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

REGIONAL BENCH - COURT NO.1

Customs Appeal No.76829 of 2019

(Arising out of Order-in-Appeal No.13-17/PAT/CUS/Appeal/2019-20 dated 03.05.2019 passed by Commissioner(Appeals), Customs, Central GST & Central Excise, Patna.)

Commissioner of Customs (Preventive), Patna
(Central Revenue Building, Birchand Patel Path, Patna-800001.)

...Appellant

VERSUS

Sri Hari Om Verma
S/o Late Muthrumal Verma,
M/s. Hari Om Laxmi Narayan Jewellers

.....Respondent

(At: Sona Patti, Distt. Bhagalpur, Bihar.)

WITH

(i) Customs Appeal No.76834 of 2019 (Commissioner of Customs (Preventive), Patna vs. Sri Vijay Anand); (ii) Customs Appeal No.76835 of 2019 (Commissioner of Customs (Preventive), Patna vs. Sri Harpreet Singh); (iii) Customs Appeal No.76836 of 2019 (Commissioner of Customs (Preventive), Patna vs. Sri Kuldeep Singh); (iv) Customs Appeal No.76837 of 2019 (Commissioner of Customs (Preventive), Patna vs. Sri Bhupinder Singh);

(Arising out of Order-in-Appeal No.13-17/PAT/CUS/Appeal/2019-20 dated 03.05.2019 passed by Commissioner(Appeals), Customs, Central GST & Central Excise, Patna.)

<u>APPEARANCE</u>

Shri Tariq Suleman, Authorized Representative for the Revenue
Shri N.K.Chowdhury, Advocate for the Respondent (s)

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

<u>FINAL ORDER NO. 77624-77628/2023</u>

DATE OF HEARING : 22 November 2023
DATE OF DECISION : 22 November 2023

Per : ASHOK JINDAL :

The revenue is in appeal against the impugned order.

2. The facts of the case are that on 20.07.2017, the respondent namely Shri Bhupinder Singh, who was travelling through train No.12335 (Bhagalpur-LTTE Express) was intercepted at Patna Railway station by the officers of Customs (Preventive), Headquarters, Patna, with a trolley bag. On examination by the Customs (P), Headquarters, Patna, few pieces of primary gold bar (in cut form marked with Dubai & Swiss) & biscuit and few small bits of gold totally weighing 2388.320 grams valued at 71,64,960/- and some jewelleries/ornaments totally weighing 2377.950 grams valued at Rs.27,84,481.50 were found and recovered. Besides these, the officers also recovered from the possession of the respondent cash of Rs.7,90,000/- and a Cheque of Rs.2,00,000/- were also recovered. The respondent failed to produce any documents regarding licit possession of the subject goods and the officers seized the same on the reasonable belief that the said goods namely Dubai/Swiss marked gold bars in cut form and gold biscuit along with jewelleries are of foreign origin and were smuggled into India through unauthorized route in violation of the various provisions of the Customs Act, 1962. The currency recovered was also seized. Statement of Shri Bhupinder Singh was also recorded, wherein he stated that he is the partner of M/s. Mohan Singh & Sons, Amritsar and his son Shri Harpreet Singh, another partner of their firm had purchased the said seized gold from M/s. Manmohan Jewellers, Amritsar. He had sold gold to M/s. Swarnika Jewellers, Bhagalpur and M/s. Hari Om Laxmi Narayan Jewellers, Bhagalpur and received a cheque of Rs.2,00,000/- from M/s. Swarnika Jewellers. Shri Bhupinder Singh was arrested and was presented before the Designated Court. In follow up action residential and trading premises of Shri Bhupindar Singh and Shri Harpreet Singh were searched on 24.07.2017 and Shri Harpreet Singh, another partner stated that they did not buy any foreign origin gold and his father was not carrying any foreign origin gold on 20.07.2017, but accepted the fact that his father was not

carrying any documents related to purchase of the said gold. He also stated that he had purchased pure gold weighing 2401.130 grams and ornaments weighing 1022.20 grams from M/s. Manmohan Jewellers, Amritsar against invoices number GT-23 and GT-20, both dated 11.07.2017 respectively He produced Bank Statement of their Firm for the period from 01.04.2017 to 26.09.2017, sales & purchase statement and I.T. Return for the period from 2014-15 to 2017-18. Further investigation conducted and another respondent Shri Kuldip Singh, the owner of M/s. Manmohan Jewellers, Jaspal Nagar, Sultan Wind Road, Amritsar in his statement recorded that he had sold pure gold and jewellery under cover of invoices and thereafter he has no role with regard to the seizure of the gold/jewellery. He also submitted that it was very difficult for him to say conclusively on the basis of photographs of the seized gold sold shown to him as to whether the gold sold by him was the same ones seized by the Department due to non-production of the seized gold before him by the department as per his request. On the basis of this statement and other documents, it was alleged that the respondents were carrying smuggled gold and jewellery, therefore, the same were seized and the proceedings were initiated against the respondents by issuance of the show cause notice. The show cause notice were adjudicated and it was held that the respondent has failed to discharge the burden cast upon them to prove the non-smuggled nature of the subject goods and this is because the source of purchase of the subject gold i.e. Shri Kuldeep Singh has not confirmed conclusively that the gold he had sold to M/s. Mohan & Sons, partnership firm of Shri Bhupinder Singh & Shri Harpreet Singh. Moreover, Shri Kuldeep Singh has also stated that he has not sold any foreign marked gold to M/s. Mohan & Sons and he had sold only "AJ Bullion' marked gold. Accordingly, the gold and jewellery were absolutely confiscated and penalties on the respondents were imposed. The said order was challenged before the Ld.Commissioner(Appeals), who dropped the proceedings against the respondents holding that the confiscation of the gold and currency is not sustainable and penalties on the respondents were also dropped. Against the said order the revenue is before us.

3. The Ld.AR appearing on behalf of the revenue submits that during the course of investigation, the respondent namely Shri Bhupinder Singh failed to produce the licit documents for carrying the gold and jewellery with him and later on during the investigation it was found that the gold and jewellery which they claimed to have purchased from Shri Kuldeep Singh was not the same as Shri Kuldeep Singh himself has admitted the same, in that circumstances, the impugned order is to be set aside and the appeals be allowed.

4. On the other hand, the Ld.Counsel for the appellants submits that the Ld.Commissioner(Appeals) has examined the issue in detail and came to the conclusion that the onus lies on the revenue to make an opinion that the gold/jewellery recovered from the respondents having a reasonable belief being smuggled one. Therefore, the impugned orders, are to be upheld.

5. Heard the parties, considered the submissions.

6. We find that it is a case of town seizure whereas as per seizure memo, it is mentioned that the “Gold Biscuit Cut Pieces” of foreign origin of Dubai, Saudi Arabia, whereas 100% purity has been mentioned and as per the test report the purity of the gold in question is 99.20%. The adjudicating authority has relied only on the statement of Shri Kuldeep Singh, who stated that on being shown of the photograph of the seized gold, he cannot say that it is the same gold which he has sold to the respondent Shri Bhupinder Singh and Shri Harpreet Singh, which creates a doubt why Shri Kuldeep Singh was not shown the seized gold to verify whether it is the same gold which he has sold to the respondent or not? Moreover, the test report which is extracted here below also shows that purity of the gold is 99.2% and seizure memo also does not match with the purity of the gold as alleged in the seizure memo :-

"ANNEXURE-2"

123

भारत सरकार टकसाल INDIA GOVERNMENT MINT — 589.

अलीपुर, कोलकाता - 700053 ALIPORE, KOLKATA - 700053

(एसपीएमसीआईएल की इकाई A UNIT OF SPMCIL)

धातु परीक्षण प्रमाण-पत्र ASSAY CERTIFICATE — जी.ए.आर. क्र. 20 G.A.R. No. 20

रिपोर्ट की तिथि Date of Report : 08.11.2017

प्राप्ति की तिथि Date of Receipt : 04.11.2017

संदर्भ Reference: बुलियन अधिकारी से एक मोहबंद पैकेट प्राप्त हुआ है जिसमें शुद्धता जांच के लिए कस्टम्स का सोने का नमूना होना बताया गया है

Received One Sealed Packet from B.O. Containing one said to be Gold Sample of Customs for purity test.

> धातु परीक्षण रिपोर्ट ASSAY REPORT (सोना GOLD):-

क्र.सं. SL.NO	मस्टर संख्या MUSTER NO. (भा.स.ट., कोल. के बुलियन विभाग द्वारा भेजा गया Sent by Bullion dept., IGM, Kolkata	भा.स.ट., कोलकता. में सोना का भार Weight of Gold muster found in IGM, Kolkata	धातु परीक्षण के बाद भार After Assay weight	सोना प्रति मिली GOLD PER MILLE
1	K(G)-3/17-18	5.42g	5.39g	992.0

> धातु परीक्षण शुल्क ASSAY CHARGE:-

रु. 1129.00 (एक हजार एक सौ उनतीस रुपये केवल) एवं लागू जी.एस.टी.

Rs.1129.00/- (Rupees One Thousand One Hundred Twenty Nine only) & GST as applicable.

सहा.प्रबंधक A.M.(तक.T.C)

महाप्रबंधक की जानकारी के लिए प्रस्तुत

Submitted to G.M. for information pl

8/11/17

8/11/17

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Scanned by CamScanner

7. Further, the gold biscuits of foreign mark were shown in photograph to Shri Kuldeep Singh for verification, but as per seizure memo, there is no such mark as mentioned.

8. In that circumstances, we find that the revenue has failed to come to the conclusion in terms of section 123 of the act to form a reasonable belief that the gold is smuggled one and further-more, the

respondent has discharged their onus by producing the licit documents and source of procurement thereof and the same has been confirmed by the supplier, but the supplier could not verify the same as he was not shown the actual gold in question. The issue has been examined by the Ld.Commissioner in the impugned order who observed as under:-

> 14. I have carefully examined and gone through the material facts on record, submissions made by the appellants and all other evidence on records. The impugned order dated 15.11.2018 held that the 1st appellant has failed to discharge the burden of proof cast upon him to prove the non-smuggled nature of the subject goods. This is because the source of his purchase of the subject gold i.e. the 3rd appellant has not confirmed conclusively that the gold he had sold to M/s Mohan & sons, Partnership firm of the 1st and 2nd appellant is the same gold seized by the Department on the basis of photocopies of the said gold seen by him. Moreover, 3rd appellant has also stated that he had not sold any foreign marked gold to M/s Mohan & Sons and he had sold only "AJ bullion" marked gold.
>
> 15. I find that in terms of Section 123 of the Customs Act, 1962 the burden to prove that old, a notified goods which has been seized in the reasonable belief that they are smuggled goods, are not smuggled goods lies on the person from whose possession the said gold is seized. I find that the said gold alleged to be marked with "Dubai" and "Swiss" was found in possession of Shri Bhupindar Singh, the 1st appellant on 20.07.2017 and for non-production of valid documents on demand the Department seized the said gold with ornaments and case on the reasonable belief that the same were improperly smuggled into and were liable to confiscation. But I find that later on shri Bhup[indar Singh during investigations produced purchase invoices for licit procurement of the said gold and ornaments but the Department brushed aside the proof as an afterthought and fabricated one to cover up the smuggled nature of the gold solely relying on the statement recorded of Shri Kuldeep Singh, the supplier of the said gold. The case of the Department is that Shri Kuldeep Singh, the supplier of the said gold. The case of the Department is that Shri Kuldeep Singh has

affirmed in his second statement recorded under Section 108 of the Act not to have sold any gold of foreign origin; rather he had sold gold marked with "AJ bullion" to M/s Mohan & Sons. Accordingly, the lower authority held that the purchase invoices would not come in the aid of the 1st and 2nd appellant and accordingly they had failed to discharge burden of proof cast upon them as per Section 123 of the Act.

16. I have gone through the copies of invoices aforementioned submitted by the claimant appellants and find that M/s. Manmohan Jewellers had sold gold under broad description "Pure Gold" totally weighing 2401.13 grams under invoice number GT-23 dated 11.10.2017 and gold under broad description "Gold Ornaments" totally weighing 1023.200 grams under invoice number 20 dated 11.10.2017. The perusal of the aforesaid two bills show that the gold sold by Shri Kuldeep Singh to Shri Bhupindar Singh has suffered appropriate GST, Central and State, and I find that payments have also been cleared at later dates which cannot be questioned keeping in mind the prevalent trade practice followed in the trade and business. Moreover, with the repeal of the Gold (Control) Act long back there is no requirement to mention description of gold in details with their marking, be it "Foreign or Indian" in the invoices. Given the above facts and Shri Kuldeep Singh not denying the invoices in question, the retail invoices produced by the claimant appellants cannot be said to be false or fabricated. Further, Shri Kuldeep Singh in his second statement dated 12.12.2017 has also explained the source of purchase of the said gold sold by his concern to the claimant appellant and I find that the said gold was purchased fromM/s. Gyan Chand Kapur & Jewellers on 11.10.2017. But the Department did not carry forward their investigations to the doorstep of the said M/s. GYan Chand Kapur & Jewellers to find out the source of the gold procured and sold by Shri Kuldeep Singh to bring together all threads pertaining to the said transaction which is very crucial for the Department to dislodge the burden of proof discharged by the claimant appellant by providing procurement documents for the subject gold. The Hon'ble Tribunal in the case of S.K.Chains Versus Commissioner of Customs (Prev.), Mumbai [2001 (127) E.L.T. 415 (Tri.-Mum.)] has held that the burden cast upon the appellant under section 123 of the Act gets discharged

with the submission of the documents for lawful acquisition of the gold and the relevant paras are extracted below:

> ***"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."*

17. The appellants have relied upon the decision in the case of Gopal Prasad versus Commr. of C.Ex., Cus. & S.T., Patna [2018 (362) E.L.T. 309 (Tri.-Kolkata) wherein it has been held that the purchase documents produced by the claimant of the gold cannot be discarded on the basis of the statement, without any verification of the content of the retail invoices and the relevant part of the said decision is reproduced below:-

> "7. ………………It may be noted that with the development of the technology and electronic revolution, there is a wide scope for verification of accurate inside information of the offenders. The investigation starts from gathering of information which should be cross-checked to ensure its veracity by making independent enquiries. The powers given under Section 108 of the Customs Act, 1962, to summon persons to give evidence and produce documents are wide and general in nature where it discloses the corroborative evidences. In the present case, I find that the investigating officers have not verified the informations contained in the retail invoices produced by the appellants insofar as VAT registration No., PAN No. and VAT payment of M/s. Bhawana International. It has merely proceeded on the basis of the statement recorded by the jurisdictional Customs/Central Excise officers of M/s. Bhawana International. It is noted that the said officers had merely recorded the statement of the proprietor of M/s. Bhawana International and no attempt was made to confront the evidence namely retail

invoices of M/s. Bhawana International produced by the appellant. Therefore, the purchase documents as produced by the appellants cannot be discarded on the basis of the statement, without any verification of the content of the retail invoices.

………………………….

8. The other aspect of this matter that the appellant produced the Stock Register showing the receipt of the said goods in their stock. In such situation, it is required to verify records and documents of M/s. Bhawana International for corroboration of the documents of the appellant. The customs officers had proceeded on the basis of the initial statement of Shri Sujit Kumar which was retracted from jail. The lower authorities observed that Shri Sujit Kumar in his initial statement admitted the smuggling of the gold. But, after considering the overall facts and circumstances of the case to the extent of purchase documents produced by the appellants such as retail invoices would prevail over the statements, unless the genuinity of the documents is doubted. Hence, I find force in the submission of the Ld. Counsel for the appellant."

18. The Hon'ble Bombay High Court in the case of Union of India versus Imtiyaz Iqbal Pthiawala [2019 (356) ELT 167(Bom) involving seizure of 575 pieces of gold bars of foreign has held that *"It is important to bear in mind that it is not the case of the Revenue before us that burden of proof cast by Section 123 of the Act will only be satisfied when the legal import of gold bars is evidenced by the docuements, establishing its import by also having Bills of Entry, and an order for home clearance by the Customs, in his possession. Advisedly so, as after the repeal of Gold (Control) Act, gold is available as a item of trade, like any other goods. The satisfactory discharge of burden of proof, will in the absence of any legislative parameter for its satisfaction, would necessarily be the satisfaction of the Authority concerned. This satisfaction of discharge of burden of proof would depend upon appreciation of the facts by the Authority concerned as there is no absolute standard of burden of proof. In civil cases, discharge of burden of proof would be varying degrees of probability. Therefore, if the Tribunal is satisfied that burden is discharged and the finding is not perverse, then no case for interference in second appeal is, warranted. In this case, we find that the impugned order of the Tribunal has an appreciation of facts, come to a conclusion that the respondent No.1 herein has discharged his burden under Section 123*

of the Act, that the 575 gold bars seized on 8th March 2000 were not smuggled gold. This finding of fact has not been shown to us, to be perverse. Thus, it is a possible view on the available facts and the evidence produced by respondent No.1." In the case of Imtiyaz Iqbal Pthiawala the Hon'ble High Court held the absence of the Revenue being able to discharge the onus on it after the respondent NO.1 has discharged the primary onus by showing the source of its purchase of gold and respondent No.1 has also shown the source of its source. Thus, shifting the onus lies upon the Revenue. Accordingly, the Hon'ble Bombay High Court following the decision in the case of R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple – (2003) 8 SCC J752 held that in the absence of the Revenue discharging its onus, it must follow that in the present facts, the respondent has discharged the burden of proof imposed upon him under Section 123 of the Act.

19. Considering the facts and circumstances of the case on hand and applying the ratios of the cases discussed hereinabove, I find that the claimant appellants have discharged the burden of proof cast upon them by producing retail invoices. As a result, the onus to prove the smuggled nature of the subject gold gets shifted to the Department but the Department has failed to adduce any evidence that the subject goods were smuggled gold imported improperly. The adjudicating authority relied on the second statement of Shri Kuldeep Singh who has stated to have sold "AJ Bullion" marked gold, different from that of seized gold having marking of "Dubai" and "Swiss". But the said statement which is not confessional and inculpatory cannot be given credence over the retail invoices, the veracity and genuinity of which cannot be put to doubt even after thorough investigations carried out by the Department. Moreover, I find that the Department ha snot been able to show any confessional statement made by any of the appellants concerned to the effect that the seized confiscated gold is smuggled gold. Further, the second statement of Shri Kuldeep Singh, 3rd appellant to the effect that he had not sold any foreign marked gold can not be used as evidence in absence of any corroboration of such averment with evidence, documentary or otherwise by the Department by way of any credible investigations. The Department did not go into

the source of the purchase of the subject gold by Shri Kuldeep Singh and there is no material evidence to show that Shri Kuldeep Singh sold "AJ Bullion" marked gold, not the subject gold seized by the Department in the absence of such description not featuring in the invoice raised by him. It is settled position of law that mere statement of a co accused cannot be used as evidence in absence of corroboration of such statement with material evidence. The Hon'ble Tribunal in the case of of Giridhari Dubey versus Commissioner of Customs (Prev.), Kolkata [2002 (149) E.L.T. 427 (Tri.-Kolkata)] involving identical issue has held, "*In 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."* It was also observed in the aforesaid order that it is not understood as to how the Commissioner is placing further burden on Sh. Giridhari Dubey who as a buyer from M/s. Lalji Bhai Kanji Bhai Soni had no access to any other record than the receipts issued for purchase to him. In commercial transations gold bar brands are not considered relevant and Commissioner cannot introduce the same. Therefore, I am of the considered opinion that the ratio of the aforesaid decision is squarely applicable to the facts and circumstances of the case on hand. In this case also, Shri Bhupindar Singh had no access to any other record than the receipts issued for purchase to him and he has produced the same in support of licit possession of the subject gold to discharge the burden of proof cast upon him under section 123 of the Act.

20. The Hon'ble Apex Court in the case of Surinder Kumar Khanna Versus Intelligence Officer, DRI [2018 (362) E.L.T. 935 (S.C.)] has observed that *"Even if we are to proceed on the premise that such statement under Section 67 of the NDPS Act may amount to confession, in our view, certain additional features must be established before such a confessional statement could be relied upon against a co-accused. It is noteworthy that unlike Section 15 of Terrorist and Disruptive Activities Act, 1987 which specifically makes confession of a co-accused admissible against other accused in certain eventualities; there is no such similar or identical provision in the NDPS Act making such confession admissible against a co-accused. The matter therefore has to be seen in the light of the law laid down by this Court as regards general application of a confession of a co-accused as against other accused."* In the last Para of the order it is held as under:-

> "In the present case it is accepted that apart from the aforesaid statements of co-accused there is no material suggesting involvement of the appellant in the crime in question. We are thus left with only one piece of material that is the confessional statements of the co-accused as stated above. On the touchstone of law laid down by this Court such a confessional statement of a co-accused cannot by itself be taken as a substantive piece of evidence against another co-accused and can at best be used or utilized in order to lend assurance to the Court. In the absence of any substantive evidence it would be inappropriate to base the conviction of the appellant purely on the statements of co-accused. The appellant is therefore entitled to be acquitted of the charges leveled against him. We, therefore, accept this appeal, set aside the orders of conviction and sentence and acquit the appellant. The appellant shall be released forthwith unless his custody is required in connection with any other offence."

21. The ld.Adjudicating authority has placed reliance on the decision of the Hon'ble High Court of Madras in the case of Commissioner of Customs (Air), Chennai-I versus P. Sinnasamy [2016 (344) ELT 1154(Mad)] vide Para 40 of the impugned order in support of his findings to hold that subject gold was smuggled into India and order for confiscation of the same. I have perused the order and find that facts leading to the said case was that a passenger coming from

abroad did not declare in his Declaration Form about gold he was carrying and on examination of his baggage 111 broken bits of gold biscuits, totally weighing 2548.3 grams, were found and recovered from certain folding scissor boxes and stapler pin boxes and the adjudicating authority ordered absolute confiscation of the same. But the Tribunal allowed redemption of the said confiscated gold on payment of fine under Section 125 of the Act and the same was challenged by the Department before the Hon'ble High Court of Madras. Thus, the above cited judgement relied upon by the adjudicating authority is not applicable to the facts of the present case and hence is clearly distinguishable.

22. As regards gold ornaments seized and confiscated, I find that there is no allegation that they are of foreign origin and it is alleged that they are made of foreign gold. But the claimant appellant has produced purchase voucher of the same in support of licit possession of the same, thus the burden cast upon the appellant under section 123 of the Act that the same are not smuggled gold has been discharged and the onus was passed on to do so. Before I part, it is to be mentioned that in the impugned notice confiscation of the same has not been proposed under section 111 of the Act but under section 119 of the Act which reads as under:-

> **"Confiscation of goods used for concealing smuggled goods.** – Any goods used for concealing smuggled goods shall also be liable to confiscation.
>
> Explanation.- In this section, "goods" does not include a conveyance used as a means of transport."

Section 111 of the Act deals with improper importation of goods and for such improper importation the appellant can be charged under section 112 of the Act. So, there is no case of the Department that the said gold ornaments were imported illegally and as such was liable to confiscation. From these facts and charges leveled against the appellant as far as gold ornaments are concerned, it is clear that the claimant appellant was nowhere concerned with the smuggling of the gold ornaments liable to confiscation under section 111 of the Act.

Moreover, the said gold ornaments cannot be said to have been used as concealment of the other gold seized by the Department as both categories of the gold were recovered from the trolley bag the 1st appellant was carrying with him. I am, therefore, of the considered opinion that there is no credible evidence to hold that the said gold ornaments were either made of smuggled gold or used as concealing the other gold seized by the Department.

23. Under the above facts and circumstances and in view of judicial pronouncements cited supra, I am of the considered view that the Department was acting on no evidence and there is no iota of evidence that the seized gold of alleged foreign origin were smuggled into India and the said ornaments were made of smuggled gold. Suspicion/presumption howsoever strong cannot take the place of evidence and cannot be a ground for confiscation of the said seized gold under Section 111 and 119 of the Customs Act, 1962, as the case may be.

24. Lastly, it is seen that the sum of Rs.7,90,000/- which was also recovered from Shri Bhupindar Singh, has been held to be the sale proceeds of smuggled gold on the basis of some papers recovered from the 1st appellant. But in the impugned notice there is not even a whisper about the said papers alleged to have entries regarding sale of gold to Shri Vijay Anand and Shri Hari Om Verma, the 4th and 5th appellants. Therefore, reliance of documents not made basis of such allegations is beyond the scope of the impugned notice, therefore, the ld.adjudicating authority has traversed beyond the scope fo the show notice against the settled position of law in this matter decided by a plethora of decisions by the Courts and Tribunals. Moreover, Indian currency is not a notified item and it is for the department to prove that the same represents the sale proceeds of smuggled goods as has been held by the Hon'ble Tribunal in the case of Jhunu Rani Saha versus Collector of Customs (Preventive) [1993 (68) ELT 649 (Tribunal)] and the Department has failed to do so. Accordingly, the said Indian Currency is not liable to confiscation and I set aside the same accordingly.

> 26. In view of the discussions made above, the impugned order confiscating the gold in question and imposing penalty on the main appellants is not sustainable in law and on facts and the same is liable to be set aside. Accordingly, I set aside the same. The confiscation of the currency seized is also not sustainable and is set aside. The appellant is entitled to the return of the gold, the currency and all other items confiscated and I order accordingly. So far as imposition of penalties upon the other appellants is concerned it is opined that once the case is decided on merits in favour of the claimant appellants i.e. Shri Bhupindar Singh and Shri Harpreet Singh, then penalties imposed upon all three other appellants under Section 112 of the Customs Act, 1962 are required to be set aside and I set aside the same accordingly.
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> 27. In the result, I set aside the impugned order and dispose of all the five appeals in the above terms with all consequential relief.

9. We have gone through the observations made by the Ld.Commissioner(Appeals), who observed that the respondent has discharged their obligation under section 123 of the Act and we do not find any infirmity in the same. Therefore, we uphold the impugned order, consequently, the appeals filed by the revenue are dismissed.

(Operative part of the order was pronounced in the open Court.)

Sd/
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/
(RAJEEV TANDON)
MEMBER (TECHNICAL)

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