pradeep Bothra, even in due course, to present before/to the authorities, so that he could convey to the authorities the inscription and description of the gold of foreign origin post rendering of his statement to the authorities. Most obvious is the fact that Pradeep Bothra could not confirm to the authorities that the gold sold by him to Rinku Verma was the very same gold seized by the authorities. Both Pradeep Bothra and Rinku Verma failed to explain anything about the said tampering and scrapping off the numbers printed on the gold bars. Further, like the cooked up evidence analysed in previous paras another aspect of intrigue and interest is to note that even as regards payment to have been made over by Rinku Verma to Pradeep Bothra, the latter could not confirm whether he had received complete or full and

final payment towards the alleged purported sale of the said gold. Above all, most important is the categorical admission by Pradeep Bothra, Director of Snehal Gems that he was not in possession of any import documentation in support of licit import of the foreign marked gold. This singular admission of Pradeep Bothra is the proverbial nail in the coffin to conclusively establish that there was no licit import of the seized/confiscated gold at all in the first place and all their efforts at preparation of fictitious sales deal and documentation were no more than mere ivory towers. It establishes the ill machinations and designs to cover up for the purported seizure of 6 kgs of foreign marked gold and attempts to legitimize it. The conspiracy theory hatched by Rinku Verma in cahoots with Pradeep Bothra simply falls apart and is fully exposed as a determined but a failed attempt at legitimization and a cover up for the seized/confiscated 6 kg of foreign marked gold.

30. Moreover, it defies all pragmatism and is bereft of any sound logic, rather it cannot get more insane than this that one supposedly is in possession of all required licit documentation to establish legal ownership and acquisition but still feels it appropriate to allow their persons/employees to not only go to jail but stay put there for over a month and a half, do not respond to repeated summons issued in order to ascertain truth and present the purported documents for nearly six months, fails to present themselves before the authorities for no specific reason. Further, more so when the stakes involved are so very high that admittedly it derails the business of Rinku Verma for the next six months, virtually bringing it to a closure/standstill-

under such circumstances it cannot be anybody's case to needlessly hold on for such inordinate length of time. In fact, were it to be so, one would have presented oneself suo motto, at the first instance to get not only the seized gold released, but also enable the release of the arrested personnel, for no apparent fault and without any further loss of time.

31. All these issues are extremely pertinent and establish the illicit credentials of seized gold and clearly indicate the concocted and whacky theory hatched in a loony manner, bringing to fore the mens rea presented by the accused, to cover up for the foreign marked gold, when the value of such seized gold is well over Rupees 1.68 crore. No prudent and rational businessman of a sane mind could under normal circumstances allow such high amounts to be dwindled and dealt with so casually, even under most trying circumstances, but for some very serious considerations as non-availability of licit documentation being illegally acquired. The entire case in the present matter, concerns with the attempt at legitimizing the illicit possession and the time required to hunt out and attempt at sourcing of documents, being made to legitimize the same. Obviously, there is no warrant for any delay in tendering of legitimate proof, if documentary legal evidence was all along available with Rinku Verma. Aggravated, this is by the fact that the amount involved in the matter is insanely very high that cannot be left to be ignored, by anyone least of all by a person who has been in the industry for quite a while.

PAYMENTS-supposedly made

32. From the records tendered by Rinku Verma to cover up for the illicit possession of foreign marked gold and demonstrate it as a licit possession, its remarkable and again quaint to note that the payments in respect of the said gold have been accounted for in the books of accounts after several months of the date of seizure and the fact as comes out from the account books is that Rinku Verma was not even a regular customer of Snehal Gems (merely being a one time purchaser). As evident from the records tendered, the payments for such sale were made between 19 August 2015 and 22 September 2015 (i.e. **after three months from the date of seizure and upto four months of the said date**) and beyond four months of the allegedly stated date of sale/purchase. No reasons have been conveyed for this inordinately long time for payment towards purchase of gold essentially as a credit sale, by either of the two viz. Rinku Verma or Pradeep Bothra. Also, as per the financial accounts submitted it may be noted that even as late as on 22 September 2015 i.e. even after four months of the date of seizure or almost five months after said purchase, by Rinku Verma, a payment of over Rs. Thirty eight lakh (Rs. 38,36,750/- to be precise) i.e. **almost 25% of the value of the seized gold was still outstanding from Rinku Verma as** due to Pradeep Kumar Bothra, Director of Snehal Gems Pvt. Ltd. and no evidence of having remitted the same could be supplied.

33. What these bits of evidence aptly establish is the enormous amount of falsification, manipulation and cover-up undertaken in an organized manner to somehow secure a licit facade for the

seized/confiscated gold. Thus while dummy sales could be manipulated closer to the date of seizure in May, it was not possible to demonstrate payments in back date. The following sequence reveals the entire story:

1. Date of seizure of FM gold. - **19.05.2016**
2. Purported date of sale - **02.05.15 to 12.05.15**
(as a legit cover)
3. Date of payment - **19.08.15, 20.08.15,**
(as a cover in support of **26.08.15, 01.09.15,**
legit sale) **04.09.15, 08.09.15**
& 22.09.15. (With
nearly 25% of payment still
outstanding and
remained unpaid)
4. Date of Rinku Verma
approaching the- **26.10.15** (1st statement
authorities recorded)
(i.e after more than
five months of seizure)
5. Date of Pradeep Bothra
appearing before the - **08.01.16** (Date of
authorities recording of statement
after dishonouring earlier
summons issued)

and thereby confirming that both Rinku Verma/Pradeep Bothra had nothing in their possession to indicate legitimate import of the seized gold. It is already on record, that Pradeep Bothra could also not relate the seized/confiscated gold with the invoices that he had drawn up as an alleged cover and supplied to Rinku Verma.

34. Pradeep Bothra, the Director of Snehal Gems Pvt. Ltd., in his testimony has however not uttered a word about any **outstanding payments** towards Rinku Verma, thereby clearly bringing out the scheming, manipulation and the deliberately but deftly worked upon, prepared and falsified nature of the cover up

documentation. All this is clearly by design and a ploy put up. However, the fact of fudging up of records and skillful manipulation and inventing them, fails to be fool proofed even by most meticulous planning, as justification for possession of the "illicitly" imported gold seized/confiscated. These latches clearly prove that the evidence tendered in support of licit possession are no more than a massive cover up, clearly crafted skullduggery and complete manipulation. The lid of the cover up operation is blown off, in response, when to certain specific questions raised to Pradeep Bothra for the foreign marked gold as indicated below - the responses point out the exercise at attempted falsification, fabrication, fakery and presenting a fictionary fable as a fairy tale response.

Q. 10. Can you provide the any import documentary regarding seized gold?

Ans. No

Q. 11. The gold bars sold to Shri Rinku Verma do not contain any Sl. No. as the same were tampered, can you state the reason for tampering?

Ans. It is not possible for me to confirm this

Q. 12. State the source of acquiring of gold sold to Shri Rinku Verma?

Ans. Local Purchase from Dealers.

Q. 13. Did Shri Rinku Verma make payments regarding purchase of gold seized for 6lcg gold bars.

Ans. I have submitted the payment related documents, which confirms the payment towards the gold sold to him, however it cannot be confirmed it is for seized gold.

35. This assertion of categorical negation that there is no evidence (by way of import documents), to establish the imported character of seized/confiscated foreign marked gold or to relate it with downstream local dealers with documentary evidence, or to even link it for certainty with the purported invoices of Snehal Gems, tendered by Rinku Verma to the department by Pradeep Bothra supports fully, the coverup version. This is thus a complete failure at an attempt to cross the threshold of Section 123 of Customs Act, and the onus that has befallen upon Rinku Verma, as a claimant of the seized/confiscated foreign marked gold.

36. The fact of categorical assertion that Pradeep Bothra did not have import documents concerning the seized gold (ref-Q.No.10of testimony of Pradeep Bothra dated 08.01.2016), when read alongwith his testimony in response to Q 6.wherein he failed to recognize the gold sold as the one under seizure and the unqualified, unequivocal and unconditional failure and testimony to confirm that the payment that he received from Rinku Verma was towards the said seized gold, fails to link the "purchase documents" tendered by Rinku Verma with the gold under seizure.

Q.6. of the testimony dt. Of Pradeep Bothra is enumerated below:

Q.6. Can you confirm the description of gold and origin of country of gold sold to Shri Verma?

Ans. Different type of gold all dealt with us so at this juncture it is not possible to recognize the same.

37. The onus under Section 123 cast upon the claimant is a deviation from the general rule and therefore it has to meet greater standards of rigour, so as to be beyond an iota of doubt or suspicion. In this case for aforesaid reasons and the fact that Rinku Verma did not produce any evidence of licit purchase, even within a reasonable time after seizure is a reflection of wholesale manipulation and perpetuation of fraud to justify the claim made by Rinku Verma. The documents produced in support of justification for licit procurement of foreign marked gold by Rinku Verma, I am afraid cannot be accepted in support of their contention as they fail to bring out any connect with the seized gold. This is particularly all the more so, in the wake of the testimony of the alleged seller of the gold, to Rinku Verma i.e. Pradeep Bothra of Snehal Gems, as indicated and demonstrated in paras foregoing.

38. As is well known that when things are undertaken merely to cover up for something which is nonexistent, there is always room for omissions. Thus it may be noted that the prepared invoices/bills submitted to the department by Rinku Verma in support of his claim to licit acquisition of foreign marked gold are grossly incomplete in details. The purported invoices submitted do not even indicate the brand of the gold sold or the marks and number of the gold bars. Apart from the fact of not mentioning of the marks and numbers inscribed on the gold bars, all that is mentioned in the invoice is the gross weight in grams and the purity of the gold bar as 995. This is done with an eye to prevent investigators to easily ascertain the truth about fabrication of the

invoices. Further, the number of each of the seized-1 kg gold bar is obliterated, scratched out and deliberately tampered. Again done with clear intents to digress and derail, deviate and divert the investigations. The appellant in the plethora of documents filed as part of his paper book evidencing business transactions (sale and purchase) of gold and diamonds of Snehal Gems – could not and did not include even a single solitary purchase voucher of gold of 1 kg bar of 995 purity, though they have included in the paper book purchase vouchers for gold of 995 purity for 150 gms, 242 gms, 417.839 gms and several of them of cut and polished diamonds (Needlessly enclosed as part of paper book – completely unwarranted). All this is again carried out with intents and singular objective of attempting to befool the investigation and create confusion. On the subject it may be of relevance to state here that at Pg. 161 of the paper book is enclosed the following document:

DAFFODILS CHS, GODREJ SNT GARDEN TAKKA, PANVEL, NAVI MUMBAI 400206.		FSG-10 Delivery Note		FSG-10 Mode/Terms of Payment	
Buyer Snehal Gems Pvt.Ltd. Bldg No. 6/127, Mittal Ind. Est. Andheri Kurla Road, Andheri East, Mumbai-400059.		Supplier's Ref. FGH-16		Other Reference(s)	
		Buyer's Order No.		Dated 16/11	
		Despatch Document No.		Dated	
		Despatched through		Destination	
		Terms of Delivery			
Description of Goods		Quantity	Rate	per	Amount
GOLD BAR 99-5		5,143.224 GRAM	2,676.99	GRAM	1,64,61,408.00
VAT1%					1,64,514.00
		Total	5,143.224 GRAM		₹ 1,66,26,022.00
Amount Chargeable (in words) Indian Rupees One Crore Sixty Six Lakh Twenty Six Thousand Twenty Two Only		IE & O.E			
Company's VAT TIN : 27820847568V Company's CST No. : 27820847568C Buyer's VAT TIN : 27890229009V Buyer's CST No. : 27890229009C Declaration We hereby that my/our registration certificate under Maharashtra Value Added Tax Act,2002 is in force on the date on which the sale of the goods specified in this tax invoice is made by me/us & that the transaction of sale covered by this tax invoice has been effected by me/us & it shall be accounted for in the turnover of sales while filling of return & the due tax, if any, payable on the sale has been paid or shall be paid.		for FALCON GOLD HOUSE PVT.LTD Authorized Signatory			
This is a Computer Generated Invoice					

8/11/16

This appears to be again a clever attempt at fraudulent conduct. From the above it is noted that the top part of the page is clearly marked/washed out. However, it appears that the name of the impugned seller could be "DAFFODILS CHS GODREJ-----"of" Garden Takka Panvel, Navi Mumbai," however at the bottom right end corner of this invoice the Authorized signatory is someone for "Falcon Gold House Pvt. Ltd." Also the weight herein does not tally with that of seized gold, there being also no date thereon. The Ld. Advocate for the appellant also could not explain the discrepancy. Thus with all the lacunae mentioned above and with

no declaration of net wt and the purity percentage-to at least decimal places, the said invoices is not only rendered suspicious but also makes it completely un relatable to seized/confiscated gold, for certain. It is no brainer that in gold trade both domestically and internationally it is imperative to indicate the date of sale, net wt and the percentage purity upto a minimum of at least two decimal places as a standard practice and as the goods are of high value and even a fractional change could bring about a large scale disruption. In effect all these invoices submitted such as the one scanned above, or the other one at page 172 of the paper book to suggest purchase of 4000 gms of gold by Snehal Gems. Pvt. Ltd. etc. are quite incomplete in essentials and do not indicate either the name of seller or the invoice number or the date of invoice or for gold bars – marks and numbers or other inscriptions or weight of individual bars or the number of pieces of gold bars or all of these. These are very vital omissions and cannot be dismissed as of mere insignificance or inconsequential, because of the particularity of the trade and industry.

39. Such omissions are bound to happen when attempting and working at a cover up for a major lapse and attempts at legitimizing the illegality. The invoices merely indicate the collective weight in gms. of gold bars, without indicating their individual weight or number and the markings thereon i.e. of the individual gold bar that was allegedly (at least on paper) said to be sold to Rinku Verma. Also it is unheard of a six kg foreign marked gold bar. It is too well known that if the invoice is not a cover up for the gold bars, it would separately indicate weight of

each gold bar sold and not mention the collective weight thereof. This is not a trade practice nor workable and affordable in day to day business practices of precious metals. These vital pieces of missing links completely puncture and demolish the appellant Rinku Verma's theory of the legal possession of the seized foreign gold.

40. It is intriguing to note that for a secondary supplier Snehal Gems while a plethora of copies of various financial transactional statements, invoices etc. are all tendered as part of paper book(from Feb. to Sep-Oct. 2015) however, in respect of the parties primarily connected in the impugned appeal-particularly Rinku Verma - there is no transactional document or ledger copy etc. tendered to the investigators by him, indicating gold supplied by/to Rinku Verma, except for the four fabricated and tailor made invoices said to be towards sale of gold to him.

41. Moreover Pradeep Bothra, the Director of Snehal Gems could not identify the accused persons appellant 1-4 namely Rajendra Kumar Dhulia, Saurabh, Shubham Verma and Golu Verma (this aspect of enquiry is most relevant in view of the statement of Rinku Verma that the four had been working for him and he had business relations with the former. Moreover, Pradeep Bothra, as stated earlier, could not provide any import document in respect of the said seized gold sold by him. His categorical assertion to the question in this regard was a firm "No".

42. The learned Adjudicating Authority while dwelling on the subject of illegal import of gold as pointed out as per notification no. 12/2012-Cus dated 17.03.2012 (as amended) has noted

that gold in any form allowed to be imported, upon payment of applicable duty, is subject to fulfillment of certain specific conditions. That it was evident that the conditions as imposed on import of such gold through nominated banks agencies star trading house, premier trading house, SEZ, EOU's etc. would need to be complied with and that the said conditions were in the nature of restrictions imposed on import of gold. As no such condition was found to be fulfilled, it was a case of smuggling, as also supported by foreign marking on the gold bars and no licit documentation for possession thereof. In terms of Hon'ble Supreme Court's order in the case of **Sheikh Mohammad vs. Collector of Customs, Kolkata 1983 (13) ELT (1439)** any prohibition imposed applies to every type of prohibition on the import or export and to the extent is therefore a prohibition. Therefore, the violation of the prohibition conditions in respect of the seized gold renders it liable to confiscation under Section 111(b) & 111(e) of the Customs Act, 1962. Also as the illegal import thereof was a violation of the notification issued in terms of Section 7C of the Act.

THE STATEMENTS BROKEN DOWN :

43. To the charge of submission of non relevant document as a cover up of the seized gold, Rinku Verma submitted that the said allegation was vague, as it was not pointed out in the show cause notice as to how the submitted documents were false, incorrect or forged in nature and therefore non-relevance of the said documents claiming them to be an afterthought and fabricated was unwarranted.

44. In reply to the show cause notice, it has been submitted by Rinku Verma that the lawful possession of gold under seizure came to be established by way of submission of the purchase invoice and

receipt of payment having been acknowledged by the seller of the gold. As for non submission of import documents and the non submission of documents relating to payment were concerned, it was his contention that the same should be ascertained from Snehal Gems Pvt. Ltd. It was his contention that having tendered these purchase documents, he had completely and satisfactorily discharged his onus under Section 123 of the Customs Act. Admitting the change in stance of the four accused appellant No. 1-4 viz. Rajendra Kumar Dhulia, Saurabh, Shubham Verma and Golu Verma, it was merely his contention(Rinku Verma) that in subsequent statements dated 15/02/2016 of Rajendra Kumar Dhuriya and Saurath and dated 16/02/2016 of Shubham Verma and Golu Verma the four accused had intimated that the gold was handed over to them by Rinku Verma for its exchange at Kolkata. This proposition is unacceptable in view of what has been discussed in earlier paras.

45. As for the role of the four accused appellant No. 1-4 viz. Rajendra Kumar Dhulia, Saurabh, Shubham Verma and Golu Verma is concerned, it may be noted that the four aforesaid persons admitted in their voluntary statement on 19.05.2015 that they were gold carriers for Rinku Verma of Katra, Manmoh an Park, Allahabad. Rinku Verma also in his statement before the investigating authority has admitted the said four persons worked for him. Moreover, it is significant that there was no change in the version of the accused and the contents of the initial first statement tendered by them were maintained, even in their subsequent statements given to the Customs authorities, under Section 108 of Customs Act, on 28.07.2015 i.e. nearly three week after release and grant of bail by the Id. CMM. Further, these statements are valid pieces of evidence as held in:

- **Surjeet Singh Chhabra Vs. UOI – 1997 (89) ELT 646 SC**

(It even upheld the binding nature of a statement, retracted within six days)

- **Illiyas Vs. Collector of Customs, Madras – 1983 (13) ELT1427 SC**
- **Soni Vallabh Das Liladhar and Another Vs. Collector of Suctoms, Jamnagar – 1983 (13) ELT 1408 SC**
- **Bhana Khalpa Bhai Patel Vs. Asstt. Collector of Customs, Bulsar- 1997 (96) ELT 211 SC**

46. The fact that the four accused in their initial statements did furnish intricate details and a wealth of information about themselves, the modus, other details about the procurement source, the amount paid for the said gold procured from ShashiKant Patil of M/s Dhanlakshmi Bullion, and admitted that Rajendra Kumar Dhulia and Golu Verma each paid Rs. 41 lakh (Rajendra Kumar Dhulia & Golu Verma) (cumulatively Rs. 82 lakh) to take the delivery of 3kg gold whereupon they reached their hotel and found Shubham Verma and Saurabh Kumar already ready with 3kg gold, cannot be merely given a go by as untrue and/or coerced. The said material pieces of evidence and admission are sufficient enough to impute the violation of Section 7C of the Customs Act, rendering the seized gold liable to confiscation under Section 111(b)& (e) of the act *ibid*. It is also of significant relevance to note that the letters sent by the four accused appellant No. 1-4 viz. Rajendra Kumar Dhulia, Saurabh, Shubham Verma and Golu Verma did not anywhere indicate that voluntary initial statement recorded on 19.05.2015 and subsequent statement dated 28.07.2015 indicating procurement of the said gold from Shashi Kant Patil of Sonapati, Kolkata, were not voluntary and true or were tendered under duress. They merely stated that the said statement was incorrect.

CHANGE in STANCE and INVALIDITY of ALTERED VERSION

47. Appellants 1-4 namely Shubham Verma, Golu Verma, Rajendra Kumar Dhuriya and Sourabh had in their initial statements dated 19.05.2015, tendered before the gazetted

officer of Customs have furnished a wealth of information to which they alone can be privy to. This includes information, both about material facts like obtaining of foreign marked gold without cover of any documentation, payments made thereto, details of persons, addresses, phone numbers both for persons from where such foreign marked gold was procured, as well as for whom it was meant to be delivered to, details of their employment and for whom they worked for, the monetary compensation they received for their job, the period for which they have been working, the number of such previous trips undertaken etc. besides their own personal information such as the place of stay in Kolkata, duration of stay, their place of stay at Allahabad, education etc. There is no allegation, for these statements tendered on 19/05/2023 as being involuntary or coerced upon or being forced upon to state so or any other allegation of inducement etc. as could cast a shadow of doubt on the veracity and truthfulness, accuracy and bonafides of the said statements.

48. Furthermore, what is important is the aspect that material facts contained in these statements are not only corroborated with one another but also with the material facts on ground. There is thus no reason to doubt the veracity of these statements. What affixes a stamp of bonafideness, correctness and truthfulness to the contents of these voluntary statements of 19.05.2015, is the fact of reassertion and reconfirming of the contents thereof, by all the four Appellant No. 1-4 Shubham Verma, Golu Verma, Rajendra Kumar Dhuriya and Sourabh viz. in their subsequent statement dated 28/07.2015, recorded after they were enlarged on bail and that too not immediately post

release, but well after around two weeks of the grant of bail to them by the Ld. CMM.

49. The continued maintenance of their earlier stance as on the date of seizure, despite the fact that the accused spent nearly forty five days in jail, also did not break their resolve to speak the truth and is a clear assertion of the fact of dishing out the correct factual information, without bias or any motive – that is plain speak-and to state the truth and blurt out the correct information, about the state of events and happenings, concerned with the matter. Also it be noted that there has been no charge of any malpractice, being adopted in recording their primary statement on 19/05/2023, by any of the accused, at any point of time, when they could have conveniently done so, either before the CMM when presented before him post arrest or even at the time of grant of bail or at any point in time through a formal communication addressed to the supervisory administrative authorities, or even while reiterating their earlier statement on 28/07/2015.

50. Merely sending a communication, that too after around nine months of recording their spontaneous and primary version, stating that their initial statements are incorrect and involuntary, is clearly unacceptable in law and holds no legal force. Refuting the same by way of a statement, this late in time also is of no help to the facts of the case. Further, it is observed that the four accused appellants No. 1-4 viz. Golu Verma, Saurabh, Shubham Verma, Rajendra Kumar Dhuriya, had no clear explanation whatsoever, to state as to why the earlier two statements were incorrect and involuntary. It is settled law that any retraction to

be valid has to be tendered at the first available opportunity while in the present case there is only a further reiteration and reconfirmation of the earlier version narrated, confirmation of material facts like places of business, telephone numbers of conspirator and prime accused which upon verification were found to be correct and several other important details. No complaint was made about atrocity, duress, coercion, inducement or the like before the Magistrate. Hence the retraction or rather the modified version (nine months later), is certainly an afterthought, made at the behest of none else but Rinku Verma – the claimant of the said seized/confiscated gold, based upon expert/legal advice rendered. It thus is neither voluntary nor truthful in its contents and is therefore dismissed as lacking any evidentiary value.

CASE LAW ANALYSIS.

51. In so far as the case laws cited by the Hon'ble Member (Judicial) in support of his findings, is concerned, the following paras are put forward

(i)Nitya Gopal Biswas Vs. Commissioner of Customs².

It is pertinent to observe that unlike the present case, in this case the claimant had filed his claim towards the foreign marked gold biscuits seized with the authorities, almost immediately after the seizure and interception of gold biscuits.

Para 2.1 clearly points out this fact. Relevant portion of the said Para is reproduced as hereunder:-

That 60 gold biscuits were given to him by the younger brother Shri Nitya Gopal Biswas at 2 p.m. on 5-9-2000 for delivering the same back to him near Sealdah. That on the same day 25-9-2000 Shri Nitya Gopal Biswas filed a claim petition for

the seized gold biscuits and that the same were purchased from one Shri Laljibhai Kanjibhai Soni of M/s. L.K. Soni, Ahmedabad by making cash payments and a photocopy of Sale bill No. 422, dated 29-8-2000 was also furnished. That Shri Lalji Bhai K. Soni of Ahmedabad has confirmed in his statement to have sold the said 60 gold biscuits to Nitya Gopal Biswas which were also recorded in his accounts maintained in the computer.

(Emphasis Supplied)

For the impugned reason and significant variation of fact and the time of the submission of the documents evidencing legitimate possession of seized gold, the ratio of the said case law cannot be made applicable to the issue herein

(ii) Ratan Kumar Saha Vs. Commissioner of Customs³.

The facts of this case are at a complete tangent with those concerned involved in the present matter. For the reason that (a) the seizure of gold and silver in this case is nowhere concerned with foreign marked origin and (b) this is a case of seizure, from the business premises of the accused. It may be noted that the Order points out to appellant's statement recorded on 4th August 2015, at the time of search mentioning the names of the person concerned, while in custody, from whom the gold and silver bars were procured. Subsequently, after discharge from the custody, the Appellant submitted a detailed letter indicating the details of sales of gold and silver and currency recovered from his premises. No akinness with the present matter can be sought to be attempted with the aforesaid case in view of (a) above. Besides, it may be observed that there is a time lag of nearly two months between time of seizure and that of submission of the documents in this case and which time lag is duly accounted on

account of health condition of the accused, being a heart patient. It is noteworthy to mention that the transaction made, as stated in the initial statement of the accused at the time of seizure was found to be so recorded in the Books of Accounts. As an aside, it be also noted that the total value of the seized goods was far less. Thus these differences in factual content have no bearing and influence upon my findings, in the present appeal.

Thus the ratio of this case law cannot be relied upon and applied to the present case.

(iii) Union of India Vs. Imtiaz Iqbal Pothiawala⁴.

The evidence towards legitimate possession of the 575 gold bars was submitted within less than 24 hrs., of seizure i.e. on the very next day of the seizure and in fact around the time the statement of accused was recorded on 09.03.2000. This was further corroborated almost real time. Briefly, the facts of the said case are as under :

"4. (a) On 8th March, 2000, 575 gold bars valued at Rs. 3.09 crore were found along with Indian currency of Rs. 21 lakhs from a cavity in a jeep, belonging to respondent No. 1. At that time, the jeep was being driven by Mr. Anis Ashraf (Driver of respondent No. 1);

(b) Respondent No. 1 and his driver were not able to produce any documents in support of legal possession of the 575 gold bars and Indian currency of Rs. 21 lakhs. This led to a reasonable belief on the part of the officers of the respondent that the goods are liable for confiscation. Therefore, the 575 gold bars and Rs. 21 lakhs cash found were seized under Section 110 read with Section 123 of the Act. This as gold is a notified goods

under Section 123 of the Act, while cash was seized in the reasonable belief that it is sale proceeds of smuggled goods;

(c) -----

(d) On 9th March, 2000, respondent No. 1 made a statement under Section 108 of the Act to the officers of respondents. In his statement, respondent No. 1 stated that 575 seized gold bars were purchased from one Mr. Chandubhai (also known as Bhupendra Thakkar);

(e) At the same-time, on 9th March, 2000, the officers of the respondent recorded the statement of one Mr. Devang A. Patel at Ahmedabad. In the statement made under Section 108 of the Act, Mr. Patel, stated that he works for one Mr. Bhupendra Thakkar whose firms are - M/s. Pawan Jewellers and M/s. Paras Bullion. He also stated that he purchases gold bars from local dealers in Ahmedabad and delivers the same as per instructions of his employer Mr. Bhupendra Thakkar. Further, he also produced copies of invoices under which the gold was sold to respondent No. 1;

(f) On 10th March, 2000, respondent No. 1 in his bail application before the Magistrate claimed that the 575 gold bars were purchased from M/s. Pawan Jewellers and M/s. Paras Bullion, Ahmedabad. Invoices/Bills in support of the same, was also produced along with the bail application;

(g) Thereafter, on 6th April, 2000 and 26th April, 2000, statements under Section 108 of the Act, were recorded of Mr. Bhupendra Thakkar alias Chandubhai who explained the sale of 700 gold bars to respondent No. 1. It was pointed out that [(300 gold bars)] was sold by his proprietary concern - M/s. Pawan

Jewellers and the remaining [400 gold bars] was sold by M/s. Paras Bullion. It was further pointed out in his statement that he also conducts business of M/s. Paras Bullion for and on behalf of its proprietor Mr. Vijay Patel;”

(Emphasis Supplied)

It may thus be noted that in this case too there is virtually no time lag in the submission of the documents evidencing legitimate possession. Therefore, the ratio of the law as pronounced by the Hon’ble Bombay High Court, cannot be adverted to in the present case.

(iv) Gopal Prasad Vs. Commr. of Central Excise, Cus. & S.T., Patna⁵.

From the facts of this case, it is evident that the seizure of precious metal was made by SSB officers and subsequently, handed over to the Customs on 20/04/2014. It is recorded in this order that Gopal Prasad who claimed ownership of the said goods on 10/05/2014 had handed over the bills through the accused person to the authorities on 20th April 2014 itself but the said officials tore of the Bill. It is therefore evident that there was no time lag, whatsoever in demonstrating the legitimate possession of the gold under seizure. Para 5 of the said order is reproduced for purpose of greater clarity.

“I find from the impugned order that Shri Sujit Kumar was intercepted by the SSB officers on 19.04.2014. Subsequently, SSB officers handed over Shri Sujit Kumar and the seized material to the Customs Officers, Motihari. Shri Sujit Kumar, in his statement dated 20.04.2014 and 21.04.2014, stated that the seized gold biscuit was given to him by Shri Chandreshwar

Prasad/Shah. The gold was scheduled for delivery to Shri Mahavir Shah/Prasad in his shop M/s. Shakuntala Jewellers at bakergunj, Patna. It is also stated that both Shri Chandreshwar Prasad/Shah and Shri Gopal Prasad/Shah used to carry gold from Nepal to India illegally. Shri Gopal Prasad/Shah by his letter dated 10.05.2014 addressed to the Commissioner of Customs, Patna stated that he was engaged in manufacture and sale of gold and silver ornaments and running a jewellery shop by the name of Saraf Jewellers. He stated that he purchased two pieces of gold bars from M/s. Bhwana International, Chandni Chowk, Delhi on 14.04.2014 vide Bill No. B1/R1/002, dated 12.04.2014 and B1/R1/003, dated 14.04.2014 respectively. It is also stated that on his instructions his brother Shri Chandreshwar Prasad/Shah handed over the gold to Shri Sujit Kumar for carrying it to Patna to hand it over to Shri Mahavir Prasad/Shah to make gold ornaments in exchange of the said gold. It is categorically claimed by the appellant that the gold bars were purchased by him legally and the SSB Officials illegally seized the same. Shri Sujit Kumar wrote a letter to Commissioner of Customs, Patna from Central jail, Muzzaffarpur stating that he had produced the bills for the seized gold to Customs authorities on 20.04.2014 but the said officials tore off the bill and sent him to jail.”

It may thus be noted, that the facts of this case are entirely different and there is enough material to suggest that the invoices were tendered and hence adoption of the ratio of this case law to grant the benefit in the present matter is uncalled for.

(v) Nand Kishore Sumani Vs. Commr. of Cus., C. Ex. & S. T., Siliguri⁶.

While the seizure was made from the vehicle on 2nd February 2012 in respect of the 10 gold bars (1746.580 grams). At the outset, it be pointed out that there were no markings of foreign origin of gold in respect of the gold seized. It has been recorded in Para 5 of the Order that there was nothing on record including any confession to submit that the seized gold originated from Bangladesh. That the being the case, it is very clear that the facts of this case are entirely distinct. The ratio of this case law therefore, would have no bearing with the present matter.

(vi) Hari Manthan Jewellery House Pvt. Ltd. Vs. Commissioner of Customs (Prev.) Patna⁷.

The DRI in the present matter had caused a search at Agarwal Gold House on 27/28 February 2014, However, the documents for licit acquisition of gold in the matter were tendered on 26 March 2014 to the DRI – i.e. after about three weeks of search and seizure operation. Contrary to the present case involving a time lag of over 5 months, in the impugned matter there is no significant time difference in producing the same before the authorities, to evidence the licit acquisition of gold. In fact as has been noted in Para 12 of the said Order, the Appellant therein Vikash Agarwal, Proprietor of the Agarwal Gold

House had on the day of seizure itself claimed the ownership of the seized goods, unlike the present matter wherein the original claimant surfaces after five months of seizure. Evidence indicating final transaction thereof was also submitted to the authorities and even discreet enquiry conducted by the authorities with the supplier of the said gold found the matter to be in support of the appellant.

Under the circumstances, the ratio of this case law is clearly not applicable to the present matter

52. In view of the aforesaid discussions on each of the case laws, the support of which the Hon'ble Member (J) has extensively drawn upon in arriving at his findings, to my mind are inapplicable to the present appeal and are clearly distinguishable with the facts of the present matter, both in factual contents as well as the legal perspective in terms of Section 123 of the Act. Thus the ratio of none of the said case laws actually comes to the rescue of the appellants and no support can be drawn therefrom in support of the pleadings of the appellant. Disregarding, the applicability of the pronouncements of the aforesaid decisions as discussed in para 51, I am of the view that the appellants have failed to discharge the onus cast upon them under Section 123 of the Act *ibid* and all the appellants are, also liable for penal consequences in law in view of the *mens rea* as evident and the contraventions in law.

53. Now, on the other hand, I would like to dwell upon, certain case laws, in support of my findings and propositions.

(i) Invalidity of statements recorded by the authorities,
almost nine months down the line.

As discussed in foregoing paras rejecting the latter statements dated 15/02/23 and 16/02/23, of the four accused appellants 1-4 viz. Rajendra Kumar Dhuriya, Sourabh, Shubham Verma and Golu Verma, it may also be pointed out that the Hon'ble Patna High Court in the case of **Commissioner of Customs, Patna Vs. Amar Kishore Prasad**⁸ in almost identical situation had held the retraction of statement was an afterthought. The Hon'ble High Court upheld the validity of the statement tendered while in custody of the department. It had further observed therein that there were no complaint made about atrocity, duress or coercion, when the accused were produced before the magistrate. Relevant para of the said order is reproduced hereunder:

"8. We have perused the records before us. It does appear that the Owner did submit before the Customs authorities that he had procured the seized gold from his customers at Raxaul. However, he failed to prove the statement. Section 123 of the Act, inter alia, provides that the burden of proof that the seized goods are not the smuggled goods lies on the person who claims to be the owner of the goods seized. Thus, the burden to prove that the seized gold was not smuggled by upon the Owner. The Tribunal has erred in shifting the onus of proof upon the Customs

8. 2013 (298) ELT 711 Pat.

*Department. The Tribunal has also erred in holding that the statement given under Section 108 of the Act once retracted was not admissible in evidence, particularly because before the carrier was produced before the Chief Judicial Magistrate he was in custody of the Customs officials for more than 24 hours. The Tribunal, however, has overlooked the fact that the Carrier, when produced before the Chief Judicial Magistrate on 24th April 1996, did not complain of atrocity, duress or coercion. The learned Chief Judicial Magistrate has recorded a categorical statement to that effect in his order. We have noticed a statement of retraction given by the Carrier on 28th April, 1996. According to us the said retraction was an afterthought. Had the Carrier given the statement under Section 108 of the Act under coercion he would have made complaint before the Chief Judicial Magistrate. Although, the Tribunal did find that there was some tampering of marks and numbers on the gold bars seized from the Carrier, the Tribunal erred in holding that mere tampering of marks and numbers did not prove that the gold bars were of foreign origin. **The fact that there was tampering of the marks and numbers of the seized gold bars coupled with the fact that the Owner thereof could not disclose the source of acquisition should necessarily lead to an inference that the seized gold bars were of foreign origin, smuggled into the territory of India.***

(Emphasis Supplied)

The initial testimonies of the four appellants 1-4 viz. Rajendra Kumar Dhuriya, Sourabh, Shubham Verma and Golu Verma, thus cannot be washed off in thin air.

(ii) In view of my findings in earlier paras and the fact that the two statements tendered by the appellants 1-4 viz. Rajendra Kumar Dhuriya, Sourabh, Shubham Verma and Golu Verma, are found to be voluntary, there is no doubt that the same can in itself be the sole basis for conviction, as was also held by the Hon'ble Supreme Court in the case of **K.I. Pavunny Vs. Asstt. Collector.(HQ.) Commissioner of Excise Collectorate, Cochin**⁹. The Hon'ble Apex Court therein held that a mere general corroboration is sufficient, and each detail was not required to be gone into. Relevant paras of the said order are quoted below:

"19. Next question for consideration is : whether such statement can form the sole basis for conviction? It is seen that, admittedly, the appellant made his statement in his own handwriting giving wealth of details running into five typed pages. Some of the details which found place in the statement were specially within his knowledge, viz., concealment of the 200 biscuits in his earlier rented house till he constructed the present house and shifted his residence and thereafter he brought to his house and concealed the same in his compound; and other details elaboration of which is not material. The question then is : whether it was influenced by threat of implicating his wife in the crime which is the sole basis for the claim that it was obtained by

threat by PW-2 and PW-5? In that behalf, the High Court has held that it could not be considered to be induced by threat that his wife will be implicated in the crime and accordingly disbelieved his plea. It is seen that admittedly after the appellant gave his statement, he was produced before the Magistrate though no complaint was filed and was released on bail. He did not complain to the magistrate that Ex. P-4 statement was given under inducement, threat or duress. It was raised only subsequently making accusations against PW-5, the Inspector of Customs. Therefore, obviously it was only an afterthought. The High Court, therefore, rightly has not given any weight age to the same. It is true that the magistrate has given various reasons for disbelieving the evidence of PW-3, the panch witness who had also, at one point of time, indulged in smuggling. It is unlikely that PW-3 would bring 200 gold biscuits of foreign marking and conceal them in the compound of the appellant without appellant's knowledge for safe custody. It is not his case that he had facilitated PW-3 in concealing them in his compound. The place of concealment of the contraband is also significant at this juncture. It is just near and visible from the window of his bedroom through which he or family members could always watch anyone frequenting the place where the contraband was concealed. This fact becomes more relevant when we consider that after concealment of the contraband in the compound one would ensure that others having access to the compound may not indulge in digging and carrying away the same. As soon as the appellant and/or the members of his family had sight of such visitor or movement by others, they would immediately catch

hold of such person or would charge them. Obviously, therefore, it would be the appellant who had concealed 200 gold biscuits of foreign marking in his compound at a place always visible from his bed-room window. Therefore, the High Court was right in its conclusion, though for different reasons, that Ex. P-4 is a voluntary statement and was not influenced by threat, duress or inducement etc. Therefore, it is a voluntary statement given by the appellant and is a true one.

20. The question then is : whether the retracted confessional statement requires corroboration from any other independent evidence? It is seen that the evidence in this case consists of the confessional statement, the recovery panchnama and the testimony of PWs 2, 3 and 5. It is true that in a trial and proprio vigore in a criminal trial. Courts are required to marshal the evidence. It is the duty of the prosecution to prove the case beyond reasonable doubt. The evidence may consist of direct evidence, confession or circumstantial evidence. In a criminal trial punishable under the provisions of the IPC, it is now well settled legal position that confession can form the sole basis for conviction. If it is retracted, it must first be tested whether confession is voluntary and truthful inculcating the accused in the commission of the crime. Confession is one of the species of admission dealt with under Sections 24 to 30 of the Evidence Act and Section 164 of the Code. It is an admission against the maker of it, unless its admissibility is excluded by some of those provisions. If a confession is proved by unimpeachable evidence and if it is of voluntary nature, it when retracted, is entitled to high degree of value as its maker is likely to face the

*consequences of confession by a statement affecting his life, liberty or property. Burden is on the accused to prove that the statement was obtained by threat, duress or promise like any other person as was held in **Bhagwan Singh Vs. State of Punjab – AIR 1952 SC 214, Para 30.** If it is established from the record or circumstances that the confession is shrouded with suspicious features, then it falls in the realm of doubt. The burden of proof on the accused is not as high as on the prosecution. If the accused is able to prove the facts creating reasonable doubt that the confession was not voluntary or it was obtained by threat, coercion or inducement etc., the burden would be on the prosecution to prove that the confession was made by the accused voluntarily. If the Court believes that the confession was voluntary and believes it to be true, then there is no legal bar on the Court for ordering conviction. However, rule of prudence and practice does require that the Court seeks corroboration of the retreated confession from other evidence. The confession must be one inculcating the accused in the crime. It is not necessary that each fact or circumstance contained in the confession is separately or independently corroborated. It is enough if it receives general corroboration. The burden is not as high as in the case of an approver or an accomplice in which case corroboration is required on material particulars of the prosecution case. Each case would, therefore, require to be examined in the light of the facts and circumstances in which the confession came to be made and whether or not it was voluntary and true. These require to be tested in the light of given set of*

facts. The high degree of proof and probative value is insisted in capital offences.

*21. In Kashmira Singh's case the co-accused, Gurcharan Singh made a confession. The question arose whether the confession could be relied upon to prove the prosecution case against the appellant Kashmira Singh. In that context, Bose, J. speaking for bench of three-Judges laid down the law that the Court requires to marshal the evidence against the accused excluding the confession altogether from consideration. If the evidence de hors the confession proves the guilt of the appellant, the confession of the co-accused could be used to corroborate the prosecution case to lend assurance to the Court to convict the appellant. The Court considered the evidence led by the prosecution, de hors the confession of co-accused and held that the evidence was not sufficient to bring home the guilt of appellant Kashmira Singh of the charge of murder. The appellant was acquitted of an offence under Section 302 IPC but was convicted for the offence under Section 201 IPC for destroying the evidence of murder and sentenced him to seven years rigorous imprisonment. This decision was considered by a four-Judge Bench in **Balbir Singh Vs. State of Punjab – AIR 1957 SC 216** wherein it was held that if there is independent evidence, besides the confession, the rule that the confession could be used only to corroborate the other evidences loses its efficacy. Therefore, it was held that if the retracted confession is believed to be voluntary and true, it may form the basis of a conviction but the rule of practice and prudence requires that it should be corroborated by independent evidence. Therein also for the*

charges of capital offence, the trial Court did not accept the confessional statement of co-accused containing inculpatory and self-exculpatory statement. The High Court reversed the acquittal and convicted the accused, accepting that part of the confessional statement of the accused which was corroborated from other evidence. This Court upheld the conviction and held that it is not necessary that each item of fact of circumstance mentioned in the confessional statement requires to be corroborated separately and independently. It would be sufficient if there is general corroboration. The ratio in Kashmira Singh's case was referred to.

25. *It would thus be seen that there is no prohibition under the Evidence Act to rely upon the retracted confession to prove the prosecution case or to make the same basis for conviction of the accused. The practice and prudence require that the Court could examine the evidence adduced by the prosecution to find out whether there are any other facts and circumstances to corroborate the retracted confession. It is not necessary that there should be corroboration from independent evidence adduced by the prosecution to corroborate each detail contained in the confessional statement. The Court is required to examine whether the confession statement is voluntary; in other words, whether it was not obtained by threat, duress or promise. If the Court is satisfied from the evidence that it was voluntary, then it is required to examine whether the statement is true. If the Court on examination of the evidence finds that the retracted confession is true, that part of the inculpatory portion could be relied upon to base conviction. However, the prudence and*

practice require that Court would seek assurance getting corroboration from other evidence adduced by the prosecution.

26. In **Naresh J. Sukhawani Vs. Union of India – 1996 (83) E.L.T. 258 (S.C) = 1995 Supp. 4 SCC 663** a two-Judge Bench [to which one of us, K. Ramaswamy, J., was a member] had held in para 4 that the statement recorded under Section 108 of the Act forms a substantive evidence inculcating the petitioner therein with the contravention of the provisions of the Customs Act as he had attempted to export foreign exchange out of India. The statement made by another person inculcating the petitioner therein could be used against him as substantive evidence. Of course, the proceedings therein were for confiscation of the contraband. In **Surjeet Singh Chhabra Vs. Union of India – 1997 (89) E.L.T. 646**, decided by a two-Judge Bench to which one of us, K. Ramaswamy, J., was a member the petitioner made a confession under Section 108. The proceedings on the basis thereof were taken for confiscation of the goods. He filed a writ petition to summon the panch (mediator) witnesses for cross-examination contending that reliance on the statements of those witnesses without opportunity to cross-examine them, was violative of the principle of natural justice. The High Court had dismissed the writ petition. In that context, it was held that his retracted confession within six days from the date of the confession was not before a Police Officer. The Custom Officers are not police officers. Therefore, it was held that the confession, though retracted, is an admission and binds the petitioner. So there is no need to call Panch witnesses for examination and cross-examination by the

petitioner". As noted, the object of the Act is to prevent large-scale smuggling of precious metals and other dutiable goods and to facilitate detection and confiscation of smuggled goods into, or out of the country. The contraventions and offences under the Act are committed in an organized manner under absolute secrecy. They are white-collar crimes upsetting the economy of the country. Detection and confiscation of the smuggled goods are aimed to check the escapement and avoidance of customs duty and to prevent perpetration thereof. In an appropriate case when the authority thought it expedient to have the contraveners prosecuted under Section 135 etc., separate procedure of filing a complaint has been provided under the Act. By necessary implication, resort to the investigation under Chapter XII of the Code stands excluded unless during the course of the same transaction, the offences punishable under the IPC, like Section 120B etc., are involved. Generally, the evidence in support of the violation of the provisions of the Act consists in the statement given or recorded under Section 108, the recovery panchnama (mediator's report) and the oral evidence of the witnesses in proof of recovery and in connection therewith. This Court, therefore, in evaluating the evidence for proof of the offences committed under the Act has consistently been adopting the consideration in the light of the object which the Act seeks to achieve.

31. It is seen that the contraband of 200 gold biscuits of foreign marking concealed in a wooden box and kept in the pit in the compound of the appellant was recovered at 9.00 a.m. on December 6, 1980 in the presence of Panch (mediator) Witnesses

including PW-3. This is proved from the evidence of PWs 2, 3 and 5. There was nothing for PW-3 to speak falsehood against the appellant who is a friend of him. PWs 2 and 5 also withstood the grueling cross-examination. There is nothing to disbelieve their evidence. The appellant herein made statement under Section 108 at 1 p.m. on December 6, 1980, i.e., after four hours. It is unlikely that during that short period PW-2 and 5 would have obtained the retracted confession under Ex. P-4 in his own handwriting running into 5 typed pages under threat or duress or promise. No doubt the wealth of details by itself is not an assurance of its voluntary character. The totality of the facts and circumstances would be taken into account. On a consideration of the evidence the High Court accepted that Ex. P-4 is a voluntary and true confessional statement and accordingly it convicted the appellant of the offences. It is seen that Ex. P-4 was given in furtherance of the statutory compulsion and the appellant made statement in unequivocal terms admitting the guilt. It is seen that in Barkat Ram's case, this Court accepted the retracted confessional statement and upheld, on that basis, the conviction. In Vallabhdas Liladhar's case and also in Rustom Das's case the retracted confessional statement found basis for conviction and in the latter the recoveries were relied as corroborative evidence. In Haroom Abdulla's case, this Court used the evidence of co-accused as corroborative evidence.

32. It is true that in criminal law, as also in civil suits, the trial Court and the appellate Court should marshal the facts and reach conclusion, on facts. In a criminal case, the prosecution has to prove the guilt beyond doubt. The concept of benefit of

doubt is not a charter for acquittal. Doubt of a doubting Thomas or of a weak mind is not the road to reach the result. If a Judge on objective evaluation of evidence and after applying relevant tests reaches a finding that the prosecution has not proved its case beyond reasonable doubt, then the accused is entitled to the benefit of doubt for acquittal. The question then is : whether the learned Single Judge of the High Court has committed any error of law in reversing the acquittal by the Magistrate. Not every fanciful reason that erupted from flight of imagination but relevant and germane requires tested. Reasons are the soul of law. Best way to discover truth is through the interplay of view points. Discussion captures the essence of controversy by its appraisal of alternatives, presentation of pros and cons and review on the touchstone of human conduct and all attending relevant circumstances. Truth and falsity are sworn enemies. Man may be prone to speak falsehood but circumstantial evidence will not. Falsity is routed from man's proclivity to faltering but when it is tested on the anvil of circumstantial evidence truth trans. On scanning the evidence and going through the reasoning of the learned Single Judge we find that the learned Judge was right in accepting the confessional statement of the appellant, Ex. P-4 to be a voluntary one and that it could form the basis for conviction. The magistrate had dwelt upon the controversy, no doubt on appreciation of the evidence but not in proper or right perspective. Therefore, it is not necessary for the learned Judge of the High Court to wade through every reasoning and give his reasons for his disagreement with the conclusion reached by the Magistrate. On relevant aspects, the learned Judge has dwelt

upon in detail and recorded the disagreement with the Magistrate and reached his conclusions. Therefore there is no illegality in the approach adopted by the learned Judge. We hold that the learned Judge was right in his findings that the prosecution has proved the case based upon the confession of the appellant given in Ex. P-4 under Section 108 of the Evidence Act and the evidence of PWs 2, 3 and 5. The prosecution proved the case beyond doubt and the High Court has committed no error of law.”

(Emphasis Supplied)

(iii) It may further be pointed out that a co-ordinate bench of the Tribunal in the case of **Rajesh Pawar Vs. Commissioner of Customs.(P), West Bengal, Kolkata,**¹⁰ had dismissed the plea of retraction of the statement based on the grounds of given under pressure, when no such plea was raised before the CJM at the time of making of the bail application. It also observed that there was no basis to tamper with the makings on the gold bar were it sourced legally. The observations of the Tribunal in para 6 of its order are very pertinent hence reproduced hereunder:

“6. The fact remains that 11 pcs. Of foreign gold biscuits have been recovered from the appellant’s possession. In his

10. 2003 (152) ELT – 201 (Tri-Kol.)

initial statement, he has admitted that these gold biscuits were purchased by him from two unknown persons. There is not even a whisper of fact in the said statement that the gold biscuits were purchased by him from M/s G. Seal & Co. The said statement which is detailed, is written in the hand of the appellant and the bearing of the words "Marzi Bina" at the time of the statement will not make such statement as involuntary inasmuch as the said point was not examined by the adjudicating authority having not been raised before him. As such it cannot be said at this stage as to whether the said words were originally in the said statement or not. I also note that no such averment was made by the appellant before the Id. CJM, at the time of making of bail application. If the appellant was prerssurised to give the statement, he was at liberty to bring the said facts to the notice of the Id. CJM before whom he was produced by the Revenue. As such, it cannot be said that the statement is involuntary and hence not correct. It is seen that the appellant when given opportunity subsequently during the investigation to produce the records, did not come forward with the same so as to help the investigation. The production of the same at the time of adjudication has been rightly ignored by the adjudicating authority by observing that the same was required for the purpose of investigation and if produced at the relevant time, would have advanced the progress of the case. It is also seen that when confronted with the fact that the biscuits purchased by them from M/s G. Seal & Co. bear the marking of swisse whereas the biscuits recovered from the appellant did not bear any such marking. The appellants' explanation is of such marking have

been erased by him so as to avoid any detection. As rightly observed by the adjudicating authority, if the biscuits in question have been legally purchased by him, out of legally imported gold, there was no justification for the appellant to tamper with the marks. The marks having been tampered with by him, the seized biscuits cannot be correlated with the biscuits claimed to have been bought by him from M/s G. Seal & Co. In this view of the matter, I find that the gold in question has been rightly confiscated by the authorities below and a penalty has been justifiably imposed upon the appellants. The impugned orders do not call for any interference. The appeal filed by the appellant is accordingly rejected."

In appeal before the High Court at Calcutta the Hon'ble High Court held the drawl of adverse inference upon failure to discharge the burden Cast upon under Section 123, as to be appropriate and logical and therefore the said order of the Tribunal was maintained¹¹ by the Hon'ble High Court. In stating so, it reversed the order of the single Bench¹² that had faulted upon the Tribunals order. In addition even costs were imposed on the appellants in the matter besides even categorizing the defence arguments as dishonest. Further, the SLP filed by the

11. 2020 (372) ELT – 683 Cal

12.2014 (309) ELT – 600 Cal.

accused against the said order of the DB also got to be dismissed¹³.

(iv) Also, in the case of **Mohamadbhai Chotubhai Cutpiecewala and Another Vs. Additional Collector of Customs**¹⁴, it is clear that a spontaneous statement deserves consideration and cannot be merely rejected by a belated retraction. This is so as the same is given without premeditation, ill will, bias etc.

(v) It may be pertinent to also advert to the case of **Phoola Ram V. Commissioner of Customs, Jaipur**¹⁵, wherein non-response to the summons issued by the authorities was held as an act of non co-operation for which it was felt safe to draw an adverse inference. It had also pointed out that a statement impleading the employer cannot be given by the employee unless it was a fact, particularly so when there were no indication of coercion, duress etc. Also the failure of the appellants to produce the purported documents in support of licit importation/possession, not produced either before the magistrate at the time of arrest, nor produced thereafter at the time of bail application – thus the non submission of such documents at first instance and their production later was clearly

13. 2022 (382) ELT – A 99SC

14.1986 (25) ELT – 413 T

15. 2007 (208) ELT – 308 (Tri – Del.)

held to be a part of massive cover up. Even a two months delay in production of the documents was clearly not accepted by the Tribunal, even though the seized gold was a mere 500 gms (5 foreign marked biscuits of 10 to las each) valued a little over Rs. 5 lakh. Relevant para of the said order is as hereunder:

"6. On the perusal of the records, I find, that the seizure of the gold biscuits was made on 23-10-97 and the statement of appellant no. '2' recorded on the spot which categorically indicates that, appellant no. '2' was an employee of appellant no. '4' and he was carrying the gold biscuits and the Indian currency, as per instructions of appellant no '4'. The statement of appellant no. '2' also indicates that he informed the authorities that these gold biscuits were of smuggled nature. The authorities, during the search of appellant no. '2' did not come across any documentary evidence regarding licit possession of the gold biscuits. It was argued by the advocate for appellant that the appellant no. '2' had in his possession the photocopy of bill '12' dated 17-10-97 but the authorities refused to take cognizance of such bill. To my mind, this is not correct statement, in as much as that when appellant no. '2' was arrested and produced before the Chief Judicial Magistrate, no documents were produced nor there is any averment of the presence of the photocopy of the bill '12' dated 17-10-97. Further, I find that the appellant no. '2' had moved a bail application on 25-10-97, in which also he had not disclosed presence of the bill 12 dated 17-10-97 to indicate the licit possession of the gold biscuits. The appellant no. '2' also did not indicate in his bail application that the amount of Indian currency was towards part payment of the purchase of

agricultural land. In the absence, of any such averments on the first instance, the statements recorded by the authorities of appellant no. '2' on 23-10-97 indicates that the appellant no. '2' was carrying smuggled foreign marked gold biscuits and the Indian currency, which was sale proceeds of smuggled silver.

Further, I find that appellant no. '4' had claimed the ownership of the seized foreign marked gold biscuits and Indian currency. It was the contention of the appellant no. '4' that he had legally purchased these gold biscuits from M/s Dhan Cholia Sons, Delhi vide bill '12' dated 17-10-97. I find from records that the authorities had visited the residential/business premises of the appellant no. '4' in Bikaner on 24-10-97. On that date, appellant no. '4' was not available but his son was present in the residence/business premises. The search of the business premises did not reveal any sale or purchase of the gold and nor did son of appellant no. '4' produce any record regarding the purchases of foreign marked gold biscuits and the currency being in possession for sale and purchase transaction of agricultural land. I find from records that the appellant no. '4' did not attend summons which were issued by the authorities to him till 19-12-97. The authorities had issued 6 summons to the appellant no. '4' to cooperate in the investigation which was not attended to by the appellant no. '4' but on 19-12-97, bill no. '12' dated 17-10-97 of M/s. Dhan Cholia Sons, Delhi and some agreements regarding the sale and purchase of agricultural land were produced. If these documents were in the possession of the appellant no. '4', he should have produced these documents at the first instance when he at time of seizure or was issued first summons by the

authorities. The learned advocate could not point out from records why the appellant no. '4' did not respond to the summons issued by the authorities till 19-12-97. The non-cooperation of appellant no. '4' with the investigating authorities from 24-10-97 to 19-12-97 is enough to draw an adverse inference against the appellant no. '4'. Since appellant no. '4' could not justify the non-production of the bill of M/s. Dhan Cholia Sons, Delhi and other documents regarding the sale and purchase of agricultural land, prior to 19-12-97, it is very evident that the appellant no. '4' had embarked upon a massive cover up operation to give legitimacy to the whole issue. I find that appellant no. '2' being an employee of the appellant no. '4', could not have given any statement which is wrong and which can be inculpatory against his own employers, unless and until it is a fact. The statements recorded of appellant no. '2' on the spot do not indicate any duress or coercion which can be noticed from the fact, that on request from appellant no. '2', the authorities took him to a safe place i.e. the Division Office of the Customs Authorities in Bikaner for search and examination of his bag. I find from the records that the bill no. '12' dated 17-10-97 as issued by M/s. Dhan Cholia Sons, Delhi only takes about sale of 5 gold biscuits but does not indicate any marks which were found on the gold biscuits seized from appellant no. '2'. It is a common knowledge that the gold biscuits with foreign marking, if legally imported, carry unique markings on them, which is generally reflected on the invoices which are issued for sale of such gold biscuits. Learned advocate was not able to show from the records that the markings which were found on the gold biscuits tallied

with the markings as indicated on the invoices on M/s. Dhan Cholia Sons, Delhi. In the absence of any direct evidence regarding the licit possession of 5 foreign marked gold biscuits in the hands of appellant no. '2' and appellant no.'4', the absolute confiscation as ordered by the lower authorities is correct and does not require any interference."

(Emphasis Supplied)

(vi) In the case of **Jamtaraj Kewalji Govani Vs. State of Maharashtra**¹⁶ the Hon'ble Apex Court while considering the matter had observed that in view of the time gap between the date of seizure and the submission of documents, the necessary inference in the case has to be drawn.

(vii) Even in the case of **Rasilaben H. Rathod Vs. Commissioner of Customs, Ahmedabad**,¹⁷ involving a seizure of 58320(58.320kgs) grams of foreign marked gold this Tribunal had categorically held the bills as produced by the party to show the acquisition of gold as licit, to be non acceptable.

(viii) Moreover, when documentary evidence is tendered in support of licit acquisition of gold (to which onus under Section 123 applies), it is of paramount importance and rather formidable to ensure 100% accuracy and matching of the goods with the details as contained in the bills/invoice submitted in support as a cover. Even a small little mismatch is safe enough to discredit those bills/vouchers/invoice and reject the same. Support for the

16. AIR 1968 SC – 178

17. 2003 (156) ELT 675 T.

aforesaid proposition and statement in law can be drawn from the ratio of the orders passed by Hon'ble Kerala High Court in the case of **Commissioner of Customs, Cochin Vs. Om Prakash Khatri¹⁸**, and any variation/difference/incompleteness in details furnished in documents can lead to the legal finding of non-discharge of the onus of proof cast upon the appellants herein under Section 123 of the Act.

54. It being an admitted position that the four accused appellant No. 1-4 were regular (workers) carriers for Rinku Verma and that the foreign marked gold, the legal veracity of which was in itself questionable, as found with no supporting documents of procurement and possession of the said gold, certainly establishes the culpability of the four accused and renders all four of them liable for penal action. Desperate and diehard attempts to legalize the illegal transaction and legitimize the illicit procurement of foreign marked smuggled gold, through fraudulent means and fictitious invoices forced by Rinku Verma alongwith Pradeep Bothra, stands unveiled, rendering all the accused liable for appropriate punitive action under the provisions of the Customs Act. The alteration of the initial version of the four accused carriers of gold, is nothing more than a futile bid to conceal this smuggled nature of the seized gold and avoid penal consequences in law.

55. In view of the aforementioned and the feeble and unsustainable bid of Rinku Verma (who claims ownership of said

18. 2019 (366) ELT – 402 Ker.

gold and failed attempt at legitimizing the procurement of 6kg of foreign marked gold), in cahoot with Pradeep Bothra is not legally sustainable. They for their contumacious conduct and clear mens rea are certainly liable for all consequences in law including punitive action against them. The order of the learned adjudicating authority therefore suffers from no inherent defect and is in accordance with law. There being no legal infirmity in the order appealed, I am of the view that the order of the learned adjudicating authority is legally sustainable and is required to be upheld as it's merits are unquestionable. In view of above and from the enquiries conducted it is clear, categorical and comprehensible that the concerted and clever attempt at creation of documents and the said documentary evidence tendered in order to demonstrate the licit acquisition of foreign marked gold is false, forged and fabricated. The attempted rebuttal of the onus cast upon the appellants under Section 123 of Customs Act 62 has failed completely and very miserably.

56. In the given circumstances and my foregoing discussions, I am of the view that the department has successfully discharged its primary onus at the preliminary stage and with the onus cast onto the appellants under Section 123, not having been discharged in the least, the order assailed warrants no interference and is required to be upheld. Having thus arrived at the irresistible conclusion that contraband gold smuggled from a third country of origin is liable to absolute confiscation and the appellants subjected to imposition of penalty, I order accordingly.

Under the circumstances, I uphold the Order-in-Original, confiscating absolutely the said 6kg foreign marked gold alongwith the other items and also uphold the imposition of penalty as contained in operative part of the adjudication order (i) to (xiv).

57. The order of the learned adjudicating authority is therefore upheld and all the appeals filed are dismissed.

Lackadaisical Investigations

58. Before parting it is imperative to point out that the investigations undertaken by the department in the matter have been done in a very shoddy and unprofessional manner. There has been no serious attempt to conduct wholesome enquiries into the case. The general approach of the department is very casual and callous. The seriousness of investigations as required to be conducted in a case of this nature is not evident from the approach of the investigating officers. Not only is the speed of investigations as is required to be undertaken in such type of cases is missing, there has been no serious attempt at timely connecting the dots and the leads. A reading of the show cause notice suggests minimal action undertaken. The case it appears is pursued and investigated not on a day to day basis but perhaps on a month on month basis, the summons are issued on an average of one per month per person, even though the investigations were in their infant stage. Scarce little care is taken to even send local summons, as are sent so as to be received after the due date rendering them infructuous, telephone call records that ought to have been looked into in the first instance, say within 24 hours of the initiation of the case are

being requisitioned for almost after a month (27 days to be precise), reference to communications/correspondence carry no details of date of origin or date of receipt (e.g. refer para 26 of show cause notice), with several other glaring lapses. It appears that the departmental investigating officers, as also the supervisory officers were completely taken over by a laidback approach and were not serious enough at all in conducting the necessary investigations in the matter. It cannot get more casual than this that the first summon to the person who is alleged as the key person and, who claims the ownership of the seized/confiscated gold as belongs to him, and is the kingpin and mastermind of the entire racket is being sent, only after four months, despite his name having cropped up in the enquiries on day one i.e. the day of the seizure itself. Summons to another lead player, the alleged supplier of gold were initially issued, at the rate of one per month and subsequently investigations against him were given a complete go by. Necessary action for pretrial disposal of seized gold under Section 110(1A) of the Customs act, is taken up, several months after seizure, thereby if not negating, severally diluting the very purpose of the enactment. That nothing can be worse than this that the CDR data of the prime accused, Rinku Verma appears to have not been investigated at all. There being no reference to it in the show cause notice. Likewise no locational details of the telephone numbers of the four carriers were sought for, to ascertain confirm the actual pick up spot of the foreign marked gold as stated in original statements and refuted/denied several months later. Even the show cause notice is also vaguely and casually drafted,

with several important details not having been gone into, it even does not list the RUDs. There are several other serious breaches in the investigations undertaken by the department. It is time therefore, that the department trained its officers to undertake investigations in a professional manner, and each and every aspect is looked into. Speed, is the essence in conduct of such investigations, and that should be the norm. The drafting of notice should also be taken as an essential component of this training process. The registry is therefore directed that a copy of this order be marked to the Secretary (Revenue) and the Chairman, CBIC for taking appropriate action in the matter so that any recurrence of such instance is eliminated.

59. In view of my observations and discussions above and my findings recorded in para 57 supra upholding the impugned order and in most respectful disagreement with the order recorded by the Hon'ble Member (Judicial) in the matter, I therefore request the Hon'ble Member (Judicial) that we direct the Registrar to refer the matter to the Hon'ble President, CESTAT in terms of the provisions of Section 129C(5) of the Customs Act, 1962, alongwith the case records.

Sd/-
(Rajeev Tandon)
Member (Technical)

60. In view of the above and the difference in the view points of we two members, constituting the Bench who heard the matter, we direct the Registrar to refer the matter to the President for his kind consideration and referring the matter to a third member for the resolution of the conflict and the difference of opinion.

The points of difference are as under:

(a) Whether the appellants have discharged their burden under Section 123 of the Customs Act, 1962 in the facts and circumstances of the case, consequently, the goods are not liable for confiscation, as held by Member (Judicial);

or

(b) Whether the appellant have failed to discharge their burden under Section 123 of Customs Act, 1962 and hence, the goods are liable for confiscation in the facts and circumstances of the case as held by Member (Technical).

(Pronounced in the open court on 29.08.2023)

**Sd/-
(ASHOK JINDAL)
Member (Judicial)**

**Sd/-
(Rajeev Tandon)
Member (Technical)**

K.M.

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL,
KOLKATA**

REGIONAL BENCH – COURT NO.1

Customs Appeal No. 79455 of 2018

(Arising out of Order-in-Original No.15/Cus/CC(P)/WB/2018-19 dated 31.08.2018 passed by Commissioner (Appeals) of Customs, Kolkata)

Subham Verma

(S/o Shri Shree Nath Verma,
H. No. 981, Manmohan Park, Old Katra,
Allahabad, Uttar Pradesh-211002)

Appellant

VERSUS

Commissioner of Customs (Preventive), Kolkata

(15/1, Strand Road, Kolkata-700001)

Respondent

With

(i) Customs Appeal No. 79458 of 2018 (Golu verma Vs. Commr. Customs (Preventive), Kolkata (ii) Customs Appeal No. 79459 of 2018 (Rajendra Kumar Dhuriya Vs. Commr. Customs (Preventive), Kolkata (iii) Customs Appeal No. 79460 of 2018 (Shri Sourabh Vs. Commr. Customs (Preventive), Kolkata) (iv) Customs Appeal No. 79461 of 2018 (Shri Rinku Verma Vs. Commr. of Customs (Preventive), Kolkata (v) Customs Appeal No. 79463 of 2018 (Pradeep Kumar Bothra Vs. Commr. of Customs (Preventive), Kolkata

(i) (Arising out of Order-in-Original No.15/Cus/CC(P)/WB/2018-19 dated 31.08.2018 passed by Commissioner (Appeals) of Customs, Kolkata)
(ii) (Arising out of Order-in-Original No.15/Cus/CC(P)/WB/2018-19 dated 31.08.2018 passed by Commissioner (Appeals) of Customs, Kolkata)
(iii) (Arising out of Order-in-Original No.15/Cus/CC(P)/WB/2018-19 dated 31.08.2018 passed by Commissioner (Appeals) of Customs, Kolkata)
(iv) (Arising out of Order-in-Original No.15/Cus/CC(P)/WB/2018-19 dated 31.08.2018 passed by Commissioner (Appeals) of Customs, Kolkata)
(v) (Arising out of Order-in-Original No.15/Cus/CC(P)/WB/2018-19 dated 31.08.2018 passed by Commissioner (Appeals) of Customs, Kolkata)

APPEARANCE :

Shri N. K. Chowdhury, Advocate for the Appellant
Shri Manish Mohan, Addl. Commir. (Authorized Representative) for the Respondent

CORAM:

HON'BLE MR. R. Muralidhar, MEMBER (JUDICIAL)

Interim Order No.2-7/2024

DATE OF HEARING : 11 January 2024
DATE OF PRONOUNCEMENT : 19/02/2024

PER R. MURALIDHAR:

In these Appeals, the following Difference of Opinion has been referred to me for deciding the issue :

- (a) Whether the appellants have discharged their burden under Section 123 of the Customs Act, 1962 in the facts and circumstances of the case, consequently, the goods are not liable for confiscation, as held by Member(Judicial);

Or

- (b) Whether the appellant have failed to discharge their burden under Section 123 of Customs Act, 1962 and hence, the goods are liable for confiscation in the facts and circumstances of the case as held by Member (Technical).

2. When the Appeal was taken up for Hearing, the Ld. Counsel appearing on behalf of the Appellants submits that there are two statements recorded initially by the Appellant Nos.1 to 4, who have subsequently retracted during the third recorded statement. The Department has proceeded with their subsequent investigation based on the facts coming out of the third recorded statement. The third statement was recorded on 15 & 16 February 2016. In this statement they have stated that one Mr. Rinku Verma is the owner of the gold. Subsequently, Mr. Rinku Verma [Appellant No.5 herein] has produced documentary evidence to the effect that the gold in question was procured by him from Snehal Gems Pvt Ltd Mumbai. Towards this, he has submitted the invoices raised by the seller. The details of the payment made through banking channel and copy of the ledger account maintained by the seller were submitted. Investigation was carried out at the end of Snehal Gems Pvt Ltd., and their Director Mr Pradeep Kumar Bothra [Appellant No. 6 herein] has recorded his statement, wherein he has confirmed that they have sold the gold in question to Mr Rinku Verma under these invoices. They have also produced documentary evidence towards the purchase of gold. Therefore, the learned counsel submits that the

Department has completely ignored the first two statements and has gone on to investigate the third statement and conducted the verification of the documentary evidence, based on the third statement only. The Appellant No.5 has produced the requisite documents, duly corroborated by the Appellant No.6 who is the seller of the gold to Appellant No.5. The Appellant No.6 has also produced the documentary evidence towards licit purchase of gold at his end and has provided the relevant stock register, purchase invoices. Hence, he submits that it can be held that the burden to prove purchase has been discharged by the Appellant under section 123.

3. He further submits that the delay in claiming the ownership, and delay occurring in other instances at the most can give rise to some doubt, but based on the same, the appellants cannot be implicated purely on account of assumptions and presumptions. He reiterates the detailed findings of the Hon'ble Member(Judicial) and cites various case law in this regard. In view of these submissions, he submits that the confiscation order confirmed by the Hon'ble Member (Technical) is erroneous.

4. He also prayed that he should be allowed to rely on a few more case law for which he was given time till 19.01.2024 to submit the hard copies as well as soft copies to the Registry. Accordingly, he has submitted these case laws which have been taken on record.

5. The Ld. Authorized Representative for the Department submits that the Member(Judicial) has gone into the facts of documentary evidence towards purchase directly without giving any finding on the initial two statements made by the Appellant No.1-4 in the space of nearly 90(ninety) days and subsequent retraction after about 7(seven) months. He submits that first of all the question has to be decided as to whether the retraction can be considered or is proper before going to the next aspect as to whether the facts contained in the third (retraction statement) are correct or not. Further, he submits that any prudent person

would have the duty to remember about the transactions and the dates on which the seizure was made, statements were recorded, statements were allegedly retracted and the documentary evidence was produced towards the procurement of goods by the Appellant No.5. He takes me through the various findings given by the Hon'ble Member (Technical), wherein he has gone into each and every point in a detailed manner and has given findings to come to a conclusion as to why the appellants have not been able to discharge the burden to rebut the allegations. Therefore, he submits that Member (Technical) has correctly affirmed the Order-in-Original. Accordingly, he prays that the Appeals may be dismissed.

6. Heard both sides in detail and perused the documents placed on record in the Appeal paper books and documents submitted by both the sides.

7. On going through the Appeal papers and other documents submitted by both the sides, the facts of the case emerging are as under :

7.1 The four appellants 1-4, namely Rajendra Kumar Dhuria, Saurabh, Golu Verma and Shubham Verma were intercepted by the authorities at Howrah railway station. They were found to be in possession of 6 pieces of 1 kg. gold bar each. The said gold was foreign marked of Swiss origin with 995.0 purity. The gold bars carried the markings "PMAPSUISSE PMAP ESSAYEUR FONDEUR". In the entire proceedings, the foreign origin of the gold is not disputed by any party.

7.2 The chronological details of the proceedings initiated are as per the following Table :

Date	Details
19.05.2015	Interception of 4 accused appellant at Howrah railway station and seizure of foreign origin gold from them

	Statement of Appellants 1 to 4 recorded under Section 108 of Customs Act. They admit that they worked as a carrier of foreign marked gold for Rinku Verma for which they were paid Rs. 1500 each. They state that the said gold was procured from Shashi Kant Patil of Dhanlakshmi Bullion Pvt. Ltd Kolkata for delivery to Rinku Verma. They indicate the amount of cash they carried to this shop. Admission of Ashish Patil cousin of Shashi Kant Patil that they deal in sale and purchase of foreign marked gold. Shashi Kant Patil was at the shop between 12.30 p.m. to 5.30 p.m.
20.05.2015	The appellants 1 to 4 are arrested and were later released on bail on 3 July 2015 and 7 th July 2015
23.06.2015 & 09.7.2015	Shashi Kant Patil fails to appear for the summons issued to him.
28.07.2015	Statements of 4 appellants Rajendra Kumar Dhuria, Saurabh, Golu Verma and Shubham Verma rerecorded after release. They reiterate their earlier version and confirm the original statement of 19.05.2015 and admit carrying gold for Rinku Verma, having made payments in cash given by him to Shashi Kant Patil towards the seized gold from Shashi Kant Patil
14.08.2015	Shashi Kant Patil fails to appear though the summons was issued for the third time
23.09.2015	Rinku Verma fails to appear before the authorities

	despite service of summons.
12.10.2015	The appellants 1 to 4, in response to a communication issued under Section 150 of Customs Act for pretrial disposal of gold under Section 110((1A) of the Customs Act, submit that the same may be returned to Rinku Verma [Appellant No.5], who for the first time claims the ownership of the seized gold.
16.10.2015	Shashi Kant Patil, appears before the authorities for the first time. He denies having sold any quantity of gold to Rinku Verma or having received any cash payment from Appellants 1 to 4.
26.10.2015	Rinku Verma, the claimant of the gold, appears before the authority for the first time, post seizure. He submits 4 invoices towards purchase of gold from Snehal Gems Pvt. Ltd.
14.12.2015	Summons issued to Director/Partner/Proprietor of Snehal Gems. But he does not appear before the authorities
08.01.2016	Pradeep Kumar Bothra, Director of Snehal Gems Pvt. Ltd, appears before the authorities for the first time. He submits that he has sold the 6 kg. gold to Rinku Verma against the 4 bills tendered by him. He states that in the course of their gold trade, they have bought the gold from other Vendors. On a question as to whether the gold seized is the same which has been sold by him, he states that he can only confirm that the Rinku Verma regularly buys the gold and cannot

	comment as to whether the seized gold is the same or not.
15.2.2016 &16.02.2016	The appellants 1 to 4 vide their letter dated 15/2 & 16/2/2016 retract their earlier statements and submit that that earlier statements tendered on 19.05.2015 and 28.07.2015 were were given under duress and were not correct

7.3 To summarize the above events :

(a) The Appellants 1 to 4 on 19.5.2015 and 28.7.2015, uniformly state that the gold in question was procured for Rinku Verma [Appellant Number 5] from Shashi Kant Patil of Dhanlakshmi Bullion Pvt Ltd on cash payment.

(b) The Appellants 1 to 4 vide their letter dated 12.10.2015, submit that the seized gold may be returned to Rinku Verma. On the same day, Rinku Verma stakes his claim as the owner of the seized gold.

(c) On 16.10.2015, Shashi Kant Patil appears before the authorities and denies having sold any quantity of gold to Rinku Verma.

(d) On 26.10.2015, Rinku Verma submits 4 Invoices towards purchase of gold from Snehal Gems Pvt. Ltd.

(e) On 8.1.2016, Statement of Pradeep Kumar Bothra [Appellant Number 6] was recorded. He submits that the gold in question was sold to Rinku Verma vide the 4 Invoices mentioned by Rinku Verma.

(f) The Appellants 1 to 4 vide their letters dated 15.2.2016 and 16.2.2016, retract their earlier statements taking the ground that the earlier statements were recorded under duress.

7.4 A careful reading of the above details clarifies that till 28.7.2015, it was being maintained that the gold in question was procured from Shashi Kant Patil for delivery to Rinku Verma. It was also said that the cash for such procurement was given by Rinku Verma.

7.5 However, vide Letter dated 12.10.2015, Rinku Verma submits the claim for his ownership by way of procurement of the gold from Snehal Gems Pvt Ltd. On 26.10.2015. He submits copies of 4 invoices issued by Snehal Gems Pvt Ltd. Their Director Pradeep Kumar Bothra confirms that the sale has taken place vide these 4 Invoices. He also produces their own purchase Invoices so as to prove that the gold in question was sold to Rinku Verma out of such procured gold.

7.6 It is noted that till 28.7.2015, the recorded statements stated that the gold has been purchased on cash basis from Shashi Kant Patil by the Appellants 1 to 4 and they were carrying the same for handing over to Rinku Verma [Appellant Number 5]. Hence, he was yet to receive the gold procured from Shashi Kant Patil. This was the stand till 28.7.2015. However, on 26.10.2015 while staking the claim for ownership, Rinku Verma, submits that the gold in question was already purchased from Snehal Gems Pvt Ltd by way of 4 Invoices. He claims that he has sent these gold bars through Appellant No.1 to 4 for getting same converted into jewellery. Appellants 1 to 4 in their retracted statement dated 15/16.2.2016 also state that they were carrying the gold given to them by Rinku Verma for onward delivery to others for conversion into jewellery. Thus, there is a complete Role Reversal so far as Rinku Verma is concerned.

7.7 While it is a case of complete Role Reversal, still what emerges is that under both the Roles, Rinku Verma is the claimant towards the ownership of the seized gold. Thus, it cannot be denied that in any view of the matter, Rinku Verma [Appellant Number 5], is the owner of the gold.

8. At this point, it would be important to go through the provisions of Section 123 of the Customs Act 1962. The relevant portions are extracted below :

123. Burden of proof in certain cases.

(1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, **the burden of proving that they are not smuggled goods shall be-**

(a) in a case where such seizure is made from the possession of any person,

(i) on the person from whose possession the goods were seized; and

(ii) if any person, other than the person from whose possession the goods were seized, claims to be the owner thereof, also on such other person;

(b) in any other case, **on the person, if any, who claims to be the owner of the goods so seized.**

9. The above statutory provision at Section 123 (1) (a) (ii) and (1) (b) clearly states that the burden of proving that they are not smuggled goods shall be on 'the person under whose possession the goods were seized' or 'on the person who claims to be owner thereof'.

10. In the present case, the Appellants 1 to 4, in none of the three recorded statements, have laid any claim towards the ownership of the gold. If all their recorded statements and the letters of Rinku Verma are read together, it is clear that only Rinku Verma can be treated as the Owner of the Gold. This inspite of the fact that there is a complete Role Reversal as discussed above.

11. Though the Appellant No.1 to 4 possessed the gold at the time of seizure, the moment someone else lays claim towards the

ownership, the onus shifts to that person to prove that the gold is not smuggled. Therefore, the burden to prove that the gold in question was not smuggled goods is solely on Rinku Verma and not with any of the other Appellants 1 to 4, since they have always been claiming that they are only carriers / handlers and never laid any claim towards the ownership.

12. It was for the Revenue to prove that the gold in question were smuggled goods so as to negate the claims of Rinku Verma after verifying the veracity of the documentary evidence produced by him.

13. It is observed that Rinku Verma has claimed that he has purchased the gold in a licit way through the 4 Invoices issued by Snehal Gems Pvt Ltd. Admittedly, the banking transactions and ledger details towards these Invoices were provided by him in support of his claim.

14. The Hon'ble Apex Court in the case of CCE Nagpur Vs Ballarpur Industries Ltd – 2007 (215) ELT 489 (SC) has held "*It is well settled that the show cause notice is the foundation in the matter of levy and recovery of duty, penalty and interest*". It has also been held in catena of decisions, that the allegations in the Show Cause Notice are the pillars / foundation of the entire proceedings. Not only the investigations should be conducted in an exhaustive manner, but also proper conclusion should be arrived at in the Show Cause Notice, with specifics of allegations on the roles played by various Noticees. Therefore, it would be important to go through the relevant portions of the Show Cause Notice, which are reproduced below [Para Numbers given are not that of the Show Cause Notice, but are supplied for convenience of reference here] :

(a) *In his voluntary statement recorded under Section 108 of the Customs Act, 1962, Raghendra Kumar Dhuriya stated that he and Golu Verma each paid Rs.41 lakhs totaling Rs.82 lakhs to Shashikant Patil of M/s Dhanlaxmi Bullion Pvt. Ltd., 43, Nalini Seth Road, 1st Floor, Kolkata-700007 and took the delivery of 3*

kg gold from him and after taking delivery they first went to Room No.306, 67/43, Strand Road, Cross Road No. 08, 2nd Floor, Kolkata where they had stayed. After reaching there, they both found that Subham Verma and Sourabh Kumar were already there with 3 Kg gold. In the afternoon, they all four left with 6 Kg gold to Howrah Station to board the train towards Allahabad to hand over the gold to Rinku Verma

(b) In his voluntary statement recorded under Section 108 of the Customs Act, 1962, Sourabh stated that he and Shubham Verma paid Rs. 35 Lakhs and Rs.48 Lakhs respectively to Shashikant Patil of M/s Dhanlaxmi Bullion Pvt. Ltd., 43, Nalini Seth Road, 1st Floor, Kolkata-700007 and took delivery of 3 kg gold from him and after taking delivery they first went to Room No.306, 67/43, Strand Road, Cross Road No.08, 2nd Floor, Kolkata where they had stayed. After reaching there, they both found that Raghendra Kumar Dhuriya and Golu Verma were already there with 3 kg gold. In the afternoon, they all four left with 6 Kg gold to Howrah Station to board the train towards Allahabad to hand over the gold to Rinku Verma.

(c) In voluntary statement, Golu Verma stated that he and Raghenda Kumar Dhuriya paid Rs.82 Lakhs to Shashikant Patil of M/s Dhanlaxmi Bullion Pvt. Ltd. 43, Nalini Seth Road, 1st Floor, Kolkata-700007 and took delivery of 3 kg gold from him and after taking delivery they first went to Room No.306, 67/43, Strand Road, Cross Road No.08, 2nd Floor, Kolkata where they had stayed. After reaching there, they both found that Sourabh and Shubham Verma were already there with 3 kg gold. In the afternoon, they all four left with 6 kg gold to Howrah Station to board the train towards Allahabad to hand over the gold to Rinku Verma.

(d) On 16/10/2015, Shashikant Patil alias Banti tendered his voluntary statement under Section 108 of the Customs Act, 1962 in response to the Summons issued vide C. No. VIII(10)02/P&I/CCP/WB/2015-16/1113 dated 09/10/2015 wherein he stated that he has been doing the business of sale & purchase of gold for last two years and denied to have any

relationship with Rinku Verma of Katra, Manmohan Park, Allahabad but when he was asked that there were communications made from his mobile number 9051583855 to mobile number 7388103677 of Rinku Verma, he replied that so many customers used to call him to ask the rate of gold, hence it may be that there have been communications with mobile number 7388103677. He also denied to identify the four accused of the case Sourabh, Raghendra Kumar Dhuriya, Shubham Verma & Golu Verma and stated that he had not sold any gold to them on 19/05/2015. He further stated that on the day of 19th May, 2015, he sold 366.300 gms gold and 212.450 gms of gold vide Voucher No.41 & 42 dated 19/05/2015 to Maheshwari Refinery, Nabadwip which is evident from the sale invoices.

- (e) *On 16/10/2015, Rinku Verma tendered his statement under Section 108 of the Customs Act, 1962 in response to the Summons issued vide C. No. VIII(10)02/P&I/CCP/WB/2015-16/1114 dated 09/10/2015 wherein he stated that he has been doing the business of sale & purchase of gold and gold jewellery from Delhi, Mumbai and Kolkata and he operates his business from his shop at 90/A/107, Mahajani Tola, Allahabad. He further stated that he knows Raghendra Kumar Dhuriya, Sourabh, Shubham Verma and Golu Verma and all they used to work for him. He also stated that he had been doing the business for last one year with Shashikant Patil of M/s Dhanlaxmi Bullion Pvt. Ltd., 43, Nalini Seth Road, 1st Floor, Room No. 101, Sonapatty, Kolkata but could not provide any sale-purchase document or any transactional evidence. He also stated that he does the business of sale and purchase of gold and jewellery with Meera Jewellers of Delhi, Snehal Gems Pvt. Ltd. of Mumbai and Shashikant Patil and Pradeep Gupta of Kolkata. He claimed that 6 kg gold recovered from the possession of Rajendra Kumar Dhuriya (2 kg gold of foreign origin), Shubham Verma (02 kg gold of foreign origin), Sourabh (01 kg gold of foreign origin) and Golu Verma (01 kg gold of foreign origin) was purchased by him from Snehal Gems Pvt. Ltd, Bidg. No. 6/127, Mittal Industrial Estate Andheri, Kuria Road, Andheri East, Mumbai-400059 vide:-*

- (i) Bill No. GOLD/MAY/1/2015-16 dated 02/05/2015 (1 kg gold),
- (ii) Bill No. GOLD/MAY/2/2015-16 dated 05/05/2015 (2 kg gold),
- (iii) Bill No. GOLD/MAY/3/2015-16 dated 09/05/2015 (2 kg gold).
- (iv) Bill No. GOLD/MAY/4/2015-16 dated 12/05/2015 (1 kg gold),

but all the bills are not supported by any import document neither any payment related documents were submitted by Rinku Verma. He stated that all the required documents may be sought for from Snehal Gems Pvt. Ltd.

(f) On 30/10/2015, Summons in the name of Director/Partner/Proprietor of Snehal Gems Pvt. Ltd., Bldg. No. 6/127, Mittal Industrial Estate Andheri, Kuria Road, Andheri East, Mumbai-400059 was issued and e-mailed to their e-mail id i.e. sgpl1991@gmail.com for submitting the below mentioned documents.

(g) Again, on 22/12/2015, summons was issued to the Director/Partner/Proprietor of Snehal Gems Pvt. Ltd. for his/their appearance before Customs authority on 08/01/2016. However, on the said date, Pradeep Kumar Bothra S/o Lal Chand Bothra, Director of M/s Snehal Gems Pvt. Ltd. tendered his voluntary statement before the Superintendent of Customs, P & I, Branch, CC(P), W.B., Kolkata wherein he inter alia stated that he has been doing the business of sale and purchase of gold, gold jewellery and diamond since 1991 and he knew Rinku Verma since April, 2015. He also could not identify the four accused persons in this case i.e. Raghendra Kumar Dhuriya, Sourav, Subham Verma & Golu Verma. In reply to question that Rinku Verma has claimed that the seized 6 kg gold was purchased by him from M/s Snehal Gems Pvt. Ltd., P. K. Bothra replied that he had sold 6 kg gold to Rinku Verma as (i) GOLD/MAY/1/2015-16 dated 02/05/2015, (ii) GOLD/MAY/2/2015-16 dated 05/05/2015, (iii) GOLD/MAY/3/2015-16 dated 09/05/2015, (iv) GOLD/MAY/4/2015-16 dated 12/05/2015 and inscription and origin of country of the seized gold, he stated that he had sold

6kg gold vide the said four bills/invoices but could neither state the inscription and origin of country of the gold sold nor could confirm that the seized gold is the same gold which was sold by him to Rinku Verma. Further, he could not provide any import documents regarding the gold sold. When, he was asked the reason for tampering of Sl. No. of the bars, he could not state any reason. He also tendered some payment related documents but could not confirm that the relevant payments were made for the seized gold.

- (h) *Thereafter, at the final stage of investigation, unexpectedly letters were received from the four accused persons i.e. Raghendra Kumar Dhuriya, Sourabh, Subham Verma and Golu Verma wherein all of them mentioned that the gold seized from their possession was given to them by Rinku Verma of Allahabad for the purpose of getting gold jewellery in exchange of the same from Kolkata, Sonapatty and their statements recorded on 19/05/2015 was not proper, correct or voluntary, hence to verify the genuiness of the claim made by Rinku Verma and to complete the investigation, another summons were served to them for recording before the Superintendent of Customs, P & I Branch, CC(P), W.B., Kolkata. Raghendra Kumar Dhuriya & Sourabh tendered their voluntary statement on 15/02/2016 and Subham Verma & Golu Verma tendered their voluntary statement on 16/02/2016 before the Superintendent of Customs wherein they inter alia stated that they have never heard the name of person namely Pradeep Kumar Bothra and any firm namely M/s. Snehal Gems Pvt. Ltd. When they were asked that why they had mentioned in their letter that their statement recorded on 19/05/2015 and 28/07/2015 that they had procured the seized gold from one Shashikant Patil of Sonapatty, Kolkata, they replied that seized gold were handed over to them by Rinku Verma at Allahabad and their statements recorded on 19/05/2015 and 28/07/2015 are wrong and statements recorded on 15/02/2016 is correct. When they were informed that for giving false and incorrect statement, they can be liable for penalty and punishments, they stated that Rinku Verma handed over the seized gold to them to exchange the same with jewellery from Shashikant Patil of Sonapatty, Kolkata but the same was denied by Mr. Patil. Further, they could not ascertain*

the actual source of seized gold. In view of the above, it appears that the said four accused persons and Rinku Verma are trying to substantiate their claim for seized gold by concocted means.

(i) The investigation of the case reveals that the four accused persons in this case i.e. Raghendra Kumar Dhuriya, Sourach, Subham Verma and Golu Verma had been working as gold carriers for Rinku Verma of Allahabad and they all are habitual offender and are very much acquainted with the modus operandi of the smuggling activity of gold. From the very first day, they all four have been trying to misguide the investigation of the case and manipulating the facts. Rinku Verma, who had claimed for the seized gold, in connivance of Pradeep Kumar Bothra, Director of M/s Snehal gems Pvt. Ltd. has been trying to legalize his unauthorized and illegal transaction by submitting non-relevance documents. It also appears that on the direction of Rinku Verma, all the four accused persons have tendered false and fabricated statements to support illegal activity of Rinku Verma and to avoid legal proceedings. Thus, the seized gold is liable to confiscation under Section 111 of Customs Act, 1962 and the said four accused persons and claimant of the seized gold Rinku Verma are liable to be penalized under Section 112 and 114AA of Customs Act, 1962. Pradeep Kumar Bothra, Director of M/s Snehal Gems Pvt. Ltd. who had tried to harbor the smuggling activity of Rinku Verma is liable to be penalized under Section 114AA of Customs, Act, 1962.

(j) In terms of Section 123 of the Customs Act, 1962 where any goods to which this Section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be on the persons, who claims to be the owner of the goods or from whose possession the goods so seized were recovered. This section applies to gold and articles of gold. The main accused in this case, Shri Raghendra Kumar Dhuriya, Shri Sourabh, Shri Subham Verma, Shri Golu Verma and claimant of the seized gold Shri Rinku Verma have not been able to discharge the burden of proof under Section 123 of the Customs Act, 1962.

(k) Therefore, (1) Shri Raghendra Kumar Dhuriya, (2) Shri Sourabh, (2) Shri Subham Verma, (4) Shri Golu Verma, (5) Shri Rinku Verma and (6) Shri Pradeep Kumar Bothra are required to show cause before the Commissioner of Customs (Preventive), W.B. Kolkata, having office at Customs House, (3rd Floor), 15/1, Strand Road, Kolkata-700001 within 30 (thirty) days from the date of receipt of this notice

14. The Adjudication process requires the Noticee to make his submissions along with supporting documents in defence of his case. In the present case, it would also be relevant to go through the submissions made by Rinku Verma [Appellant No.5 - claimant of ownership]. The relevant portions are extracted below :

2. *The goods seized in the instant case were lawfully purchased by him and he has also submitted the copies of such legal purchase and procurement of the gold bars. Investigation has been caused with the seller of the gold bars and from Show Cause Notice, it is also evident that the seller has accepted such sale in my favour. The Show Cause Notice nowhere adduced any evidence denying such lawful purchase by him. In such circumstance, question of illegal importation of the seized gold cannot arise. However, he shall submit his detailed reply on the same after going through the relied upon documents to the Show Cause Notice. It is further to state that by submitted the legal documents of purchase and procurement of the gold bars, he had duly discharged his burden in terms of Section 123 of the Customs Act, 1962 and this is settled principle of law that until and unless such evidences are discarded by the Department with other cogent and corroborative evidences, the goods cannot be confiscated under the Customs Act, 1962.*

(i) *The present noticee duly claimed ownership of the seized gold and prayed for return of the same before the investigating authority when investigation was conducted with him and under his statement dated 26.10.2015, the noticee no. 5 herein had duly stated the fact purchase of the said gold from M/s. Snehal Gems Pvt. Ltd. (in short 'M/s. SGPL) of Andheri (East), Mumbai under four separate invoices. The noticee had duly produced original copies of such purchase invoices before the investigating authority at the time of investigation with him.*

(ii) That from the Show Cause Notice it appears that investigation was also caused with M/s. SGPL when their Director, Shri Pradeep Kumar Bothra had duly appeared before the investigating authority and tendered his statement dated 08.01.2016 under Section 108 of the Customs Act, 1962 and confirmed sale of such goods under the said invoices in favour of Shri Rinku Verma. In reply to question no.3, in his statement dated 08.01.2016, Shri Bothra categorically acknowledged issuance of invoices and sale of gold. In reply to question no. 12 & 13 respectively in this statement dated 08.01.2016; Shri Bothra had confirmed purchase of gold from local dealers and submitted payment details received from Shri Rinku Verma. He had duly produced his purchase documents along with stock, sale, purchase registers as well as Ledger Account maintained with respect to sale in favour of Shri Rinku Verma. Such documents are duly enclosed as relied upon documents under covering letter dated 18.05.2017 duly issued by the Ld. Superintendent of Customs (Preventive), Adjudication Branch, CC(P), WB, Kolkata in favour of my above named client. As such, the fact of purchase of gold by Shri Rinku Verma and sale of the same by M/s. SGPL in his favour were corroborated during the course of investigation by way of adequate, proper and legal documents before the investigating authority. The seller of the gold had also acknowledged & corroborated such fact and produced documents to substantiate his source of gold and stock as on date of sale in favour of the present noticee no. 5.

(iii) That in the present Show Cause Notice, nowhere such documents produced by the present noticee as well as M/s. SGPL have been alleged or established on evidence as false, incorrect or forged in nature.

(iv) That surprisingly, at para 27 of the Show Cause Notice it is alleged that the present noticee in connivance with the Director of M/s. SGPL had tried to legalize his unauthorized and illegal transaction by submitting 'non-relevance' documents. However, how the documents produced by the present noticee and/or M/s. SGPL are of no relevance, has not been illustrated in the Show Cause Notice. Thus the allegation is absolutely vague in nature. The investigating authority could not point out that any of the documents produced during the course of investigation by noticee no. 5 and/or

6, are false, incorrect or forged in nature. In absence of such allegation that the documents are false, forged and/or afterthought & fabricated in nature, the investigating authorities cannot allege 'non-relevance' documents.

15. The Adjudicating Authority is required to consider the allegations contained in the Show Cause Notice and the submissions made by the Noticee and finally give a finding for arriving at his own conclusions. The relevant portions of the Order in Original are extracted below :

4. I find in response to the summon issued vide C. No. VIII(10)02/P&I/CCP/WB/2015-16/1114 dated 09/10/2015, Rinku Verma tendered his statement under Section 108 of the Customs Act, 1962 on 26/10/2015 wherein he stated that he has been doing the business of sale and purchase of gold and gold jewellery from Delhi, Mumbai and Kolkata and he operates his business from his shop at 90/A/107, Mahajani Tola, Allahabad. He further stated that he knows Raghendra Kumar Dhuriya, Sourabh, Shubham Verma and Golu Verma and all of them used to work for him. He also stated that he had been doing the business for last one year with Shashikant Patil of M/s Dhanlaxmi Bullion Pvt. Ltd., 43, Nalini Seth Road, 1st Floor, Room No. 101, Sonapatty, Kolkata. However, I find that he could not provide any sale-purchase documents or any transactional evidences in support of his aforesaid claims. Rinku Verma also stated that he does the business of sale and purchase of gold and jewellery with Meera Jewellers of Delhi, Snehal Gems Pvt. Ltd. of Mumbai, Shashikant Patil and Pradeep Guptra of Kolkata. I find Rinku Verma has claimed that 6 kg gold recovered from the possession of Raghendra kumar Dhuriya (02 kg gold of foreign origin), Shubham Verma (02 kg gold of foreign origin), Sourabh (01 kg gold of foreign origin) and Golu Verma (01 kg gold of foreign origin) was purchased by him from Snehal Gems Pvt. Ltd., Bidg. No.6/127, Mittal Industrial Estate Andheri, Jurla Road, Andheri East, Mumbai-400059 vide the following bills-

(i) Bill No. GOLD/MAY/1/2015-16 dated 02/05/2015 (1 Kg gold), (ii) Bill No. GOLD/MAY/2/2015-16 dated

05/05/2015 (2 Kg gold), (iii) Bill No. GOLD/MAY/3/2015-16 dated 09/05/2015 (2 Kg gold) and (iv) Bill No. GOLD/MAY/4/2015-16 dated 12/05/2015 (1 Kg gold)

I find that all the above mentioned bills are not supported by any import documents. Besides, Rinku Verma did not submit any payment related documents. Rinku Verma stated that all the required documents may be sought for from Snehal Gems Pvt. Ltd.

5. xxxxxxxxxxxx *I find that the aforesaid 06 (Six) pieces of gold bars of foreign origin were seized under Section 110 of the Customs Act, 1962 on the reasonable belief that they were smuggled into India through unauthorized route and are liable for confiscation under Section 11(b) and Section 111(d) of the Customs Act, 1962. In terms of section 123 of the Customs Act, 1962, the onus in the subject case for proving that the seized 06(six) pieces of gold bars of foreign origin, totally weighing 6.00 kgs valued at Rs. 1,68,58,500/- are not smuggled gold shall be on Shri Raghendra Kumar Dhuriya, Shri Sourabh, Shri Subham Verma, Shri Golu Verma from whose possession the aforesaid 06 (six) pieces of gold bars were seized and the claimant of the seized gold Shri Rinku Verma. The notices, in this case, were required to substantiate and discharge the burden of proof under Section 123 of the Customs Act, 1962. I find from the facts of the case discussed hereinbefore, that the conditions stipulated in Section 123 of the Customs Act, 1962 were in no manner complied with by the apprehended and accused persons Shri Raghendra Kumar Dhuriya, Shri Sourabh, Shri Subham Verma, Shri Golu Verma and the claimant of the seized gold Shri Rinku Verma, this being a clear case of smuggling of gold. I find Shri Raghendra Kumar Dhuriya, Shri Sourabh, Shri Subham Verma, Shri Golu Verma and the claimant of the seized gold Shri Rinku Verma have failed to discharge the burden of proof under Section 123 of the Customs Act, 1962.*
6. *I find from the aforesaid discussion that the 04 (four) apprehended person i.e. Raghendra Kumar Dhuriya, Sourabh, Subham Verma and Golu Verma have knowingly, willingly and voluntarily involved themselves in the nefarious*

activity of smuggling of gold. I find that initially the aforesaid apprehended persons gave contradictory statements to the investigating authorities. I find from their voluntary statements recorded on 19.5.2015 that the 04 (Four) apprehended persons had undeniably admitted that the gold bars were obtained by them from the shop of Shashikant Patil @ Banti at Dhanlaxmi Bullion Pvt. Sonapatty, Kolkata and the aforesaid gold bars were to be handed over to Rinku Verma in Alahabad. The aforementioned claim was also confirmed by them in their subsequent statements dated 28.07.2015. However, subsequently at the final stage of investigation, letters were received from the four accused persons i.e. Raghendra Kumar Dhuriya, Sourabh, Subham Verma and Golu Verma wherein all of them claimed that the gold seized from their possession was given to them by Rinku Verma of Allahabad for the purpose of getting gold jewellery in exchange of the same from Sonapatty, Kolkata and they also claimed that their statements recorded on 19/05/2015 were not proper, correct or voluntary. I thus find that the 04 (Four) apprehended persons gave contradictory statements before the investigating authorities. It is thus evident that the statements rendered by the aforesaid 04 (four) apprehended persons before the investigating authorities are false and have been made with the sole intention to mislead the investigation. It is also evident that on the direction of Rinku Verma, all the aforesaid four apprehended persons have tendered false and fabricated statements to support illegal dealings of Rinku Verma in smuggled gold and to avoid the legal consequences of their involvement in the clandestine activity of smuggling of gold. I find the letters received from the four apprehended persons i.e. Raghendra Kumar Dhuriya, Sourabh, Subham Verma and Golu Verma at the final stage of investigation as detailed above is a desperate attempt by Rinku Verma to avoid the legal consequences of being involved in gold smuggling activities and is also a futile attempt to claim that the seized smuggled gold was legally sourced. I find that to substantiate the claim made by the Rinku Verma that the 06 (six) kgs. Of gold had allegedly been purchased by him from Snehal Gems Pvt. Ltd., the 04 (four) apprehended persons have totally contradicted their earlier

statements dated 19.5.2015 and 28.7.2015 wherein they had indisputably admitted that they had obtained the gold from the shop of Shashikant Patil and had claimed on 15.2.2016 and 16.2.2016 that the gold seized from their possession was given to them by Rinku Verma of Allahabad for the purpose of getting gold jewellery in exchange of the same from Sonapatty, Kolkata and their statements recorded on 19/05/2015 were not proper, correct or voluntary. This implies admission on the part of the 04 (Four) apprehended persons i.e. Raghendra Kumar Dhuriya, Sourabh, Subham Verma and Golu Verma that they gave false statements to the investigating authorities. In this matter their contention that their statements were not voluntary is not based on facts as the aforesaid 04 (Four) apprehended persons had never claimed before the Hon'ble Courts that their statements were not voluntary-thus their arguments that their statements recorded on 19.05.2015 being not voluntary is liable to be rejected outright.

7. *I find the bills submitted by Rinku Verma in course of tendering of his statement on 16.10.2015 were not supported by any import documents and no payment related documents were submitted by Rinku Verma. In view of the aforesaid, I find that the bills submitted by Rinku Verma were not validated by supporting documents and as such Rinku Verma did not furnish any corroborative documents to authenticate the bills submitted by hi. Pradeep Kumar Bothra, Director of M/s Snehal Gems Pvt. Ltd. had during his statement stated that he had sold 06 (Six) kgs of gold to Rinku Verma but could not state the inscription and origin of country of the gold sold to Rinku Verma. Pradeep Kumar Bothra did not furnish any import documents regarding the gold sold to Rinku Verma and could not confirm that the seized gold is the same gold which was sold by him to Rinku Verma. He could not state any reason for tampering of the serial number of the bars. Besides, Pradeep Kumar Bothra could not confirm the relevant payments made for the seized gold. I thus find that Pradeep Kumar Bothra could not furnish any licit documents to confirm that the seized gold had been sold by him to Rinku Verma. However, Pradeep Kumar Bothra admittedly claimed that he had sold 06 (Six) kgs of gold vide the 04 (Four) bills*

submitted by Rinku Verma. I thus find Pradeep Kumar Bothra, Director of M/s Snehal Gems Pvt. Ltd. had knowingly, willingly and voluntarily connived with Rinku Verma to corroborate the purported gold purchase documents submitted by Rinku Verma to ostensibly claim that the smuggled gold was legally obtained. I find Pradeep Kumar Bothra has actively, consciously and deliberately involved himself in the gold smuggling activities of Rinku Verma and has harboured the smuggling activities of Rinku Verma and is thus liable to be penalized under Section 114AA of Customs Act, 1962.

8. *I find it evident from statements of the 04 (four) apprehended persons i.e. Raghendra Kumar Dhuriya, Sourabh, Subham Verma and Golu Verma that Rinku Verma is the main person involved in the gold smuggling activities and the seized smuggled gold was also claimed by him (Rinku Verma) on the basis of unsubstantiated gold purchase documents. I find Rinku Verma has knowingly, willingly and voluntarily involved himself in the nefarious activity of smuggling of gold. I find all efforts were made by Rinku Verma in a futile attempt to prove that the smuggled gold was legally obtained. The gold purchase documents furnished by him were not corroborated by him or by Pradeep Kumar Bothra who claimed without any supporting documents to have sold the gold to Rinku Verma. I find Rinku Verma has actively, consciously and deliberately involved himself in the gold smuggling activities and has claimed the seized gold on the basis of purported uncorroborated gold purchase documents and is thus liable to be penalized under Section 112 of the Customs Act, 1962 and Section 114AA of the Customs Act, 1962.*

16. I have carefully gone through the Show Cause Notice, the reply thereto and the discussions and findings by the Adjudicating Authority in the Order in original.

17. From the above relevant extracts of Show Cause Notice, it is observed that from Para (a) to (b), vivid details have emerged to

the effect that the seized gold was procured from Shashi Kant Patil of Dhanlakshmi Bullion Pvt Ltd., on payment of cash. The details of Cash paid by the individual appellants have also been specified. As against this, by a single statement recorded on 16.10.2015, Shashi Kant Patil has simply denied the same. From the SCN, it is clear that after this recorded Statement of Shashi Kant Patil, the lead on this count was not followed up and was in fact completely abandoned by the Revenue.

18. Para (h) above states that in order to verify the genuineness of Rinku Verma's claim, one more Statement of the Appellant No.1 to 4 was recorded on 16.2.2016. In this statement they maintained that the gold in question was handed over to them by Rinku Verma for onward delivery for getting the same converted / exchanged with jewellery. The conclusion has been arrived at by Revenue that they have not been able to properly ascertain the source of gold and their version is concocted to help Rinku Verma. Therefore, as per this Para (h), the Revenue takes the view that the earlier version of procuring the same on cash from Shashi Kant Patil looked more probable.

19. Para (i) details the past actions of the Appellants. It states that the Appellant No.1 to 4 have tendered false statements as per the directions of Rinku Verma. It also speaks of '*connivance*' of Pradeep Kumar Bothra who '*had tried to harbor the smuggling activity of Rinku Verma*'.

20. Para (j) states that Appellant No.1 to 4 are the main accused and Rinku Verma is the claimant of the gold and they have not been able to discharge the burden of proof under Section 123 of the Customs Act 1962.

21. The framing of the allegations vide the above Paragraphs raises many questions:

- (i) When all the earlier leads were clearly pointing out to the cash transactions by way of purchase from Shashi Kant Patil, as to why this lead was completely

abandoned immediately after the statement recorded by him on 16.10.2015, is not known.

- (ii) Except for the small notings about '*connivance*' and '*trying to harbor the smuggling activity of Rinku Verma*', there is no detailing about the role played by Pradeep Kumar Bothra, so as to bring him in as a co-noticee. Unless it is proved by way of proper evidence that the Invoice details given by him towards his own purchases, his Invoices raised on Rinku Verma and the Banking transactions are fabricated and sham, he cannot be made a co-noticee on mere assumptions. However, he has been made a co-noticee with no in-depth investigation.
- (iii) After taking a clear view that Rinku Verma is the mastermind and Appellant No.1 to 4 acting on his behest, still the Appellant 1 to 4 have been treated as the main accused [usage of this word itself is not correct since this is not a prosecution proceeding].
- (iv) Section 123 very clearly states that the burden of proof lies with the person claiming the ownership. The Appellant No.1 to 4 have been claiming that they have bought the gold for Rinku Verma. Subsequently he has claimed the ownership stating that he has bought from Snehal Gems Pvt Ltd. Therefore, the issue of ownership was never in doubt. Accordingly, the only person responsible to discharge the burden of proof could be only Rinku Verma. However, the SCN states that Appellant No.1 to 4 and Rinku Verma were not able to discharge the burden of proof. This shows that the Dept itself was not sure as to who should be discharging the burden of proof.

22. Coming to the reply filed by the Appellant No.5 [claimant of ownership], the most relevant issues raised by him are :

- (i) The noticee had duly produced original copies of such purchase invoices before the investigating authority at the time of investigation with him.
- (ii) In reply to question no.3, in his statement dated 08.01.2016, Shri Bothra categorically acknowledged issuance of invoices and sale of gold. In reply to question no. 12 & 13 respectively in this statement dated 08.01.2016; Shri Bothra had confirmed purchase of gold from local dealers and submitted payment details received from Shri Rinku Verma. He had duly produced his purchase documents along with stock, sale, purchase registers as well as Ledger Account maintained with respect to sale in favour of Shri Rinku Verma. Such documents are duly enclosed as relied upon documents under covering letter dated 18.05.2017 duly issued by the Ld. Superintendent of Customs (Preventive), Adjudication Branch, CC(P), WB, Kolkata in favour of my above named client. As such, the fact of purchase of gold by Shri Rinku Verma and sale of the same by M/s. SGPL in his favour were corroborated during the course of investigation by way of adequate, proper and legal documents before the investigating authority. The seller of the gold had also acknowledged & corroborated such fact and produced documents to substantiate his source of gold and stock as on date of sale in favour of the present noticee no. 5.
- (iii) That in the present Show Cause Notice, nowhere such documents produced by the present noticee as well as M/s. SGPL have been alleged or established on evidence as false, incorrect or forged in nature.
- (iv) However, how the documents produced by the present noticee and/or M/s. SGPL are of no

relevance, has not been illustrated in the Show Cause Notice. Thus the allegation is absolutely vague in nature. The investigating authority could not point out that any of the documents produced during the course of investigation by noticee no. 5 and/or 6, are false, incorrect or forged in nature. In absence of such allegation that the documents are false, forged and/or afterthought & fabricated in nature, the investigating authorities cannot allege 'non-relevance' documents.

23. From the relevant portion of the Order in Original extracted above, it is seen that the Adjudicating authority has more or less reiterated the allegations in the Show Cause Notice and has made no attempt to address the issues raised by the Noticee. Principles of natural justice requires him to address all the issues and give a proper finding as to why the submissions are not acceptable for the conclusions arrived at by him, which has not been done in this case.

24. In his reply to SCN, Noticee No. 5 submitted that Noticee 6 had duly produced his purchase documents along with stock, sale, purchase registers as well as Ledger Account maintained with respect to sale in favour of Shri Rinku Verma. Such documents are duly enclosed as relied upon documents under covering letter dated 18.05.2017 issued by the Ld. Superintendent of Customs (Preventive), Adjudication Branch, CC(P), WB. However, the Adjudicating authority at Para 7 holds "*I find that all the above mentioned bills are not supported by any import documents.*" . There is no mention as to whether the documents placed by the Noticee 5 [Rinku Verma] and Noticee 6 [Pradeep Kumar Bothra], were put to verification and what kind of verification was done, as to who undertook this exercise, to come this conclusion. Without such specifics, his bland standalone statement does not withstand legal scrutiny.

25. Since the Dept had received an earlier lead about procurement of the seized gold on cash basis without proper

documents from Shashi Kant Patil, in this case, Revenue is required to prove the following points:

- (a) The gold in question were not procured from Snehal Gems Pvt Ltd., though the Appellant No.5 was claiming so.
- (b) The gold in question was procured on cash basis from Shashi Kant Patil.

26. At the cost of repetition, it would be worth going through the factual details. It is seen that after the claim of Rinku Verma about procurement of the gold from Snehal Gems Pvt Ltd., a Statement has been recorded from Pradeep Kumar Bothra [their Director - Appellant Number 6]. From the statement recorded, it is seen that he has affirmed that he has sold the goods in question by way of the 4 Invoices submitted by Rinku Verma. The Purchase Invoices of Snehal Gems were also submitted to the effect that the entire transaction is licit one. Rinku Verma has submitted supporting documents in the form of Ledger copies and Banking transactions details. The Dept. is relying on the statement of Pradeep Kumar Bothra to the effect that he cannot vouch if the gold sold by him is the same one which has been seized. But on this basis alone, the Dept. cannot come to a conclusion that the claim of Rinku Verma is not correct. They were required to go into further depth to check the Banking Transactions between Rinku Verma and Snehal, Snehal and their Vendor to prove that the claim of Rinku Verma was not correct. There is nothing to indicate from the Show Cause Notice and the Order in Original to show that such an exercise was undertaken. The relevant extracts of SCN discussed above, has not brought in any evidence whatsoever to fortify their allegations against the Appellant No.5 and 6.

27. Secondly, as observed from the chronological Table, till 28.7.2015, all the initial leads point out to the role of Shashi Kant Patil for having sold the gold on cash basis to Rinku Verma. He issues a simple denial on 16.10.2015 and subsequently, this lead is given a quiet burial. It is not known as to what stopped the

Revenue from pursuing this lead to drive home the point that Shashi Kant Patil had a role to play in the present case and the gold in question was indeed procured from this source. This is a very serious lapse in the entire investigation process.

28. The chronological events clearly prove that the transactions in question has lead to many queries for which proper answer was required to be found by the Revenue. The delays caused due to non-appearance for the Summons issued, non-production of the Invoices even when the Appellants 1 to 4 were jailed, producing of the Invoices after many months, retraction of statement by the Appellants 1 to 4 after many months etc, gives enough cause to raise many queries. But these are the cues to be taken for an in-depth and exhaustive investigation to arrive at a clear conclusion about the role played by each of the noticee while issuing the Show Cause Notice. Once this exercise is done, it is for the Noticees to make their submissions and after this, it is for the Adjudicating authority to consider the allegations vis-à-vis the submissions/documentary evidence on record to come to proper conclusion. From the Order in Original, which completely takes the support from Show Cause Notice, it emerges that none of the issues raised by the appellants have been properly addressed before coming to a conclusion.

29. Now coming to the point raised by the Revenue in their arguments about non-addressing of the retraction by the Member Judicial while coming to his conclusion. As observed by me in the above paragraphs, by abandoning the lead in respect Shashi Kant Patil and pursuing the lead in respect of the transactions with Snehal Gems, the Revenue itself has given a deemed acceptance for such a retraction. The fact that no further investigation was taken up at the end of Shashi Kant Patil fortifies my conclusion in this regard. In such a situation the only option for the Bench was to consider the material evidence produced or otherwise by both the sides in respect of the transactions between Rinku Verma and Snehal Gems Pvt Ltd.

30. The shortcomings of investigations and perfunctory allegations in the Show Cause Notice cannot be undone at Tribunal level. All the observations about the lapses / shortcomings in the investigation / Show Cause Notice, however serious or valid / relevant they may be, would at best remain as observations only. Therefore, these observations cannot form the basis to arrive at the conclusion as to whether the Appellant has discharged the onus of burden of proof under Section 123. It can be done only on the basis of the Documents produced by the claimant of ownership [Noticee / Appellant No.5] and documents produced by the Noticee / Appellant No.6. In order to negate / refute the claim of the Noticee 5, the onus had shifted to the Revenue to undertake proper investigation to check the veracity of these documents for coming to their conclusion. The factual matrix discussed above, does not suggest that anything to this effect was undertaken by the Revenue.

31. Since the facts of the present case are very similar [probably less severe than in the cited case law], it may be relevant to go through the judgement of Bombay High Court in the case of **UOI Vs Imtiaz IqbalPothiawala – 2019 (365) ELT 167 (Bom)**

- (i) *The grievance of the Revenue as brought out in this question is that the burden of proof cast upon the respondent under Section 123 of the Act, that they were not smuggled goods, is not discharged. This we note from the questions framed is only in view of the absence of legal evidence, such as maintenance of books of account, registration with the Sales Tax, Income-tax, etc., to show legal purchase of the gold.*
- (ii) *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 ipso 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.

- (iii) *At this, the Learned Additional Solicitor General emphasized the fact that the 575 seized gold bars were secreted in a specifically made cavity in jeep. This, according to him, would be done only in case the gold so secreted, was smuggled gold. Further, it is submitted by the Revenue that on 8th March, 2000, neither the respondent No. 1 and/or his driver (Mr. Anis Ashraf) whose statement was recorded, could produce any documents in support of the legal possession of the gold.*
- (iv) *xxxxxxxxxxxxx The impugned order dated 3rd June, 2005 of the Tribunal has not allowed the respondent's appeal on the ground that the seizure itself was bad, absent reasonable belief. It allowed the appeal on the ground that the respondent No. 1 had discharged the burden of showing that gold bars are not smuggled.*
- (v) *The Learned Additional Solicitor General drew our attention to various statements of respondent No. 1 under Section 108 of the Act, which indicated that he was not filing income-tax return, so much so he is unable to explain the source of the funds to purchase the gold. This for the reason that though he states that the money was borrowed, he is unable to state the name of the persons who lent him the money. It is further submitted that there were differences in bills issued for sale of gold by [M/s. Paras Bullion and M/s. Pavan Jewellers], then those used for sale to other persons. There were also discrepancies in the statements regarding delivery of gold either in Ahmedabad or in Mumbai. It is emphasized that the respondent No. 1 had made telephone calls to Dubai. All the above facts, according to the Revenue, would establish that the seized gold bars were smuggled and the respondent No. 1 had failed to discharge the burden cast upon him under Section 123 of the Act.*
- (ix) *The impugned order dated 3rd June, 2005 has held that the respondent No. 1 has discharged the burden of proof under Section 123 of the Act. This as the respondent No. 1 had explained the source of his purchase namely from [M/s. Paras Bullion and M/s. Pavan Jewellers]. In fact, the person running two firms viz; - Mr.*

Bhupendra Thakkar has himself admitted in his statements to the Office of DRI that the seized gold has been sold by him to respondent No. 1. In fact, on 9th March, 2000, employee of Mr. Bhupendra Thakkar i.e. Mr. Devang Patel, in his statements had shown copies of the invoices to the Officers of DRI, evidencing sale of gold by [M/s. Paras Bullion and M/s. Pavan Jewellers] to respondent No. 1. Besides, the bills showing the acquisition of gold from [M/s. Paras Bullion and M/s. Pavan Jewellers] were also produced with the bail application on 10th March, 2000 filed by respondent No. 1;

(x) *Further, Mr. Bhupendra Thakkar, in his statement has also explained the source of the gold in possession of [M/s. Paras Bullion and M/s. Pavan Jewellers] namely - purchase from companies and firms who in turn had purchased the same from the Banks. The purchase and sale of gold by [M/s. Paras Bullion and M/s. Pavan Jewellers] were reflected in their separate books of account which were also produced before Officers of DRI. Nothing adverse is shown to us which would justify ignoring the same;*

(xi) *It is noteworthy that the Officers of DRI did not pursue investigation further with [M/s. Paras Bullion and M/s. Pavan Jewellers] and the other concerned entities. Thus, not pursuing the further investigation, would imply that the Officers of the DRI were satisfied with the explanation given by respondent No. 1 and that of Mr. Bhupendra Thakkar on behalf of [M/s. Paras Bullion and M/s. Pavan Jewellers]. The impugned order, particularly, records the fact that the discrepancies were noted by Commissioner with regard to the bill book. However, it holds that it is not of much consequence in view of the fact that these discrepancies were also found in respect of bills issued to other customers. So far as the inconsistency in the statement of the driver of respondent No. 1 is concerned viz; the place from where gold was taken possession of i.e. Ahmedabad or [Mumbai], is one plea of inconsistent evidence. The subsequent statement of taking possession of gold from Ahmedabad, in fact, is in accordance with documents on record and corroborated with the statement of Mr. Bhupendra Thakkar and Mr. Devang Patel. The fact that M/s. Pavan Jewellers] were not found at the given address when visited, is to be considered in the light of the fact that, M/s. Pavan Jewellers were duly registered with the Sales Tax Authorities, having a sales tax account number, their accounts were audited by a Chartered Accountant and relevant income-tax returns were also produced to establish the existence of [M/s. Pavan Jewellers]. Further, the Tribunal found that [M/s. Paras Bullion and M/s. Pavan*

Jewellers] were firms in existence and not fictitious firm. This finding of fact, on the basis of record, is a possible view as the Revenue in the face of the above record with the authorities, did not investigate further or bring on record evidence to demolish the evidence brought on record by respondent No. 1. The impugned order dated 3rd June, 2005 thus noted that the discrepancies noted ought to have been pursued further. This not having done, results in the explanation offered by respondent No. 1, being accepted.

32. In the present case also, the Purchase Invoices have been produced by the Appellant Number 5. The Revenue has found that the Vendor in question is existence and his statement has been recorded and in fact has been made Noticee Number 6. While admittedly, there has been unexplained delay in producing the documentary evidence, non-acceptance of the same or casting doubts on the same on this ground alone is erroneous, without in-dept verification of the evidence produced. In the present case, the belated made claim of Rinku Verma has not been considered adversely, since Revenue itself has carried out further investigations at Snehal Gems, and no conclusive evidence has been brought in by the Revenue to the effect that these documents are sham / forged / non-existent. The Dept has also abandoned the early lead / angle about the cash purchase from Shashi Kant Patil. Hence, I find that the ratio of the Bombay High Court discussed above would be squarely be applicable in the present Appeals.

33. Out of my detailed observations on the investigation and Show Cause Notice, some observations are also echoed from the Interim Order No.1 to 6/2023 dated 29.08.2023, passed by this Bench. The Hon'ble Member (Technical) has found some glaring lapses in the Show Causes Notice, which he has elaborated at Para 58 of the Order. For the sake of brevity, I am refraining from reproducing the same, but confining myself to some of the points getting highlighted therein :

- ❖ The investigations undertaken by the department in the matter have been done in a very shoddy and unprofessional manner.
- ❖ There has been no serious attempt to conduct wholesome enquiries into the case.
- ❖ The general approach of the department is very casual and callous.
- ❖ The seriousness of investigations as required to be conducted in a case of this nature is not evident from the approach of the investigating officers.
- ❖ A reading of the show cause notice suggests minimal action undertaken.
- ❖ That nothing can be worse than this that the CDR data of the prime accused, Rinku Verma appears to have not been investigated at all. There being no reference to it in the show cause notice.
- ❖ Likewise no locational details of the telephone numbers of the four carriers were sought for, to ascertain confirm the actual pick up spot of the foreign marked gold as stated in original statements and refuted/denied several months later.
- ❖ Even the show cause notice is also vaguely and casually drafted, with several important details not having been gone into, it even does not list the RUDs.
- ❖ There are several other serious breaches in the investigations undertaken by the department.

34. In my considered view, with the lackadaisical approach of the Revenue resulting in a Show Cause Notice lacking several

elements, any painstaking findings by the Bench, which may implicate the Appellants, cannot come to the rescue of the Revenue. The prime reason being that the appellants were never put to notice on these issues and cannot be asked to defend the same at Tribunal level after about 9 years after the event has taken place years [Seizure happened in May 2015] and when the Show Cause Notice was issued in April 2016. This would go against the principles of natural justice. In other words, the shortcomings of investigation and lack of proper allegations in the Show Cause Notice, cannot be overcome by any factual details ascertained by Tribunal now. With due respect, I take that the view that these would, at the most, remain as observations only and cannot be used for coming to a conclusion to implicate the appellants.

35. To summarize my conclusions :

(a)The Show Cause Notice has proceeded on an erroneous notion that the burden of proof is required to be jointly discharged by Appellant No.1 to 4 along with Appellant No.5. In fact the only person who would be required to discharge the burden of proof would be Appellant No.5. Framing of charges on Appellant No.1 to 4 on this count is erroneous. The ownership claimant Rinku Verma [Appellant No.5] has produced 4 Invoices towards purchase from Snehal Gems Pvt Ltd. The transaction details by way of ledger and bank have been produced by him. Taking this lead, the Revenue has caused investigation at the end of Snehal Gems, who have confirmed the transactions in respect of 4 Invoices and also produced their purchase invoices and many other records which are part of the relied upon documents in the Show Cause Notice. No proper conclusion has been arrived at by Revenue to disprove the claims of Rinku Verma and Snehal Gems Pvt Ltd. The issues raised in the replyt to Show Cause Notice have not been properly addressed. While certain discrepancies might have been observed when the documents were examined by the Bench, but on their own, it cannot be conclusively concluded that the documents were fabricated /

forged in the absence of any specifics coming in, in the Show Cause Notice.

(b) The Revenue had an original lead about the procurement of the gold in question by way of cash transaction between Shashi Kant Patil and Rinku Verma. Even as it was important for the Revenue to prove the gold in question was not procured from Snehal, in view of clear lead, the Revenue was also required to prove that the gold in question was procured way of cash transactions from Shashi Kant Patil. This lead has been completely abandoned without any proper reason. This is a serious lapse on the part of the Revenue.

(c) In this case, since there were contrary claims, the onus was on the Revenue was on two folds. Firstly, to disprove the claim of Rinku Verma that the gold was procured through proper Invoices, secondly to prove that the gold was in fact procured on cash basis from Shashi Kant Patil. As per my detailed observations, I find that on both these counts, the Revenue has failed.

(d) Therefore, I hold that the onus under Section 123 stands discharged by Appellant No.5 [claimant of ownership] since Revenue has not come out with any specific adverse evidence against these Invoices and transactions. I also hold that Appellants 1 to 4 were in no way required to discharge this burden in terms of Section 123.

(e) Hence, I agree with the Hon'ble Member Judicial that burden of proof stands discharged under Section 123 and hold that seized goods are not liable for confiscation.

36. The reference is answered and the difference of opinion stands resolved on the above terms. The papers may be put up before the Division Bench for deciding and releasing the Final Orders.

(Pronounced in the open court on 19.02.2024)

Sd/-
R. Muralidhar
Member (Judicial)

Pooja

FINAL ORDER NO. 75287-75292/2024

DATE: 21st February, 2024

In view of the majority decision, the appeals are allowed.

Sd/
(RAJEEV TANDON)
MEMBER (TECHNICAL)

Sd/
(ASHOK JINDAL)
MEMBER (JUDICIAL)