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

REGIONAL BENCH – COURT NO. 1

Customs Appeal No. 75234 of 2016

(Arising out of Adjudication Order No. 45/CUS/CC(P)/WB/2016 dated 23.11.2015 passed by the Commissioner of Customs (Preventive), Custom House, 3rd Floor, 15/1, Strand Road, Kolkata – 700 001)

Shri Rajan Kumar Jha **: Appellant**
Village: Pouram, P.O.: Hayaghat,
District Darbhanga, Bihar

VERSUS

Commissioner of Customs (Preventive) **: Respondent**
Custom House, 3rd Floor, 15/1, Strand Road,
Kolkata – 700 001

WITH

Customs Appeal No. 75247 of 2016

(Arising out of Adjudication Order No. 45/CUS/CC(P)/WB/2016 dated 23.11.2015 passed by the Commissioner of Customs (Preventive), Custom House, 3rd Floor, 15/1, Strand Road, Kolkata – 700 001)

Shri Ramesh Kumar Agarwal **: Appellant**
Flat No. 7301, Block-7A, 3rd Floor,
Neha Apartment, Sati Jaymati Road,
Athgaon, Guwahati – 781 001

VERSUS

Commissioner of Customs (Preventive) **: Respondent**
Custom House, 3rd Floor, 15/1, Strand Road,
Kolkata – 700 001

AND

Customs Appeal No. 75263 of 2016

(Arising out of Adjudication Order No. 45/CUS/CC(P)/WB/2016 dated 23.11.2015 passed by the Commissioner of Customs (Preventive), Custom House, 3rd Floor, 15/1, Strand Road, Kolkata – 700 001)

Shri Raju Arora **: Appellant**
9918, Ahata Thakurdas, Sarai,
Rohilla, Karol Bagh, New Del

VERSUS

Commissioner of Customs (Preventive) **: Respondent**
Custom House, 3rd Floor, 15/1, Strand Road,
Kolkata – 700 001

APPEARANCE:

Shri Nilotpal Chowdhury, Advocate
[In respect of Customs Appeal No. 75234 of 2016]

Shri Ramakant Gaur, Advocate,
Ms. Meenakshi Sahu, Advocate,
[In respect of Customs Appeal No. 75263 of 2016]

For the Appellant(s)

Shri Sourabh Chakravorty, Authorized Representative,

For the Respondent

CORAM:

HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NOs. 77072-77074 / 2025

DATE OF HEARING: 18.06.2025

DATE OF DECISION: 29.07.2025

ORDER: [PER SHRI ASHOK JINDAL]

The appellants are in appeal against the impugned order wherein the ld. adjudicating authority has ordered confiscation of the seized gold under Section 111(b) of the Customs Act and imposed penalties on all the appellants under Section 112(b) / Section 114AA of the Act.

1.1. Since all these appeals emanate from a common order, they are taken up for disposal together by way of a common order.

2. The facts of the case are that on the basis of intelligence developed by the officers of Directorate of Revenue Intelligence (DRI), Kolkata Zonal Unit that two persons namely Shri Chandra Shekhar Jha and Shri Ranjan Kumar Mishra, both aged about 25 years, were coming from Guwahati by Train No. 12518, Kolkata-Guwahati Garib Rath Express and likely to

reach Kolkata on 28.02.2013 afternoon with considerable quantity of gold bars/biscuits in concealment which were brought into India by way of smuggling from Bangladesh through North-Eastern bordering states, the said persons were intercepted on 28.02.2013 in coach No. G-10 of Garib Rath (12518) Express, when the train was about to reach at Kolkata Railway Station while carrying yellow coloured metals believed to be gold in biscuits/bars form in their person. The said persons did not have any documents in their possession support of their legal importation or transportation of the same.

2.1. Summons were issued to both the apprehended persons directing them to appear before the Senior Intelligence Officer at Directorate of Revenue Intelligence, Kolkata office at 3rd Floor of Harrington Mansion, 8, Ho Chi Minh Sarani, Kolkata-700071 on 28/02/2013 itself to explain their role in dealing with gold biscuits/bars, found in their possession. On reaching the DRI office at the above address, both Shri Chandra Shekhar Jha and Shri Ranjan Kumar Mishra were searched personally in presence of the independent witnesses accompanying the team. In course of the personal search of Sri Chandra Shekhar Jha and Shri Ranjan Kumar Mishra, 3 (three) belts were found, which were marked as "B-1", "B-2" and "B-3". From belt B-1, 17 (seventeen) smaller and 2 (two) bigger pieces of yellow coloured rectangular metal pieces were found. From belt B-2, 17 (seventeen) smaller and 1 (one) bigger pieces of yellow coloured rectangular metal pieces were found. From belt B-3, 17 (seventeen) smaller and 1 (one) bigger pieces of yellow coloured rectangular metal pieces were found. Total 55 Nos. of yellow coloured rectangular shaped metallic pieces believed to be of gold was recovered. A detailed inventory of the recovered yellow coloured rectangular shaped metallic pieces were prepared and total weight of the same was found to be 12.504 kgs.

2.2. A seizure memo incorporating all the particulars of the recovered yellow coloured rectangular shaped metallic pieces believed to be gold was prepared and the goods were seized under Section 110 of the Customs Act, 1962 on the reasonable belief that those were liable for confiscation under Section 111 of the Customs Act, 1962.

3. Thereafter, statements were recorded from the apprehended persons under Section 108 of the Customs Act, 1962.

3.1. In his statements dated 28.02.2013 and 01.03.2013, Shri Chandra Shekar Jha inter alia stated that he is an employee of M/s. Trackon Courier Company, Delivery franchise in Guwahati; additionally, he used to carry gold privately, on instructions of one Shri Ramesh Kumar Agarwal alias Shri Dilip Agarwal alias Tony (hereinafter referred to as the "appellant no. 2") of M/s. Mayur Medicos / Vayur Medicos, Fancy Bazaar, Guwahati; that the appellant no. 2 has confidence on him, and he had carried his gold consignment in the past. He used to take gold from Shri Dilip Agarwal alias Tony / appellant no. 2 in Guwahati and deliver the same to one Pramod in Kolkata; as per his knowledge, one Raja of Dimapur had brought these gold biscuits from Bangladesh to erase the gold markings, it was reshaped after melting and prepared for despatch to Kolkata via Guwahati. He further stated that apart from Raja of Dimapur and Shri Dilip Agarwal of Guwahati (appellant no. 2), Shri Rajan Jha of M/s.

Trackon Courier Services (hereinafter referred to as the "appellant no. 1"), amongst others, were involved in this business, but he had no knowledge about their addresses.

4. Based on the intelligence gathered and inputs received from the statements of both the Intercepted persons viz., Shri Chandra Sekhar Jha and Shri Ranjan Kumar Mishra, searches were conducted at the various places in Guwahati on 01.03.2013 by DRI Guwahati along with Officers of Guwahati Customs Division observing all formalities.

5. During the course of the above, a search was conducted inter alia at residential premises of Tony @ Ramesh Agarwal at Flat No. 7301, 3'd Floor, Block No. 7A, Sati Jaymati Road, Athgaon, Guwahati-01, but nothing incriminating in nature was recovered. Search was conducted on 01.03.2013 in presence of Smt. Kusum Agarwal wife of Shri Ramesh Kumar Agarwal and a lady officer in presence of two independent witnesses. Statement of Smt. Kusum Agarwal wife of Shri Ramesh Kumar Agarwal/appellant no. 2, was recorded u/s 108 of the Customs Act, 1962, wherein she inter alia stated that: -

(a) Her husband Shri Ramesh Kumar Agarwal @ Tony looked after the business of Vayur Medicos. Other than this, her husband did not have any other source of income.

(b) Neither she nor any of her family members/staff knew anyone by the name of Chandra Shekhar Jha/Ranjan Kumar Mishra.

(c) Her husband Shri Ramesh Kumar Agarwal @ Tony was not involved with the business of either gold or gold bar and did not own the gold bar seized at Kolkata.

(d) Her husband left for Kolkata via Siliguri on 01.03.2013 by flight but she did not know the time or flight number or the name of the Airlines.

(e) Her husband went to Kolkata for his treatment but she did not tell anything about the Doctor or Hospital where he was treated.

(f) The mobile numbers of her family members were as under,

Smt Sita Devi Agarwal:- 9707812529,

Meghna Agarwal:-9864406175,

Kusum Agarwal:- 8486024704,

Ramesh Agarwal:- 7896827933

6. Follow-up investigation was also conducted in respect of M/s. Track Courier Private Limited, Guwahati.

7. Subsequently, representative samples were drawn from the impugned goods, which were subjected to examination before the Chemical Examiner, Chemical Laboratory, Kolkata and weighment of each bar was also taken; the total weighment of the gold bars was calculated as 12520.427 grams. A Panchanama dated 07.03.2013 was drawn, incorporating all the details. A Test Report was obtained from the Customs House Chemical

Report, Kolkata dated 07.03.2013, which indicated that the purity of each sample was in the range of 99.93 – 99.96 %.

8. Shri Ramesh Kumar Agarwal @ Tony Agarwal (appellant no. 2) was summoned on 14.03.2013 to appear on 22.03.2013, but he did not turn up on that day. Smt. Kusum Agarwal wife of Shri Ramesh Kumar Agarwal vide letter dt. 04.03.2013 intimated that her husband had not returned after his treatment and the summon vide Book No. 018, Serial No. 872 dated 01.03.2013 was not delivered by her to her husband, and soon after his arrival, the same would be handed over to him for his appearance before DRI Kolkata. Shri Ramesh Kumar Agarwal was again summoned on 01.04.2013, 19.04.2013 for his appearance on 08.04.2013 & 30.04.2013 respectively, but he did not appear on the due dates. Summon dated 01.04.2013 was also served to him through DRI Guwahati duly received by Meghna Agarwal D/o Ramesh Agarwal on 04.04.213. Again, vide letter dated 05.04.2013, Smt. Kusum Agarwal intimated this office that her husband had not returned after his treatment and the summon vide book no. 004, serial no. 170 was not delivered to her husband and as soon as he came, the same would be handed over to him and he would appear before this office. Shri Ramesh Kumar Agarwal, through his advocate Shri Rajendra Nath Barik, replied vide letter dated 30.04.2013 and sought more time for his appearance. It was also stated that his client had no manner of connection and/or relation with the said case and was not aware as to why he was being summoned by DRI Office.

9. In the meantime, one Shri Raju Arora (hereinafter referred to as the "appellant no. 3") S/o. Late Tilak Raj Arora, 9918, Ahata Thakurdas, Sarai Rohilla, Karolbagh, New Delhi – 110 005 claimed the goods under seizure vide his letter dated 15.03.2013 received in the office of DRI, Kolkata on 25.03.2013. The claim was received by post. Along with the said letter, he had enclosed a Rent Agreement dated 14.12.2012 between Shri N. K. Jain S/o Shri M. P. Jain, 1" & 2nd Floor, Shoppers Point, Fancy Bazar, Guwahati and Shri Raju Arora s/o Late Tilak Raj Arora, 9918, Ahata Thakur Dass, New Rohtak Road, Karol Bagh, Delhi; VAT Invoices bearing number 4, 7 and 8 dated 18.02.2013, 19.02.2013 & 20.02.2013 respectively of "Shree Shayam Traders, 2034/8, Shop No. 1, South Extn. Part-l, Near Pelinji Kotla Mubarakpur, New Delhi-110003"; AWB No. 319514554 dated 26.02.2013 of Trackon Couriers Pvt. Limited which was 'Receivers Copy", consignor being "Raju Arora, Shoppers Point, 1" Floor, Fancy Bazar, Guwahati", consignee being "Raju Arora, Office Delivery, Kolkata", goods being parcel of weight 13 kgs 150 grams, total charge Rs. 14,000/-.

9.1. In his letter dated 15.03.2013, Shri Raju Arora stated that: -

(i) He was a permanent resident of Delhi residing at 9918, Ahata Thakurdas Sarai, Rohilla, Karol Bagh, New Delhi 110 005 and he was engaged in the business of construction, doing job-work on readymade garments and also acted as commission agent for sale/purchase of gold and gold ornaments;

(ii) Sometime in the month of October 2012, as he was looking to start his own gold jewellery business and was not satisfied being a commission agent, he sought the advice of Mr. N. K. Jain of Guwahati who was a veteran in the bullion business and a good friend since the last 25 years, he expressed his desire to him to open a jewellery showroom. Mr. Jain advised him to open a showroom in Guwahati where there were less competitors and better margins. Upon enquiring about showroom space, Shri Jain informed him that he had a showroom in Guwahati in a posh area ideal for opening jewellery showroom which was lying vacant and he would be willing to give the same to him on rent. As the said offer of Shri N. K. Jain seemed reasonable to him, he entered into a Rent Agreement dated 14.12.2012 with Shri Jain for the said showroom;

(iii) That in the meantime, he also approached Shri Atal Bihari Agarwal who was well known to him since the last several years and requested him to sell him at least 10 to 15 Kgs. of gold on credit which he would use to make gold jewellery and sell from his showroom in Guwahati. He promised to pay for the said gold once his showroom started functioning. As he was known to Shri Atal Bihari Agarwal for a long time, he agreed to sell 12 Kgs. of gold to him on credit subject to the condition that henceforth he shall only buy gold from him and also that the showroom he would open in Guwahati had to be in a posh locality. He assured Shri Agarwal that both his conditions would be fulfilled and upon being satisfied after seeing the aforementioned Rent Agreement dated 15.12.2012, Shri Atal Bihari Agarwal finally sold the said gold to him vide Invoices baring Nos. 4, 7 and 8 dated 18.02.2013, 19.02.2013 and 20.02.2013 respectively. VAT was duly charged on purchase of the said gold, and as such, the said gold was bonfide purchased by him.

(iv) Pursuant to receipt of the said gold, he requested Mr N. K. Jain to carry the said gold to Guwahati so that the process of converting the same to jewellery may be started.

(v) Accordingly, Shri Jain agreed to carry the said gold and carried the same in his Check-in-Baggage to Guwahati on 22.02.2013 by SpiceJet Flight No.SG-893. He also left from Delhi by train on 23.02.2013 and reached Guwahati on the morning of 25.02.2013.

(vi) During his stay at Guwahati, he went to his showroom situated at 1" Floor, Shoppers Point, Fancy Bazar, Guwahati 781001 and oversaw the interior decoration work being conducted there. As he wanted to open the showroom within the month of March 2013, he requested them to expedite the work. He also met Mr. Ramesh Kumar Agarwal @ Tony who he was already acquainted with. He also met various craftsmen and artisans and enquired about manufacture of jewellery. He was also informed that jewellery was not made in Guwahati and those who sell gold jewellery in Guwahati get the same from Kolkata. He was further informed that as Hallmarking did not happen in Guwahati and was done in Kolkata only there would be no point getting jewellery made in Guwahati in as much as customers today buy only Hallmarked gold jewellery.

(vii) Accordingly he decided to take the said gold to Kolkata and exchange the same with jewellers for gold jewellery and pay the difference for making charges. However, he was a little apprehensive about carrying so much gold on his person from Guwahati to Kolkata and sought advise from Mr. N. K. Jain. Unfortunately, Mr. N. K. Jain was busy with some personal problems and was unable to guide him. Having no other choice, he sought guidance from Mr. Ramesh Agarwal who advised him to entrust the said gold to a courier as they were regularly taking and bringing gold and gold jewellery from Kolkata to Guwahati. As the said idea seemed reasonable to him, he requested Shri Ramesh Agarwal to introduce him to a courier. Accordingly, Shri Ramesh Agarwal introduced him to Trackon Couriers Pvt. Ltd. on 26.02.2013 who agreed to transport the said gold to Kolkata to their head office and he was to take delivery from their head office at Kolkata on 01.03.2013. He was given a receipt bearing No.319514554 and he paid Rs.14000 towards courier charges.

(viii) On 01.03.2013 he called up the head office of M/s. Trackon Couriers Pvt. Ltd. at Kolkata at the number mentioned in the receipt given to him and enquired about his consignment when he was informed that they did not have any information regarding the same. As he was getting anxious, he approached the Guwahati branch of Trackon Couriers Pvt. Ltd. and enquired as regards the fate of his consignment when much to his shock and surprise he was informed that the said consignment had been seized alleging the said gold to be smuggled.

(ix) He immediately came to Kolkata on 03.03.2013 and got in touch with a learned Advocate and he requested him to take steps to find out the position of the case. Upon conducting enquiries, his learned advocate informed him on 10.03.2013 that two persons had been arrested by the officers of DRI on the allegation that they were carrying gold of foreign origin brought into India from Bangladesh and had seized the said good.

(x) As the said gold was not illegally acquired and / or smuggled gold, he immediately returned to Delhi and organized all the documents evidencing his lawful claim to the said gold which he had enclosed with his letter.

(xi) He claimed the said gold under seizure and stated further that the same was bona fide acquired gold on which VAT had duly been charged, he had bought the said gold under proper credit invoices issued by M/s. Shree Shayam Traders. The said gold was meant for manufacture of jewellery for his showroom at Guwahati and was being sent to Kolkata after being melted at Guwahati so that the same may be exchanged for gold jewellery after paying making charges so that the same may be sold from his showroom at Guwahati.

(xii) He also requested to release the said duty paid bona fide acquired gold to him.

10. In view of the claim filed by Shri Raju Arora (appellant no. 3), and to examine the role of Shri Rajan Jha of Guwahati (appellant no. 1), partner/owner of the franchisee viz. M/s. Arti

Communications of M/s. Trackon Courier at Fancy Bazar, Guwahati, as was also cited by both the apprehended persons Shri Chandra Sekhar Jha and Shri Ranjan Kumar Mishra, the Revenue examined Shri Rajan Jha / appellant no. 1 , who in his statement dated 08.04.2013 recorded under Section 108 of the Customs Act, 1962 inter alia stated that: -

(i) He had franchise agency of M/s Trackon Courier Pvt. Limited, a Delhi based company in the name of M/s Arti Communication at Guwahati having its office at Sartaj Complex, Shop No. 3, Col. J. Ali Road, Fancy Bazar, Guwahati-701001 and House No. 2, Zoo Narangi Road, Guwahati-701001. Arti Communication was a partnership firm fully engaged in courier business only. Shri Chandra Shekhar Jha was his partner in said firm.

(ii) He and Shri Chandra Shekhar Jha used to work together in Trackon Courier at Pune for about two years. Arti Communication was initially a proprietorship firm started in the year 2008-09. Chandra Shekhar Jha joined this firm after six months of its inauguration.

(iii) Chandra Shekhar Jha is also known as Shekhar. For on-line activities, Chandra Shekhar Jha used his short name Shekhar. He had recognized the photo of Chandra Shekhar Jha.

(iv) Regarding the working of his courier firm, he stated that they send all the documents/non-documents/parcels booked by their firm M/s Arti Communication to main collection point of Trackon Courier Pvt. Limited situated at House No. 54, Udyanchal Path, G.M.C.H. Road, Guwahati-781005. This was the liability of the courier company Trackon Courier Pvt. Limited to deliver the consignments at destined address and persons. They used to book the consignment on their own rates and pay the courier company at pre-fixed rates. Their difference was their profit. Apart from this, Courier Company used to pay commission at pre-decided rates regarding the consignments received and subsequently distributed in his area.

(v) As the policy of the Trackon Courier, they could not take consignments for booking like Narcotics, liquid, arms and ammunition, currency notes, silver/gold in any form etc as mentioned on the website of Trackon Couriers Pvt. Ltd. This information is also pasted in his office at Guwahati and each and every franchise was bound to obey these conditions. If any franchise of Trackon Courier Pvt. Limited booked the consignment of Gold/Silver that would be illegal.

(vi) No consignment of gold was booked ever by his courier firm from Guwahati and if anyone claimed that the consignment of gold is booked through his courier office from Guwahati, that was wrong and the documents as provided by him may be false/fabricated.

(vii) C. No. 319514554 dt. 26.02.2013 was issued by his courier office. This CN was generated on 15.03.2013 at his Fancy Bazar office under pressure and life threat from Ramesh Agarwal and Raju Arora. This blank CN was issued to his branch by Trackon Couriers Pvt. Ltd. on

15.03.2013 and in any way; it can't be issued on 26.02.2013. In fact, this CN was issued on 15.03.2013 under threat and pressure of Raju Arora and Ramesh Agarwal.

(viii) Ramesh Kumar alias Dilip alias Tony Agarwal owned a medical store named Vayur Medicos at Fancy Bazar, Guwahati.

(ix) Trackon Couriers Pvt. Ltd. had also asked him about 17 CN's including the said CN vide their letter dated 03.04.2013 and he had told them that after proper verification, he would answer them about the CN's.

11. Meanwhile, Shri Raju Arora, Shri N. K. Jain and Shri Ramesh Kumar Agarwal filed three Writ Petitions (Nos. 13480W of 2013, 14187W of 2013, 14190W of 2013) separately under Article 226 of the Constitution of India in the Hon’ble Calcutta High Court. Their submissions were in the same line regarding the requirement of their personal presence at DRI office under summon issued under section 108 of Customs Act 1962, citing the retraction letter dated 11.04.2013, reportedly made by Shri Rajan Kumar Jha apprehending the physical and mental torture at DRI office. The Hon'ble Calcutta High Court vide order(s) dated 10.05.2013, 13.05.2013, 13.05.2013 respectively allowed presence of a lawyer appointed by the Court at the cost of the petitioners during recording of their statements to oversee the mode and manner of the investigation that was being carried out and for no other purpose. It was made clear that the officer so appointed should not interfere in any manner whatsoever with either the questions that are being put or with the manner of the enquiry provided.

11.1. Subsequently, in observance of Hon'ble High Court Order, Shri Raju Arora / appellant no. 3 was examined under Section 108 of the Customs Act 1962 and statements recorded, wherein, he inter alia stated that the gold purchased by him was in 55 pcs and have no marking; that these were in the form of bar (biscuit) out of which, 4 pieces were of approx. 1 kgs without any marking and rest 51 pcs were of weight 166-167 gms approx.; at the time of purchasing, it was kept in a bag in open form. It was also stated by him that he (appellant no. 3) was in contact with Shri Ramesh Agarwal from 25.02.2013 night as it was learnt to him that his work could not be done at Guwahati; that he had told Ramesh Agarwal to suggest him some way to do his work and it was told to him that the market was closed at that time and on next day, he would suggest him after enquiring; next day, Shri Ramesh Kr. Agarwal told him that there was a courier person who transported the valuable goods and he was known to him from a long time and they both went there; that agency was at the name of 'Trackon' and it was told that they would deliver the goods, whatsoever, but would not be illegal.

11.2. Shri Ramesh Kumar Agarwal (appellant no. 2) was also examined on 24.05.2013 under Section 108 of the Customs Act, 1962, observing Hon'ble Court's order, wherein he inter alia stated that he dealt in medicine as retailer. It was also stated that he had a retail medicine shop namely "Vayur Medicose" at S.R.B.C. Road, Fancy Bazar, Guwahati; his mobile number was 8486024704 registered at his name and he was using it from last two years; that he knew Shri Raju Arora since last 20-22 years and had no business relations with Shri Raju Arora and Shri N. K. Jain. It was further stated that he met Shri Raju Arora at his medical shop on 25.02.2013 at 8.30 p.m. when his shop was about to close for that day; Shri Raju Arora (appellant no. 3) told him about his new business of Gold Jewellery Showroom at Guwahati and intimated that he had some gold to send to Kolkata for manufacturing of jewellery and asked him the way how it would be sent to Kolkata as he was unwilling to carry in person to Kolkata; that he (appellant no. 2) advised him to come next day; that Shri Raju Arora came to his shop on 26.02.2013 at around 12.30 pm and he took him to M/s. Trackon Courier which was nearby to his shop.

11.3. Statement of Shri Ramesh Kumar Agarwal was again recorded on 28.05.2013 wherein he inter alia stated that Shri Rajan Kumar Jha was the booking clerk who booked the consignment of Raju Arora consisting gold on 26.02.2013 at Trackon Courier, Fancy Bazar office; he had no other business relations with Chandra Shekhar Jha except sending medicine consignments through his courier company; that Shri Raju Arora was given a receipt after booking and it was told that on production of same, goods might be collected from Trackon Office at Kolkata; that Shri Rajan Jha had given the receipt to Shri Raju Arora, but he had not seen the receipt number at that time; he had seen and signed the CN No. 319514554 dated 26.02.2013 of Trackon Courier showing consignor and consignee both Raju Arora. It was informed that he could not comment whether that CN was handed over to Shri Raju Arora on 26.02.2013.

11.4. Summons were also issued to Shri Rajan Jha on 26.06.2013 at his Guwahati address seeking his attendance at DRI office 11.07.2013, was returned by Postal department being undelivered. Summons were also sent to the residential address of Shri Rajan Jha on 17.07.2013 seeking his appearance on 25.07.2013 but the said summon was also returned by postal authorities.

12. The Revenue was of the view that said seized 12.504 Kgs of gold having estimated value of Rs. 3.75 Crores (approx.) had been improperly imported by land though unauthorized routes and without observing the import formalities and without payment of appropriate duties in contravention of provisions of Customs Act 1962, are liable to confiscation under Section 111(b) of the Customs Act 1962; that Shri Ramesh Kumar Agarwal @ Dilip Agarwal @Tony, the appellant no. 2 herein, being the alleged mastermind of the smuggling racket, had organized, planned smuggled, distributed and transported the impugned items through unauthorized routes in connivance with Shri Rajan Kumar Jha, the appellant no. 1 herein, who has indulged himself in smuggling activities in disguise of 'courier activities', rendering the goods so seized liable for confiscation under section 111 of Customs Act 1962; that Shri Raju Arora, the appellant no. 3 herein, in connivance with his associate Shri Ramesh Kumar Agarwal (appellant no. 2), the mastermind behind the instant case, had indulged himself in procurement of forged/fabricated documents to claim the seized gold as legally procured and/or being member of the gold smuggling syndicate and had misled the investigation by fabricating the facts of the case. Regarding the claim made by Shri Raju Arora/appellant no. 3, the Revenue was of the view that the same is an afterthought and based on forged/fabricated documents which have allegedly failed the test of authenticity in course of investigation and thus liable for rejection.

13. After completion of the investigation, a Show Cause Notice bearing DRI. F. No. 31/KOL/2013 dated 16.08.2013 was issued, inter alia, to the appellants herein, proposing confiscation of the seized 12.504 Kgs of gold in bar/biscuits form having estimated value of Rs. 3.75 Crores under Section 111(b) of Customs Act, 1962, along with imposition of penalties on the appellants herein under Section 112(b) / Section 114AA of the Act. The allegations made in the Show Cause Notice, inter alia, are as under: -

(i) The subject seized gold bar/biscuits were smuggled into India through unauthorized land route of bordering state(s) in North East region of the country and after smuggling the same have been subjected to melting to erase the foreign markings and to re-shape it in the form of gold bars/biscuits. It is relevant to mention that out of 55 bars/biscuits, four gold bars weighing 1004 grams each were found to contain encryption of separate 8 digit numbers.

(ii) The subject smuggled gold bars / biscuits were being carried by two apprehended persons who were otherwise engaged with courier activities to give the impression that they were bona fide carriers of courier consignments;

(iii) Both the apprehended persons namely Shri Chandra Sekhar Jha and Shri Ranjan Kumar Mishra were not supposed to carry any courier consignments of their own for delivery according to the policy and modalities of the courier consignments dealt by M/s. Trackon Couriers Pvt. Ltd. (with whom they were employed/engaged) and in course of apprehension with the smuggled gold also, they were neither found with any other consignments (courier) nor any documents validating the carriage of the smuggled gold were recovered from their possession;

(iv) Shri Chandra Sekhar Jha & Shri Ranjan Kumar Mishra have knowingly indulged themselves in transportation & carrying of smuggled gold for their material gain. They used the shield of courier business activities to avoid the routine checks by various agencies and took recourse of unique modus operandi for concealing the contraband goods i.e. gold of foreign origin in bar/biscuits form.

(v) Both Shri Chandra Sekhar Jha and Shri Ranjan Kumar Mishra were apprehended with smuggled gold bar/biscuits concealed in their body and they have admitted their guilt. They have clearly stated the name of Shri Ramesh Kumar Agarwal @ Shri Dilip Kumar Agarwal @ Tony Agarwal and identified the photograph of Shri Ramesh Agarwal as Shri Dilip Agarwal who engaged them for carrying the instant consignment. They also admitted that it was well within their knowledge that the subject gold was of foreign origin and was defaced & re-shaped after melting to erase the foreign markings.

(vi) Shri Rajan Kumar Jha, being the franchisee of M/s. Trackon Couriers Pvt. Ltd., was one of the key persons in dealing in smuggled gold in disguise of his courier business activities and also engaged them in smuggling activities with the greed of extra money.

(vii) Shri Ramesh Kumar Agarwal had continuous contact with both the apprehended persons i.e. Shri Chandra Sekhar Jha and Shri Ranjan Kumar Mishra and also with Shri Rajan Kumar Jha, who accompanied him to Kolkata on 01.03.2013 and had made / received several calls through his mobile numbers

(viii) The said seized 12.504 Kgs of gold having estimated value of Rs. 3.75 Crores (approx) and improperly imported by land though unauthorized route and without observing the import formalities and without payment of appropriate duties in contravention of provisions of Customs Act 1962, are liable to confiscation under Section 111(b) of the Customs Act 1962.

(ix) Shri Ramesh Kumar Agarwal @ Tony Agarwal @ Dilip Agarwal, being the mastermind of the smuggling racket organized planned smuggling and distribution, transportation of the dutiable items through unauthorized routes in connivance with Shri Rajan Kumar Jha, who indulged himself in smuggling activities in disguise of 'courier activities' rendering the goods so seized liable for confiscation under section 111 of Customs Act 1962 and thereby rendered themselves liable for penal action under section 112(b) of the Customs Act 1962.

(x) Shri Raju Arora in connivance with his associate Shri Ramesh Kumar Agarwal, the mastermind behind the instant case of outright smuggling, indulged himself in procurement of forged/fabricated documents to claim the seized gold as legally procured and/or being member of the gold smuggling syndicate had misled the investigation by avoiding summon, delaying the proceedings, and fabricating facts of the case and misled the Hon'ble Calcutta High Court by providing wrong information and mis-statements and thereby rendered himself liable for penal action under section 114AA of the Customs Act 1962.

14. The matter was adjudicated by way of the impugned order bearing No. 45/CUS/CC(P)/WB/2016 dated 23.11.2015, whereby the ld. adjudicating authority has passed the following order: -

> *"(1) I confiscate the seized 12.504 Kgs gold as detailed in the inventory of Goods of the Seizure Case No. DRI. F. No. 31/KOL/2013 dated 16.08.2013 and valued at Rs.3.75 Crore under section 111(b) of the Customs Act, 1962.*
>
> *(2) I impose an exemplary penalty of ₹ 3.75 Crore (Three Crore Seventy Five Lakh)-only on the noticee Shri Ramesh Agarwal alias Dilip Agarwal alias Tony being the mastermind and king pin of the instant smuggling operation who has acted in utter disregard to the law of the land, under Section 112(b) of the Customs Act' 1962.*
>
> *(3) I impose an exemplary penalty of ₹ 5 Crore (Five Crore) only on the noticee Shri Raju Arora for falsely claiming the ownership of the smuggled gold and submitting forged documents in the instant smuggling operation under Section 114AA of the Customs Act' 1962.*
>
> *4) I impose a penalty of ₹ 50 Lakh (Fifty Lakh) only on the noticee Shri Rajan Jha for his active participation in the instant smuggling operation under Section 112(b) of the Customs Act' 1962.*
>
> *..."*

15. Aggrieved from the said order, the appellants are before us.

16. The Ld. Counsel appearing on behalf of Shri Raju Arora (the appellant no. 3 herein) has made various submissions, which are as under: -

(i) By way of the appeal, the present appellant challenges the legality and validity of the Order-in-Original dated 23.11.2015 passed by the Commissioner of Customs (Preventive), Kolkata, which directed the confiscation of 12.504 kgs. of gold and imposed personal penalties under the Customs Act, 1962. The appellant, a bona fide trader, claims legitimate ownership of the seized gold, duly supported by invoices, transport records, courier receipts, and banking documentation.

(ii) It is submitted that the confiscation order is unsustainable in law and fact, as the Department has failed to prove smuggling or the contraband character of the gold. The order is further vitiated by the denial of the appellant's statutory right to cross-examine witnesses and by reliance on inadmissible and uncorroborated statements in violation of Section 138B of the Act and the principles of natural justice.

(iii) On 28.02.2013, two persons, namely, Mr. Chandra Shekar Jha and Mr. Ranjan Kumar Mishra, were intercepted in the Garib Rath Express near Kolkata, with 55 gold bars weighing 12.504 kg. The gold bore no foreign markings. Statements were recorded under Section 108 of the Customs Act from the above two and other individuals, who allegedly linked the consignment to one "Raja of Dimapur" and further to Mr. Dilip Agarwal and ultimately to the appellant.

(iv) The appellant has consistently maintained that he lawfully purchased the gold through legitimate channels, supported by documents including a courier receipt dated 26.02.2013, purchase records from Shyam Traders, and financial transactions linked to HDFC Bank. A specific request for cross-examination of witnesses was made in para 12 of the Appellant's reply to the Show Cause Notice dated 16.08.2013, issued accusing the appellant of illegal importation and demanding confiscation of the gold and imposition of penalties. Despite this, the impugned order brushed aside the appellant's evidence, failed to examine the chain of custody, and relied on inadmissible call data records and unverified third-party statements.

(v) No Evidence of Smuggling or Foreign Origin: The appellant submits that the entire confiscation is based on conjecture, as none of the seized bars bore foreign hallmarks. Unlike the case of *Makkhan Lal Bind v. CCE (Kolkata) Custom Appeal No. 77874 of 2018*, where each bar had foreign inscriptions (e.g. "PAMP SUISSE", "VALCAMBI SUISSE") to suggest origin, the bars in this case have no foreign markings at all. There is therefore no evidence that they were ever in Bangladesh or any other country. The SCN fails to identify any time, place or person involved in crossing the border, and it concedes that the supposed smuggler "Raja" was never traced or examined. No letter rogatory was sent to Bangladesh or any foreign agency to verify any overseas link. In short, the Department produced no positive evidence of importation or tampering of purity, and admitted (in effect) that it relied solely on statements and suspicions.

(vi) Onus of Proof Not Discharged: In these circumstances, the appellant had no burden to prove the origin of the gold. The onus always lies on the Department to first establish a "reason to believe" smuggling occurred. Until the Department produces some credible evidence of contraband crossing (which it has not), the statements of others cannot shift the burden. As held in *Shri Madhukar Sonaba Bhagat v. CCE (Kolkata) (2019) Cus. Appeal No. 75235 of 2017*, where gold was seized from the appellant's shop, the Tribunal found "no reasonable belief" for confiscation in the absence of evidence that the documents were false or the gold was foreign-made. The appellant had satisfactorily explained lawful possession, so the confiscation was held "not sustainable". By parity, the burden of proof has not been met here, and the Department's suspicion (based only on statements and chemical purity) is insufficient to justify confiscation.

(vii) Documents and Explanation Disregarded: The appellant presented extensive evidence showing legitimate acquisition and sale of the gold; consignment receipts (dated 26.02.2013), bank statements, purchase invoices, and transfer documents from HDFC Bank to his Kolkata supplier. These fully accounted for the bars. This evidence was brushed aside; the Order-in-Original merely repeats the Show

Cause allegations without analyzing the appellant's records. It assumes a smuggling ring and focuses on telephone records that were neither in the Show Cause Notice nor in the relied-upon documents. The adjudicator made no finding on the validity of the appellant's receipts and invoices, and falsely assumed the sale was false solely because Mr. Atal Agarwal (his supplier) did not appear in person. This was unfair: a missing witness or retrospective dealer registration cancellation (noted in SCN) cannot, by itself, discard detailed documentary chains of transactions. The Appellant's supporting documents were entitled to full, objective consideration, not the wholesale rejection they received. It is a matter of record that nobody other than Mr Atal Bihari Agarwal was summoned, who claimed ownership of the gold. Mr Agrawal was struggling with comorbidities, and he succumbed to such disease. It is submitted that Mr. Agrawal left for the heavenly abode on 01.01.2016. The summoning of Mr. Agarwal and the date of his death are merely months apart.

(viii) Denial of Cross-Examination: Most critically, the appellant expressly asked to cross-examine all persons whose statements were relied on, including the two couriers and the Guwahati courier partner (Rajan Jha). Paragraph 12 of his SCN reply dated 22.06.2015 contains this plea, yet the adjudicating authority's Order is completely silent on it. Not a word addresses why the cross-examination was denied or on what basis. In effect, the authority relied only on portions of allegedly "inculpatory" statements (and surreptitious call data) without giving the appellant any chance to test their truth. This is a fundamental breach of natural justice. The appellant had a statutory right under Section 138B of the Customs Act to test each witness by cross-examination, unless the authority recorded justified reasons under Section 138B(1) for not allowing it. No such reasons were given. To the contrary, the Order simply adopted the officers' narrative, ignoring the very fact that a cross-exam request was made.

(ix) Reliance on Uncorroborated Statements: The Show Cause Notice's case rests almost entirely on statements of third parties. As held in *Sampad Narayan Mukherjee v. UOI 2019 SCC Online Cal 150(Calcutta High Court, 2019)*, if the appellant's request to cross-examine is refused, those statements "have no evidentiary value" unless Section 138B's conditions are satisfied. In the present case, the conditions (witness dead, unavailable, etc.) do not exist. There is no finding that any declarant is beyond reach or that the summons were ineffective. Likewise, *Basudev Garg v. Commissioner of Customs H.R. (2013) III Delhi 2269 CUS A.A*. underscores that cross-examination "cannot be denied" absent the exceptional circumstances enumerated (dead witness, unreasonable delay, etc.). The impugned order failed to establish any such exception. The effect is exactly that stressed in *Andaman Timber Industries v. CCE (2016)15 SCC 785* and reaffirmed in *Sampad Narayan [2019 SCCOnline Cal 150]:* denying cross-exam "is a serious flaw which makes the order nullity". By refusing cross-examination without satisfying Section 138B, the adjudicator not only violated natural justice but also flouted the statutory safeguard that evidence must be tested by the opposite party. This vitiates the entire proceeding.

(x) Failure to Establish a Reasonable Belief of Smuggling: The cornerstone of the Department's case is the assumption that the seized gold was smuggled from Bangladesh. However, the gold bore no foreign markings, a key indicator under jurisprudence to suspect foreign origin. Moreover, no evidence was produced of cross-border movement, no country of origin was identified, and no smuggling route, vehicle, person, or money trail was discovered.

(xi) In *Neeraj Agarwal v. CC (Preventive), Kolkata, (2024) 18 Centax 539 (Tri-Cal),* the Tribunal held that mere purity or foreign markings on gold do not by themselves establish foreign origin. In the present case, with no foreign markings and no corroborative evidence, the Department's suspicion lacks the statutory foundation of "reasonable belief."

(xii) Similarly, in Madhukar Sonaba Bhagat v. CC (Preventive), WB (Final Order No. 75782/2019), the Tribunal ruled that confiscation cannot be sustained in the absence of reasonable belief and evidence of smuggling. The appellant's gold was found lawfully procured, and his explanation was not rebutted by evidence. The same principle applies here.

(xiii) Appellant Has Discharged the Burden of Proof: Even assuming the Department had a prima facie suspicion, the Appellant has discharged the burden under Section 123 by producing:

- Valid invoices from Shayam Traders;
- Courier dispatch receipts from M/s. Trackon Courier dated 26.02.2013;
- Bank records evidencing fund flow and business transactions as submitted by Late Atal Bihari Agarwal vide his Affidavit;
- Statements from Mr. Narendra Kumar supporting the lawful transport of gold.

(xiv) None of these documents were proven to be false. Their genuineness was never disputed through cogent evidence or proper inquiry. As held in *Neeraj Agarwal (supra),* documentary evidence is sufficient unless contradicted, and "until the contrary is proved, such evidence is admissible."

(xv) Violation of Principles of Natural Justice - Denial of cross-examination: The appellant had explicitly requested cross-examination of witnesses relied upon by the Department in paragraph 12 of his reply. However, the ld. adjudicating authority failed to acknowledge or adjudicate this request, nor gave any reason for denying it. This is a direct violation of Section 138B of the Customs Act and settled constitutional jurisprudence. In *Andaman Timber Industries v. CCE (2016) 15 SCC 785*, the Hon'ble Supreme Court held that denial of cross-examination of persons whose statements are relied upon amounts to a violation of natural justice, and the order becomes a nullity. The Calcutta High Court in *Sampad Narayan Mukerjee v. UOI, 2019 SCC Online Cal 150*, similarly quashed the confiscation order on the ground that denial of cross-examination vitiates the adjudication proceedings. Other judicial precedents relied upon in support are as follows: -

a. *Ajay Saraogi v. UOI, IA No. GA 1/2009 (Cal HC):* - Failure to allow cross-examination makes the entire proceeding invalid.

b. Basudev Garg v. CC, ILR (2013) III Delhi 2269: - Section 138B must be considered; denial invalidates the outcome.

c. Sameer Shah v. UOI, WP No. 3220/2020 (Bombay HC): - Right to cross-examine is essential in quasi-judicial proceedings.

(xvi) In this case, no exceptional reason was recorded for denying the Appellant this right, making the order procedurally unsound and liable to be set aside.

(xvii) Inadmissible and Unreliable Evidence Relied Upon by the Department: In this case, the Department has sought to rely on: -

- Uncorroborated statements made under Section 108 ibid., some of which were retracted;
- Call data records (CDRs) do not form part of the Relied Upon Documents (RUDs);

- Allegations against a person named "Raja," whose identity and involvement were never established.

(xviii) None of the said evidence meets the legal threshold for admissibility. Statements under Section 108 cannot be treated as substantive evidence unless tested through cross-examination. As per Elora Tobacco Co. Ltd. v. UOI, 2024 SCC Online MP 3508, reliance on such statements without cross-examination infringes the right to a fair hearing.

(xix) In *Roshan Sharma v. Asst. Commissioner, State Tax, MAT 854/2024 (Cal HC),* the Court remanded the matter for fresh adjudication when cross-examination was denied.

(xx) Absence of Money Trail or Import Link: Critically, the investigation failed to establish any:

- Fund transfers from India to any foreign seller;
- Connection to any international smuggling syndicate;
- Records showing entry from Bangladesh or other ports;
- Letter rogatory or request for mutual legal assistance to verify the foreign origin.

(xxi) The so-called smuggler "Raja" was never located or examined, and no foreign entity was identified. This lack of probative evidence shows that the case is founded on conjectures, not facts.

16.1. In view of the above submissions, the Ld. Counsel for appellant no. 3, namely, Shri Raju Arora, prayed for setting aside the order of confiscation of the seized gold and the penalty imposed on the said appellant, as confirmed in the impugned order.

16.2. From the records, it is seen that Shri Ramesh Kumar Agarwal (the appellant no. 2 herein) has filed the present appeal *inter alia* on the following grounds:-

(i) For that the adjudication order, insofar as it relates to the imposition of penalty on the appellant is bad in law, wholly illegal and perverse, and as such, the said adjudication order is liable to be set aside.

(ii) For that the findings of the learned adjudicator while imposing personal penalty on the appellant is bad in law and perverse and the same deserves to be set aside.

(iii) For that the instant order impugned herein has been passed in gross violation of the principles of natural justice which alone is enough to render the resultant order bad in law and liable to be set aside.

(iv) For that the learned Adjudicator failed to consider that in the statements recorded from the appellant on 24.05.2013 and 28.05.2013, he had categorically and specifically denied having any manner of connection and/or relation with the gold since seized by the DRI authorities from Shri Chandra Shekhar Jha and Shri Ranjan Kumar Mishra. It is submitted that the said statements recorded from the appellant were recorded under Section 108 of the

Customs Act, 1962 and were substantive evidence. In the said statements, the appellant had neither claimed the gold nor expressed that he was the owner thereof. In the premises, the said statements ought not to have been ignored by the learned Adjudicator while imposing personal penalty on the appellant.

(v) For that the learned Adjudicator manifestly erred in imposing personal penalty on the appellant, inasmuch as, Shri Raju Arora in his statements dated 23.05.2013 and 24.05.2013 recorded under Section 108 of the Customs Act, 1962 had claimed the said gold and had stated that the said gold was lawfully purchased by him from Shri Atal Bihari Aggarwal. It is submitted that in the statements recorded from Shri Raju Arora, he had explained the details and the manner in which he came in possession of the said gold and the said statements clearly show that the appellant had merely recommended the courier agency for sending the said gold from Guwahati to Kolkata and besides the aforesaid, the appellant had no manner of connection and/or relation with the said lawfully purchased gold. The said statements of Shri Raju Arora fully corroborate the statements of the appellant in all material particulars and there is neither any discrepancy nor inconsistency regarding the involvement of the appellant in the said statements. In the premises, there was no warrant and/or justification in imposing personal penalty on the appellant as has been done in the instant case and consequently the order impugned herein is liable to be set aside in so far as it imposes personal penalty on the appellant.

(vi) For that the learned Adjudicator failed to consider that the only material being relied on by the Department against the appellant are the statements obtained from Shri Chandra Sekhar Jha, Shri Ranjan Kumar Mishra and Shri Rajan Jha. In this context it is pertinent to state that the said statements of Sri Chandra Sekhar Jha, Sri Ranjan Kumar Mishra and Sri Rajan Jha are statements of co-accused persons who are facing joint adjudication in pursuance of a common show cause notice. Law is well settled that the statements of co-accused persons are not substantive evidence and cannot be relied upon for the purpose of adjudging another accused guilty in the same proceedings. In the premises, statements of the aforesaid three persons ought not to have been relied upon against the appellant for the purpose of imposing personal penalty.

(vii) For that the learned Adjudicator committed grave error in law by relying on the statements of the aforesaid three persons without granting an opportunity to the appellant to cross-examine them in spite of specific request being made in this regard by the appellant in his reply to the show-cause notice. It is submitted with that as the said three statements formed the genesis of the instant case on the basis whereof, the appellant was falsely implicated in the instant case the only weapon that the appellant possessed to defend himself was by way of cross-examining the said three persons to bring out the truth and to establish his innocence. The said request for cross-examination was made with the said view and was in consonance with the principles of natural justice. Unfortunately, the learned Adjudicator completely over looked and/or ignored the appellant's request for cross examination and proceeded to pass the order impugned herein and imposed exorbitant personal penalty on the appellant by rendering him defenseless by ignoring his request for cross-examination of the said three persons. In the premises, the order impugned herein has occasioned grave miscarriage of justice and the same is liable to be set aside, with consequential relief to this appellant.

(viii) For that the learned Adjudicator while relying on the decision of *K. P. Abdul Majeed vs. Commissioner of Customs, Cochin reported in 2014 (309) ELT 671 (KER)* manifestly erred by using the said decision to justify reliance on statements of co-accused persons. It is submitted that the said decision clearly states that confessional statement of co-accused can be treated as evidence provided sufficient materials are available to corroborate such evidence. In the instant case, however, there is not even an iota of evidence besides the said statements of co-accused persons that even remotely implicates the appellant, and as such, even going by the observations made in *K. P. Abdul Majeed (supra),* which is in the nature of obiter dicta, and hence is not legally binding as a precedent the said statements do not pass the test contained therein and reliance on the same vitiates the order impugned herein in so far as it relates to the appellant. In the premises, the order impugned herein is liable to be set aside and/or quashed in so far as it relates to imposition of personal penalty on the appellant.

(ix) For that the learned Adjudicator manifestly erred while coming to the conclusion in paragraph 77 of the order impugned herein that he is not convinced regarding the innocence of the appellant and his ignorance about seizure of subject gold on 28.02.2013 as there are two versions of cause of absence of the appellant from summons issued by DRI. It is submitted that the learned Adjudicator has stated at paragraph 77 of the order impugned herein that though it has been stated in the reply to the show-cause notice filed by the appellant's learned Advocate that he went to Delhi for treatment, his wife and his salesman have stated in their statements that he in fact left for Kolkata on 01.03.2013. It has been further stated by the learned Adjudicator in the said paragraph that this difference in versions of the cause of absence of the appellant from appearing before the DRI was occasioned due to the reason that he had not been able to collect medical certificates from Doctors at Kolkata and, therefore, he gathered the same from Delhi.

(x) It is submitted that the said observations and conclusions of the learned Adjudicator are belied by the statement recorded from the appellant which has been set out at paragraph 38 (XIX) as well as at paragraph 95 (XIX) wherein it has been categorically stated that the appellant came to Kolkata on 01.03.2013 and after 2-3 hours he went to Delhi by air for his treatment. It is thus evident that in spite of there being a clear explanation of how the appellant travelled to Delhi via Kolkata in the order impugned itself, the learned Adjudicator has proceeded to erroneously hold that there are two versions and has termed them as "stark dis-resemblance" and has reached the conclusion that the appellant simply absconded. The extracts of the statements of the appellant as contained in the order impugned herein clearly show that the appellant had in fact initially travelled to Kolkata and therefrom to Delhi for his treatment. It is further submitted that the learned Adjudicator has also proceeded to discredit the medical certificate submitted by the appellant without any warrant and/or justification even though the appellant is a known case of hypertensions, depression and schizophrenia and the medical documents submitted along with the reply to the show-cause notice cannot be said to be "gathered" as has erroneously been done by the learned Adjudicator. In the circumstances, the said conclusions arrived at by the learned Adjudicator clearly demonstrates his pre-conceived bent of mind and his hostile attitude towards the appellant which had rendered him incapable of adjudicating the instant case in a fair, justiciable and bona fide manner. As prejudice is evident from perusal of the said portions of the impugned order, the entire order in so far as it relates to the appellant cannot be said to have been passed judiciously in a equitable, fair and reasonable manner and consequently the same is liable to be set aside.

(xi) For that the learned Adjudicator failed to consider that the only material being relied on by the Department in the instant case are the statements obtained from Shri Chandra Sekhar Jha, Ranjan Kumar Mishra and Sri Rajan Jha. It is submitted that the first two persons were the persons who were apprehended with the gold in question. All the aforesaid persons were admittedly working for Tracon Courier. It is thus crystal clear that irrespective of the statements given by them, the correctness of the case of the appellant and Shri Raju Arora is corroborated by the fact that 12.5 kgs. (55 pieces) of gold was admittedly handed over by Shri Raju Arora to Tracon Courier Service against proper receipt issued by them. The same gold was seized by the Officers of DRI from the representatives of Tracon Courier. This aspect of the case clearly goes to show that the gold weighing 12.5 kgs. (55 pcs.) was in fact given by Shri Raju Arora to the said courier service for transportation to Kolkata. In this context, it is further pertinent to state that Sri Rajan Jha in his statement recorded on 08.042013 had stated that the said consignment note no. 319514554 dated 26.02.2013 was in fact issued by him, however, he has introduced a new story in his subsequent statement that the consignment note was issued on 15.03.2013 at his Fancy Bazar Office under pressure and life threat from the appellant and Shri Raju Arora. Significantly enough, no police complaint or even a complaint to the Officers of DRI had been made by Sri Rajan Jha, in respect of issuing the said consignment note on 15.03.2013 under pressure and life threat given to him by the appellant and Shri Raju Arora. No complaint of whatsoever nature, either before the police authorities or before the DRI authorities to this effect, had been made by Sri Rajan Jha. It is thus evident that with a view to save the courier company and to keep it out from the purview of investigation, the said two persons from whom the gold was recovered have named the appellant as the person who had given the gold to them for transportation to Kolkata when in fact and effect the gold along with its covering documents in evidence of lawful purchase were handed over by Shri Raju Arora to their firm Tracon Courier on 26.02.2013. The statements recorded from the said two persons are belied from the statement of Shri Raju Arora who is the claimant of the gold in question. It was for clarifying the said fact that the appellant had prayed for cross-examination of the said persons. However, the learned Adjudicator took no steps whatsoever to present the said persons for the purpose of being cross examined during the course of personal hearing in spite of both written and verbal requests advanced by the appellant's learned Counsel. Furthermore, it is evident from the statements recorded from the appellant, Shri Raju Arora and Shri Narendra Kumar Jain that the statements alleged to have been made by of Shri Chandra Sekhar Jha, Shri Ranjan Kumar Mishra and Shri Rajan Jha are false and false to their knowledge and false to the knowledge of the Department. In fact, the innocence of the appellant is further proved from the fact that even though thorough and protracted search was conducted at his residence, nothing incriminating of whatsoever nature was found there. In the premises, save and except the statements of the said three persons, there were no materials against the appellant warranting imposition of penalty on him under Section 112 (b) of the Customs Act, 1962.

(xii) For that law is well settled that statements of co-accused persons are not substantive evidence and cannot be relied upon for the purpose of establishing the guilt of another accused. The statement of a co-accused can at best be used for the purpose of lending assurance to the verdict of guilt which the judicial mind is about to pronounce upon appraisal of independent material and/or evidence. Thus, a Learned Judge cannot start with the confession of a co-accused for the purpose of adjudging another accused guilty. Learned Judge has to first marshal the independent material and/or evidence and if he finds substantial material against the said accused, he can then look into the statement of a co-accused for the purpose of lending assurance to the verdict of guilt which he is about to pronounce on the basis of such independent materials and/or evidence. A learned Judge cannot start with confession of co-accused persons and adjudge another accused guilty in a joint proceeding on the basis of common show cause notice. In the instant case, save and except the statement of a co-accused persons, there are no independent material and/or evidence on the basis of which it can be concluded that firstly, the appellant had smuggled the gold into India from Bangladesh and, secondly, knowing the said gold to be of smuggled nature, entrusted it to Shri Chandra Sekhar Jha and others for transportation to Kolkata. On the other hand, there are overwhelming evidence in the records of the case which categorically show that the gold in question was acquired lawfully by Shri Raju Arora at Delhi with supporting documents, was brought from Delhi to Guwahati by Shri Narendra Kumar Jain by Spice Jet Flight, and was handed over to Shri Raju Arora at Guwahati for manufacturing ornaments. There is ample evidence to further show that jewelleries of latest designs are not manufactured at Guwahati inasmuch as only tribal style jewelleries are manufactured by the artisans at Guwahati, and as such, the said gold was being sent by Shri Raju Arora to Kolkata for manufacturing gold ornaments out of the said gold pieces and/or for exchanging the same for readymade manufactured ornaments from local jewellers at Kolkata upon payment of making charges. In the circumstances, the statements of co-accused persons cannot be treated as substantive evidence for the purpose of adjudging my client guilty, inasmuch as, there are no independent material and/or evidence to show that my client was dealing with smuggled goods which he knew are liable to confiscation under Section 111 of the Customs Act, 1962. It is therefore, submitted that no penalty under section 112 (b) of the Customs Act, 1962 was liable to be imposed on the appellant as has been done in the instant case, thereby rendering the same illegal, mala fide and arbitrary.

(xiii) For that the learned adjudicator lost sight of the fact that there is ample evidence in the records of the case to show that the appellant had neither dealt with any smuggled gold nor was he the owner of the gold under seizure. Furthermore, the appellant's residence and business premises had been thoroughly searched by the Officers of DRI at Guwahati. In the course of such searches nothing incriminating of whatsoever nature was found and/or seized by the officers concerned. Statements had been recorded from the wife of the appellant wherein she had categorically stated that the appellant is engaged only in the business of medicines and stone crushing. The statement of the appellant recorded under Section 108 of the Customs Act, 1962 also contains his categorical denial regarding having any manner of connection and/or relation with the gold under seizure save and except introducing Tracon Courier people to Sri Raju Arora. These facts have been corroborated by Sri Raju Arora in his statement. The statement of the appellant gets further credence from the statement of Shri Narendra Kumar Jain. In the premises, in the absence of any evidence against the appellant except retracted confessional statements of co-accused persons, the learned adjudicator ought to have relied on the overwhelming evidence in favour of the appellant's innocence and the gold under seizure ought to have been released to him. Further, no personal penalty was liable to be imposed on the appellant. In the circumstances aforesaid, the order impugned herein smacks of patent arbitrariness and betrays complete non-application of mind on the part of the learned adjudicating authority rendering the order impugned herein bad in law and liable to be set aside insofar as it relates to confiscation of the bona fide acquired gold of the appellant and imposition of personal penalty on him.

(xiv) For that the learned adjudicator completely overlooked and/or ignored the fact that the gold in question could not be of foreign origin as has been alleged in the show cause notice for two reasons, (i) the said gold had been claimed by Shri Raju Arora as having been purchased at Delhi along with valid documents and stated to have been brought from Delhi to Guwahati by Shri Narendra Kumar Jain in his statement and, (ii) the said gold does not bear any foreign markings. In the premises, there is overwhelming evidence in the records of the case which demonstrates that the appellant neither dealt with any smuggled gold nor gave such gold to Chandra Sekhar Jha or that he was aware that the same are liable to confiscation under Section 111 of the Customs Act, 1962. In the premises, no penalty was liable to be imposed on the appellant under Section 112(b) of the Customs Act, 1962.

(xv) For that Section 112(b) of the Customs Act, 1962 provides for imposition of personal penalty on a person who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under Section 111 of the Customs Act, 1962. In this context, it is pertinent to state that there is ample evidence in the records of the case to show that the appellant had not acquired possession of or was in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any other manner dealing with the gold in question which he knew or had reason to believe are liable to confiscation under Section 111. In the instant case, there are no independent material and/or evidence to show that the appellant had done any of the acts mentioned above, and as such, no penalty was justified and warranted on the appellant under the provisions of Section 112 (b) of the Customs Act, 1962.

(xvi) For that the learned adjudicator failed to consider that the department is trying to make a mountain out of a mole hill by harping on the so-called statement of Shri Rajen Kumar Jha who initially made a statement as per the dictates of the officers concerned only to retract the same later and once again fall victim to the guiles of the department and parrot statements as per their desire. At the very least, statements recorded from such a person forms a very weak type of evidence and no reliance ought to be placed on the same on this ground alone Inasmuch as it does not inspire any confidence. In the premises, reliance on the said statements by the learned adjudicator for imposing personal penalty on the appellant has occasioned grave miscarriage of justice warranting interference by the Tribunal.

(xvii) For that the learned adjudicator has manifestly erred by imposing an exorbitant "exemplary" penalty of Rs. 3.75 crores on the appellant under Section 112(b) of the Customs Act, 1962. It is submitted that as the other four sub-sections do not relate to the appellant, inasmuch as, sub-section (i) relates to prohibited goods and gold is not a prohibited item, sub-section (iii) relates to baggage declaration under Section 77 of the Customs Act, 1962, sub-sections (iv) and (v) deal with joint offences covered under sub-sections (i), (ii) and (iii). In the premises, the relevant provision for imposition of penalty on the appellant, if at all, was sub-section (ii) of Section 112(b) ibid which provides for imposition of penalty not exceeding the duty south to be evaded or five thousand rupees. It is submitted that import of gold is subjected to 10% duty and since the value of the gold is admittedly Rs. 3.75 crores, the maximum penalty that could have legally been imposed on the appellant is Rs. 37.50 Lakhs only (i.e., 10% of Rs. 3.75 crores). Unfortunately, the learned adjudicator seems to have been misguided by some notion which is not borne out from the Customs Act, 1962 and he has acted in an extra-judicial manner and ultra vires the powers vested in him by virtue of the Customs Act, 1962. In the premises, the resultant order smacks of blatant non-application of mind and demonstrates ignorance of the provisions of the Customs Act, 1962 on the part of the learned adjudicator thereby calling into question his competence and/or bias on his part rendering the order impugned herein bad in law and liable to be set aside in its entirety.

(xviii) For that no penalty is justified and/or warranted against the appellant under Section 112(b) of the Customs Act, 1962. The ingredients of Section 112(b) are completely absent in the instant case. Section 112(b) provides for imposition of penalty only on the person or persons who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under Section 111. Law is well settled that confiscation of illegally imported goods can be ordered whenever the same are found, but while imposing penalty on a person, the adjudicating authority has to ensure that the person concerned, knowingly that the goods were of tainted character, did any of the acts specified in the latter part of Section 112. Thus, where confiscation of goods can be ordered irrespective of knowledge, imposition of penalty warrants complete knowledge on the part of the person concerned and in the absence of knowledge, which is a very vital ingredient of Section 112 of the Customs Act, 1962, no penalty can be imposed. In the instant case, there is no evidence of whatsoever nature to show that the gold under seizure is any manner connected and/or related with the appellant.

(xix) The only material brought on record by the Department is the statement of Shri Chandra Sekhar Jha, Shri Ranjan Kumar Mishra and Shri Rajan Jha which is in the nature of confession of a co-accused and is further exculpatory in nature and hence necessarily inadmissible as per Section 30 of the Evidence Act, 1972. Furthermore, there is not a shred of evidence in the entire record of the case to show that the appellant, having known the aforesaid persons, with knowledge that they deal in illegally imported and/or smuggled gold, agreed to receive the said gold and was involved in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with the said gold. In the premises, as the ingredients of Section 112(b) of the Customs Act, 1962 are conspicuous by their absence, no penalty ought to have been imposed on the appellant under the said provision.

(xx) For that the so-called statement of Shri Rajan Kumar Jha, which is being relied upon by the Department to prove its case, has already been retracted by him. At the very least, statements recorded from such a person forms a very weak type of evidence and no reliance ought to be placed on the same on this ground alone inasmuch as it does not inspire any confidence.

16.3. Further, the Ld. Counsel appearing on behalf of Shri Rajan Kumar Jha (the appellant no. 1 herein) has made the following submissions: -

(i) The said appellant has been implicated on the basis of statement of co-noticee.

(ii) The appellant was not found in possession of the goods.

(iii) Nobody at any stage of the investigation had ever stated that the appellant had any knowledge about the smuggled character of the goods.

(iv) The adverse conclusion against the appellant has been drawn only on the basis of the allegations and without affording the opportunity to cross examine the co-accused, whose statements were recorded and used as evidence against the appellant herein.

(v) Prayer for cross examination has neither been dealt with nor denied.

(vi) Non-grant of cross examination, vitiates the proceedings. In this regard, the appellant relies upon the following: -

- *Andaman Timber Industries [2015 (324) ELT 641 (SC)];*
- *Sampad Narayan Mukherjee [2019 (366) ELT 280 (Cal)];*
- *Ajay Saraogi [2023 (386) ELT 333 (Cal)]*

(vii) Confessional statement of co-accused, even if found to be admissible, should be treated as a light-weight document and the same is not always voluntary, in the facts of the present case. In this regard, reliance is placed on the following case-law:

- *Manindra Chandra Dey [1992 (58) ELT 192 (Cal)]*

16.3.1. Accordingly, the appellant no. 1, Shri Rajan Kumar Jha, prays for setting aside the penalty imposed on him.

17. On the other hand, the Ld. Authorized Representative appearing on behalf of the Revenue has reiterated the findings in the impugned order. He made various submissions, which can be summarized as follows: -

(i) The apprehended persons, namely, Shri Chandra Sekhar Jha and Shri Ranjan Kumar Mishra, were not able to discharge burden of proof u/s 123 of the Customs Act, 1962 that the goods were not smuggled in nature.

(ii) On the issue of reasons to believe as enshrined in Section 123 of the Act, reliance is placed of the judgment of the Hon'ble Supreme Court in the case of *State of Gujarat vs. Mohanlal Jitamalji Porwal and Another [1987 (29) E.L.T.483 S.C.].* In this case the seized gold chain was coated with mercury and purity of gold was 99.6%; without foreign markings).

(iii) Reliance is also placed on the entire judgment of the Hon'ble Supreme Court in the case of *Om Prakash Khatri vs Commissioner [2019 (368) E.L.T. A155 (S.C.)]* on the issue of burden of proof u/s 123 of the Customs Act, 1962 including the issue that the seizure being a town seizure and not effected in an international border or near an airport / seaport does not make the seizure illegal. In this case the purity of the seized gold was 99.8%; without foreign markings.

(iv) The four statements given by each carrier of the seized gold were never retracted and they have reiterated their previous statements in their subsequent ones, implying that they had given their voluntary, true and correct statement each and every time without being subjected to any threat or duress or coercion.

(v) That Shri Chandra Sekhar Jha in his statement dated 28.02.2013 stated that he knew that gold reaches India through an unauthorized route from Bangladesh to Dimapur and from there, a person named Raja of Dimapur sent it to Dilip Agarwal; that it was also stated that that Rajan and his many associates are engaged in this wrong business of gold in the guise of franchisee of Trackon Courier, Fancy Bazar, Guwahati where he and Ranjan were employed.

(vi) That Shri Ranjan Kumar Mishra in his statement dated 28.02.2013 stated that Shri Ramesh Kumar Agarwal @ Shri Dilip Agarwal smuggled these goods from Bangladesh through Dimapur and in this work a person of Dimapur named Raja helped him.

(vii) As stated by Shri Chandra Sekhar Jha, this gold was brought illegally from abroad and hence his and /or other courier company never provides their challan for this.

(viii) Hence, there remains no ambiguity with regard to the seizure of gold from the possession of the aforesaid two persons, without any covering documents.

(ix) That as stated by Shri Roshan Kumar Jha, employee of M/s.Trackon Courier Pvt. Ltd., Shri Rajan Kumar Jha was the in-charge of both Lakhtokia, Fancy Bazar, Guwahati branch and Zoo Road, Tinali, Guwahati branch and that he had gone to Kolkata two days prior to the search on 01.03.2013 of the branch.

(x) As seen from the statement of the Area Manager of M/s. Trackon Courier Pvt. Ltd., all the consignments booked in various branches in North-East for transshipment to different parts of the country are routed through his office at GMCH, Guwahati and no consignment of gold bars was handed over to Shri Chandra Shekhar Jha from Area office for delivery to Kolkata.

(xi) Both the arrested persons S/Shri Chandra Shekhar Jha and Ranjan Kumar Mishra identified the photograph of Ramesh Kumar Agarwal and stated that this person was known to them as Dilip Agarwal @ Tony

Agarwal. They also stated that neither any challan of Trackon courier was prepared for the consignment of gold carried by them nor handed over to them for carrying the goods.

(xii) It is evident that immediately after effecting the seizure on 28.02.2013 and well before the claim on gold made by Raju Arora vide his letter dated 15.03.2013 (received by DRI in its office on 25.03.2013),follow up action was initiated by DRI (on 01.03.2013 itself) and thereby it got clearly established that M/s Trackon couriers neither handed over any gold nor any document in respect of the gold seized from the said two persons. The gold carried by S/Shri Chandra Shekhar Jha and Ranjan Kumar Mishra was not handed over to them by Trackon Courier. They carried the gold on their own by concealment, without any document, at the instructions of Ramesh Kumar Agarwal @Dilip Agarwal@ Toni Agarwal and assisted at Guwahati by Rajan Kumar, only for the sake of monetary gain.

(xiii) The gold under seizure consists of 51 (fifty one) small pieces of 166/168 gms. each and 04 (four) big pcs. weighing 1004 gms. each, having embossed serial numbers 10010075, 10010076, 10010077 and 10010078 on the 04 big pieces. The Sample Testing Report dated 07.03.2013 of the Chemical Examiner, Kolkata showed purity of the seized gold in the range of 99.93% to 99.96%.

(xiv) The VAT invoices nos. 4, 7 and 8 submitted by Raju Arora to claim the gold did not mention the number of pieces, individual weights and serial numbers as embossed on the 4 big gold bars under seizure and most importantly, the purity mentioned in each of the VAT Invoices was 99.5% and not 99.93% to 99.96%. Hence, his claim on the seized gold does not have legs to stand on these aforesaid grounds. Further findings during / post investigation in respect of the invoices are elaborated in the latter part of this submission.

(xv) The DRI had already initiated follow- up action on 01.03.2013 immediately after the seizure on 28.02.2013 and searches were conducted in three offices of M/s Trackon Courier in Guwahati on 01.03.2013 itself and statement of the Area Manager Mr. Manoj Kumar Biswas was recorded, wherein he had stated that gold and silver are forbidden items for transshipment by his courier company and no consignment of gold bars was handed over to Shekhar Jha from Area office for delivery to Kolkata and Mr. Jha was not allowed to take booking of consignments containing gold for delivery through Trackon Courier because as per policy, gold is a prohibited item for shipment through Trackon Courier.

(xvi) From the statement of Shri Subhendu Sekhar Jana, A.G.M. of Trackon Couriers Pvt. Ltd., dated 02.04.2013, it is revealed that on 08.03.2013, AWB/CN (pre-printed stationery) no(s). 319514501 to 3195515000 were sent to their Area office at

Guwahati (GHY) for their use and further distribution to franchise in North-East Region; he tendered the said register, in original to DRI, for facilitation of investigation under his signature; there was no scope of using the C.N. No. 319514554 on 26.02.2013 as the pre-printed blank C.N. stationery was supplied from his office at. Kolkata to Area Office at Guwahati on 08.03.2013. He stated that copy of AWB No. 319514554, as shown to him, found to contain origin and destination columns as blank and it was Receiver's copy which should be retained with the receiver of the goods after taking delivery. He confirmed that date of issuance as shown as 26.02.2013 was absolutely impossible. He also confirmed that no such consignment was either received by his Area Office at Guwahati or Regional Office at Kolkata vide AWB No.319514554 for onward despatch /delivery.

(xvii) From the statements of Shri Manoj Biswas, Area Manager, M/s. Trackon Courier Pvt. Ltd., it emerges that the said AWB was fabricated by his franchise at Fancy Bazar; AWB No. 319514554 shown as 'consignment not found' after on-line tracking of the same in their system.

(xviii) The statement of Shri Rajan Jha dated 08.04.2013 inter alia reveals that as per policy of Trackon Courier, consignments of Silver/ Gold/ Narcotics etc. could not be taken for booking; no consignment of gold was booked ever by his courier firm from Guwahati and if anyone claimed that the consignment of gold is booked through his courier office from Guwahati, that was wrong and the documents as provided by him may be false / fabricated; C. No. 319514554 dt. 26.02.2013 was issued by his courier office. This C.N. was generated on 15.03.2013 at his Fancy Bazar Office under pressure and life threat from Ramesh Agarwal and Raju Arora. This blank C.N. was issued to his branch by Trackon Couriers Pvt. Ltd. on 15.03.2013 and in any way; it cannot be issued on 26.02.2013. In fact, the C.N. was issued on 15.03.2013 under threat and pressure of Raju Arora and Ramesh Agarwal; that he also recognized the photograph of Ramesh Kumar Agarwal @ Tony @ Dilip Agarwal.

(xix) Shri Ramesh Kumar Agarwal in his statements dated 24.05.2013 and 28.05.2013, inter- alia accepted knowing Raju Arora and that he took him to Trackon Courier Fancy Bazar office where Rajan Kumar Jha was the booking clerk who booked the consignment consisting of gold of Raju Arora on 26.02.2013; that he knew Chandra Shekhar Jha; that he also stated that Rajan Jha had given the receipt to Raju Arora; that the goods were booked in his presence by Raju Arora; that he has no idea about the ownership of the gold and he had not seen the gold;

(xx) That Shri N.K. Jain in his statement dated 12.06.2013 has inter alia stated that that three sale invoices in the name of Shri Raju Arora, issued by M/s SHAYAM TRADERS, weight appx. 12 kgs. were given to him along with goods for carrying; that he did not know any person by the name of Rajan Jha and did not have any idea about the said letter dated 11.04.2013.

(xxi) Shri Chandra Sekhar Jha, in his statement dated 09.07.2013 stated that he works for Shri Rajan Jha as one of his employees at his courier company at Fancy Bazar, Guwahati; The gold intercepted from his possession on 28.02.2013 was not booked through his courier branch and no CN of Trackon Courier was provided to them in this regard on 27.02.2013 when they moved for Kolkata. It was also stated that Shri Ramesh Kumar Agarwal had handed over the said gold to him at his medical shop named 'Vayur Medicose' Fancy Bazar Guwahati at about 6,00 pm on 27.02.2013 and no person named Raju Arora was present there; that Shri Ramesh Kumar Agarwal was the actual owner of said smuggled gold; this was not a courier consignment. He again stated that Shri Ramesh Kumar Agarwal had handed him over the said gold concealed in cloth waist belt for carrying it to Kolkata and he did the job for want of money.

(xxii) The respondent states that the statements recorded from all the aforesaid persons was never retracted by any one of them at any stage. Those were rather reiterated in their subsequent statements. The three persons, namely Raju Arora, Ramesh Kumar Agarwal and N.K. Jain stated in their voluntary statements that they did not have any knowledge about the letter dated 11.04.2013 written by Rajan Kumar Jha to DRI. Hence, the letter was clearly false and fabricated. In view of the detailed facts in the aforesaid statements, the investigations carried out in the matter by DRI, precise facts brought before the department by the officials of Trackon Couriers Pvt. Ltd., and the confession of Shri Rajan Kumar Jha that he issued the C.N. No. 319514554 giving a back date under threat and coercion from Raju Arora and Ramesh Kumar Agarwal and that he did not write the letter dated 11.04.2013, it becomes clear that the findings of the Adjudicating Authority that the AWB No. 319514554 dated 26.02.2013 which was accompanied with the claim letter of Shri Raju Arora dated 15.03.2013 was not actually issued by Trackon Courier Pvt. Ltd. and it was false and based on afterthought, holds ground.

(xxiii) Call Detail Records of the noticees and others involved were also analysed and the complicity is also established that Shri Ramesh Kumar Agarwal, Shri Rajan Jha, Shri Chandra Shekhar Jha and Shri Ranjan Kumar Mishra were in touch with one another over phone and Raja of Dimapur also communicated with Ramesh Kumar Agarwal, Rajan Jha and Chandra Shekhar Jha.

(xxiv) Whereas it was claimed that the seized gold was purchased bona fide by Shri Raju Arora under cover of VAT invoices bearing number 4, 7 and 8 dated 18.02.2013, 19.02.2013 & 20.02.2013 respectively of "Shree Shayam Traders, 2034/8, Shop No. 1, South Extn. Part-I, Near Pelinji Kotla Mubarakpur, New Delhi-110003", Shri Atal Bihari Agarwal, Proprietor of "Shree Shayam Traders" (as appeared from the said invoices) neither appeared under repeated summons nor produced the documents requisitioned by DRI for evidence viz. Stock Register for (F.Y.2012-13, Sale Bills, Sales Tax/VAT Returns etc. for F.Y.2012-13, Trade Licence, TIN Regn. Certificate, copy of Agreement for credit sales, if any.

(xxv) Against a Writ Petition filed in the Hon'ble Calcutta High Court, Shri A. B. Agarwal was allowed to accompany a lawyer of his choice to appear under summon before DRI officer. In spite of that even after servicing of intimation through his advocates (as last few summons returned undelivered) Shri A. B. Agarwal failed to produce evidence in support of claim filed by Shri Raju Arora regarding the authenticity of purchase of gold from him.

(xxvi) TIN (Tax identification number) of "Shree Shayam Traders, 2034/B, Shop No. 1, South Extn. Part-I, Near Pelinji Kotla Mubarakpur, New Delhi-110003" was found to be mentioned as 07330456433 in the invoices issued to Shri Raju Arora. From TINXYS data base, TIN No. 07330456433 was verified and revealed that the same was issued to one Dealer as "Shri Shyam Traders, 2034/B Pilanji Kotla Mubarakpur, New Delhi-03, date of registration as 26.12.2012".

(xxvii) Database search in the name of the firm "Shree Shayam Traders" revealed the dealer with separate address as "0-1/40, Budh Vihar, PH-1, Delhi-86 showing date of registration as'08.02.2011' having TIN as '07250391293', RC No. 0391293. It is obvious that Shri Atal Bihari Agarwal was the Proprietor of "SHRI SHYAM TRADERS" at the declared address of 2034/B, Pilanji Kotla Mubarakpur, New Delhi-03, and not of "SHREE SHAYAM TRADERS". This can not be treated as a mistake in printing in invoices or whatsoever, as it would be evident from the WP No. 20706(W) of 2013 filed in the Hon'ble Calcutta High Court that the petitioner Shri Atal Bihari Agarwal had identified himself as the Proprietor of "M/s. Shree Shayam Traders" (repeat M/s. SHREE SHAYAM TRADERS) permanently residing at 2034/8, Pilanji Kotla Mubarakpur, New Delhi-03. Shri Atal Behari Agarwal, being proprietor of Shyam Traders cannot declare himself as a proprietor of Shree Shayam Traders and cannot issue invoices in the name of Shree Shayam Traders. A copy of a notarised affidavit made by Shri Atal Bihari Agarwal, declaring himself as the proprietor of M/s Shyam Traders can be found placed at pgs. 324-326 of the Appeal Petition of Raju Arora.

(xxviii) Enquiry at the House No. 2034-8/1, Pilanji Kotla Mubarakpur, New Delhi-03 stated to be the shop of Shri A. B. Agarwal also revealed that M/s Shri Shyam Traders proprietor Shri Atal Bihari Agarwal was rent holder of his shop from December 2012 to January 2013 only, as confirmed by the landlord of above mentioned premises, Shri Pramod Kumar vide letter dated 03.07.2013. Hence the question of issuance of invoices by said Shri Atal Bihari Agarwal from that address on 18.02.2013, 19.02.2073 & 20.02.2013 is false & fabricated. It was also observed that no business activities was carried out from the said rented premises ever by Shri Atal Bihari Agarwal or by M/s. Shri Shyam Traders. As such there is no question of having his permanent residence at the said address as stated in the WP No. 20706(W) of 2013 filed in the Hon'ble Calcutta High Court.

(xxix) Further, in the said WP No. 20706 (W) of 2013 filed in the Hon'ble Calcutta High Court by Shri Atal Bihari Agarwal (spelt as 'Atal Behari Agarwal'), said to be Proprietor of 'M/s. Shree Shayam Traders', as at page 8 of the writ petition, it was stated that the proprietorship firm was duly registered with the VAT authorities. The petitioner was an Income Tax assessee having PAN bearing No. AGWPA5655K and regularly pays applicable income tax to the authorities concerned. On study of the PAN database, it revealed that the declared PAN AGWPA5555K did not pertain to Shri Atal Bihari Agarwal but belonged to Shri Raju Arora, i.e. the claimant of the seized goods. This clearly indicates that Shri Atal Bihari Agarwal also misled the Hon'ble High Court in connivance with Shri Raju Arora in the matter of declaring his business profile, and thereby rendered his activities doubtful so far as issuance of VAT invoices is concerned.

(xxx) The VAT invoices nos. 4, 7 and 8 submitted by Raju Arora to claim the gold did not mention the number of pieces, individual weights and embossed serial numbers as contained in the 4 big gold bars under seizure and most importantly, the purity mentioned in each of the VAT Invoices issued by A.B. Agarwal, as submitted by Raju Arora was 99.50 and not 99.93% to 99.96% as per Chemical Examiner’s report. Hence Raju Arora’s claim on the seized gold does not have legs to stand on these aforesaid grounds.

(xxxi) The documents submitted by Shri Raju Arora along with the Show Cause Notice in respect of legal procurement of the gold under seizure, it was found that bank statement of M/s S.S. Enterprise was attached and the address in this bank statement was written as C-25 Vijay Vihar Colony Naya Khera Ambabari Jaipur Pin No. 302023. On the other hand, in the VAT INVOICE where S.S. Enterprise is selling gold to M/s Agarwal Traders, the address of S.S. Enterprise is LM-75A, Amber Tower, Sansar Chandra Road, Jaipur- 302001. It therefore is clear that the two 'S.S. Enterprise’s are different.

(xxxii) Several bills on the subject of legal procurement of the seized gold was submitted, whereby S.S. Enterprise sold gold to Agarwal Traders. He had submitted bill no. 352 dated 02.05.2012, bill no. 353 dated 26.05.2012, bill no. 354 dated 31.05.2012, bill no, 355 dated 30.05.2012, bill no.356 dated 30.08.2012, bill no.357 dated 03.09.2012, bill no. 358 dated 07.09.20L2, bill no. 359 dated nil, bill no, 350 dated 26.09.2012, bill no. 361 dated 09.10.2012, bill no. 362 dated 16.10.2012. It was observed S.S. Enterprise, being so big merchant bullion of gold was selling gold to only one party, "Agarwal Traders" over a period of near six months. This kind of singular transaction only to one company over such a long period of time is absolutely un- trustworthy and unbelievable.

(xxxiii) Further, Agarwal Traders raised Vat invoices to Shri Shayam Traders at the rate of around Rs. 2950/- per gram whereas Agarwal Traders is itself buying the gold at the rate of Rs 2935 to Rs. 3199/- average of which is much higher than the sale value Rs. 2950/-. It is unfathomable why a business firm will sell gold after concurring a huge loss instead of making a profit.

(xxxiv) Conclusion of ld. Adjudicating Authority is that book of accounts of S.S. Enterprise, sale invoice of M/s S.S. Enterprise to M/s Agarwal Traders, sale invoice of M/s Agarwal Traders, sale invoice of M,/s Agarwal Traders to M/s Shayam Traders are totally forged and fabricated. It was logically concluded by him that documents provided in support of selling of gold to Shri Raju Arora by M/s Shayam Traders was false and fabricated.

(xxxv) The ld. adjudicating authority also found it not believable that showroom space of much lesser consideration has been covered under an 'Agreement' whereas credit sale of gold to such a huge tune between Raju Arora and Atal Behari Agarwal is not properly recorded under an agreement, is without proper documentation, and on credit. The claim of purported transportation of gold first from Delhi to Guwahati without any insurance and again purported transportation through Trackon Couriers Pvt Ltd. (against their laid down policy of transhipment of gold) and that too without insurance from Guwahati to Kolkata does not hold ground.

(xxxvi) It is also evident that none of the invoices / bills/ documents supplied by Shri Raju Arora, either on earlier occasion with his letter dated 25.03.2013, or annexed at a later stage with reply to the Show Cause Notice is similar in number, weight and purity to the gold under seizure. All the documents/bills/VAT invoices/Bank documents submitted by Raju Arora show purity of gold claimed by him as 99.50%, which differs from the actual purity of the gold under seizure, being 99.93 to 99.96%. Further, in the VAT invoices, the aggregate weight is shown but the individual weights as per seizure (51 pieces of small biscuits weighing 166/168 gms. and 04 bars of weight 1004 gms.each bearing embossed serial nos.) are nowhere reflected. Hence they do not tally. The purity mentioned therein is also 995. In the HDFC Bank documents, quantity of gold sold is shown 50 pcs. & 100 pcs. – commodity details 100 gm. – 995, which again differs from the actual weight and purity of gold under seizure. Whereas the weight of the gold under seizure is 166/168 gms. each for 51 pieces of small bars and 1004 gms. each for 04 one kg. bars (each big bar bearing embossed serial number), as mentioned in the Seizure List, duly signed by Shri Chandra Shekhar Jha and Ranjan Kumar Mishra in the presence of two independent witnesses and Inventory / seizure List has been received by them under their signature on 28.02.2013. The purity of the seized gold is in the range of 99.93 to 99.96%.

(xxxvii) Hence from the foregoing it is evident that the claim on the gold by Raju Arora by way of trying to establish it as being forwarded through Trackon Courier to Kolkata with C.N. No. 319514554 dt.26.02.2013 as the covering document is completely false and fabricated. Also, the claim on the seized gold vis-a vis its weight, purity and nature by producing documents which do not corroborate such facts of seizure of gold by DRI is not proven beyond doubt and hence the burden of proof u/s 123 that the gold is not smuggled in nature has not been discharged by Raju Arora.

(xxxviii) In support of the contentions on the subject matter of reasonable belief for seizure of gold, admissibility of statements, absolute confiscation of the gold and imposition of penalty on the appellants, reliance is placed on the following case-law: -

- *Commr. of Customs(Prev.) Vs Rajendra Damani @ Raju Damani [2024 (5) TMI 730 - CUSTA No. 16 of 2023--CALCUTTA HIGH COURT]*
- *Om Prakash Khatri Vs. Commissioner [2019 (368) E.L.T. A 155 (Supreme Court.)]*
- *Commissioner of Customs, Cochin Vs. Om Prakash Khatri [2019 (366) E.L.T. 402 (Ker.)-High Court of Kerala at Ernakulam.]*
- *Commissioner of Customs Patna vs. Amar Kishore Prasad [2013 (298) E.L.T.711(Pat.)-High Court at Patna]*
- *Commissioner of Customs (Export) Vs. Shri Ashwini Kumar alias Amanullah [CUS AA 37/2021 & CM APPL. 34847/2023 - HIGH COURT OF DELHI]*
- *Nidhi Kapoor & Others vs. Principal Commissioner and Addl. Secy. to GOI & Ors. [WP(C) 8902/2021 ,9561/2021, WP(C) 13131/2022,CM APPL. 11400/2023, WP(C) 531/2022, CM APPL 1519/2022 and W.P.(C) 8083/2023,CM APPL 31146/2023 - HIGH COURT OF DELHI]*
- *Commr. of Customs (Prev.), NCH, New Delhi Versus Suresh Bhonsle [2024 (388) E.L.T. 90 –CESTAT PRINCIPAL BENCH, NEW DELHI- C.A. Nos. C/50934 with 51257 & 51737/2018 (DB)]*
- *Shankar Lal Goyal Vs. Commissioner of Customs, New Delhi. [2023 (12) TMI 1156 - CESTAT NEW DELHI -- CA- 50070 of 2020, F.O. No. 51685/2023]*

- *Deepak Handa & Ravi Handa vs. Principal Commissioner of Customs (Prev.), New Delhi [C.A. No. 52922 of 2019 & 52923 of 2019, F.O. No. 51520-21 /2021- CESTAT, PRINCIPAL BENCH, NEW DELHI.]*
- *Bala Nagu Naga Raju Versus Commissioner of Central Tax, Guntur GST [C.A.30400 of 2022 (S.M.) /F.O. No. 30092/2023]*
- *State of Gujarat Versus Mohanlal Jitamalji Porwal & Another [1987 (29) E.L.T. 483 (S.C.)]*

17.1. In view of these submissions, the Ld. Authorized Representative of the Revenue prayed that the Order of the adjudicating authority be upheld in its entirety.

18. Heard the parties and considered their submissions.

19. We find that in this case, the facts which are not in dispute are as under.

19.1. On 28.02.2013, the two persons, namely, Shri Chandra Shekhar Jha and Shri Ranjan Kumar Mishra, were intercepted in Coach No. G-10 of Garib Rath (12518) Express, when the train was about to reach the Railway Station at Kolkata, which started from Guwahati. These persons were interrogated and searched, whereby it was found that they were carrying 3 (three) belts, marked as "B-1", "B-2" and "B-3".

19.2. From these belts, totally 55 numbers of yellow coloured rectangular metal pieces, believed to be gold, were recovered. A detailed inventory of the said items was made and the total weight of the said gold was found to be 12.504 kgs. A Seizure Memo was prepared, on the reasonable belief that the said goods are liable for confiscation under Section 111 of the Customs Act, 1962.

19.3. Thereafter, on examination, out of 55 bars/biscuits, 4 (four) numbers of gold bars, weighing 1004 grams each, were found to be having some numbering thereon and the other pieces were found to be weighing around 166-168 grams each. Representative samples were drawn from the said gold and sent to the Customs House Chemical Laboratory (CHCL), Kolkata for examination. Thereafter, vide Report bearing No. 3139-3200/SZD(G)-59-120 dated 07.03.2013, it was reported as under: -

Sl. No.	Box No.	Total pcs & description	Total samples drawn & there details	Purity % (by weight)	Remark
1.	B-1	19 Pcs. [including two pcs having inscription 10010077 & 10010078]	**2 (Two),** S-7 (0.844 gms) S-6 (1.592 gms)	S-7: 99.95; S-6: 99.96	Total weight of gold contained in box B-1= 4843.518 gms
2.	B-2	18 Pcs. [including one pc having inscription 10010075]	**2 (Two),** S-5 (1.047 gms) S-4 (1.779 gms)	S-5: 99.96; S-4: 99.93;	Total weight of gold contained in box B-2= 3838.980 gms
3.	B-3	18 Pcs. [including one pc having inscription 10010076	**3 (Three),** S-3 (0.953 gms) S-2 (2.328 gms) S-1 (4.929) gms)	S-3: 99.94; S-2: 99.94; S-1: 99.95;	Total weight of gold contained in box B-3= 3837.929 gms

19.3.1. From the said Report, it is seen that the purity of the gold recovered is 99.93% to 99.96%. On reasonable belief, the gold was held liable for absolute confiscation and accordingly, proceedings were initiated against the appellants.

19.4. It is a further fact on record that Shri Raju Arora, who is the appellant no. 3 herein, vide his letter dated 15.03.2013, received in the Office of the DRI on 25.03.2013, claimed to be the owner of the said gold which he claims to have purchased by from M/s. Shri Shayam Traders, Mubarakpur, New Delhi through invoices bearing Nos. 4, 7 and 8 dated 18.02.2013, 19.02.2013 and 20.02.2013 respectively, on which VAT has been paid. For better appreciation of these facts, the said invoices are extracted hereinbelow: -

ANNEXURE B

70

Tin No. 07330456433

!! Jai Shree Shyam !!

VAT INVOICE

Shree Shayam Traders

2034 / B Shop No. 1, South Extn. Part-I, Near Pelinji Kotla
Mubarakpur, New Delhi-110003

Wholesaler Dearler & Broker
Gem Stone, Gold & Silver Jewellery & Bullion

M/s RAJU ARORA S/o Lt. TILKRAJ ARORA

Address 99 BAHATA ThAKURDAS

Party Tin : SARAI Rohilla Karol Bag Delhi-5

Bill No. 4

Date : 18/2/2013

S. No.	PARTICULARS	QTY.	RATE	AMOUNT
	GOLD BAR 99.5	6510.050 Grams	2975/- P Gram.	19367398.75
	PAN NO. AGWPA5655K			

Rupees One crore ninety five Lac sixty One thousand Seventy three Only	Total	19367398.75
	Vat % 1	193673.98
	R/o +	.27
	G. Total	19561073.00

Subject to Jaipur Jurisdiction.
E. & O. E.
This is certify that we have valid registration.
Under VAT & above information is true & correction.

RAAgrowal
For : Shree Shayam Traders

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Tin No. 07330456433 !! Jai Shree Shyam !!

VAT INVOICE

Shree Shayam Traders

2034 / B Shop No. 1, South Extn. Part-I, Near Pelinji Kotla
Mubarakpur, New Delhi-110003

Wholesaler Dearler & Broker
Gem Stone, Gold & Silver Jewellery & Bullion

M/s RAJU ARORA S/o Let TIALK RAJARORA
Address 9918 AHATA Thakurdas
Party Tin : Sarai Rohilla Karol Bag-DELHI

Bill No. 7
Date : 19/12/2013

S. No.	PARTICULARS	QTY.	RATE	AMOUNT
	GOLD BAR 99.50	4000.000 GRAM.	2975/- P. Gram	11900000.00
	PAN NO. AGWPA5655K			

Rupees One crore twenty thousand Lac Nineteen thousand Only

Total	11900000.00
Vat % 1	119000.00
R/o	—
G. Total	12019000.00

Subject to Jaipur Jurisdiction.
E. & O. E.
This is certify that we have valid registration.
Under VAT & above information is true & correction.

For : Shree Shayam Traders

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Tin No. 07330456433 !! Jai Shree Shyam !!

VAT INVOICE

Shree Shayam Traders

2034 / B Shop No. 1, South Extn. Part-I, Near Pelinji Kotla
Mubarakpur, New Delhi-110003

Wholesaler Dearler & Broker
Gem Stone, Gold & Silver Jewellery & Bullion

M/s RAJU ARORA S/o Let. TILAK RAJ ARORA
Address 9918 AHATA Thakurdas Sarai
Party Tin : Rohilla Karol Bag DELHI-5

Bill No. 8
Date : 20/12/2013

S. No.	PARTICULARS	QTY.	RATE	AMOUNT
	GOLD BAR-99.50	2000.150 GRAMS	2975/- P.Gram.	5950446.00
	PAN NO. AGWPA5655K			

Rupees Sixty Lac ninenthousand ninem hundred fifty one only

Total	5950446.00
Vat % 1	59505.00
R/o	—
G. Total	6009951.00

Subject to Jaipur Jurisdiction.
E. & O. E.
This is certify that we have valid registration.
Under VAT & above information is true & correction.

For : Shree Shayam Traders

20. From the above, we find that the purity of the gold in the said invoices is shown as "99.5" per cent. The numbers / pieces of gold is also not mentioned in the said invoices. Further, it is a fact on record that the claim of the appellant no. 3 is that he had sent the said gold from Guwahati to Kolkata through M/s. Trackon Courier Pvt. vide receipt bearing No. 319514554 on which Rs.14,000/- has apparently been paid as courier charges. It is also the claim of the appellant no. 3 that they had booked the said consignment on 26.02.2013 and the said gold was to be delivered to them on 01.03.2013.

20.1. However, when the said consignment of gold had not reached there and it was intimated that the said consignment has been seized on the belief that the said gold is a smuggled one, the appellant, namely, Shri Raju Arora, who claims to be the owner of the said gold, did not approach the DRI authorities with licit documents of procurement of the said gold, but intimated only through his letter dated 15.03.2013, which was received in the Office of the DRI on 25.03.2013. As the facts of the case are very much clear, that the gold in question is of a purity of 99.93% to 99.96%, therefore, we find that there was a reasonable belief that the same is a smuggled one. In these circumstances, in terms of Section 123 of the Customs Act, 1962, the onus lies on the person who was carrying the gold or the person claiming ownership of the gold, to prove that the said gold has been procured through licit means. Shri Raju Arora, the appellant no. 3, approached the Department to claim ownership of the gold and produced three invoices in support of such claim, which pertain to "gold bar" of "99.5" per cent purity, without giving a description of the gold in question inasmuch the numbers / pieces of gold or as to what was the weighment in respect of each piece of gold. In the present case, it is a fact on record that the purity of the gold is 99.93% to 99.96%. In these circumstances, the said invoices cannot be relied upon as evidence of licit procurement of the gold in question. Therefore, the invoices produced as defence / evidence by the claimant/appellant, namely, Shri Raju Arora, are discarded.

21. Thus, in terms of Section 123 of the Customs Act, the appellants have failed to discharge their onus of procuring the gold in question, that it has been procured through licit means. Hence, the authorities below have rightly absolutely confiscated the gold in question. Accordingly, the order of absolute confiscation of the gold in question is upheld.

22. Now, we come to the issue of imposition of penalties on the appellants and other defences raised by the appellants before us.

23. Regarding the issue of non-granting of cross-examination of the witnesses, whose statements were relied upon, and the contention of violation of the principles of natural justice, we find that the facts of the case are very much clear that the gold in question is having a purity of 99.93% to 99.96% and the invoices produced are of gold having 99.5% purity and hence, the statements recorded during the course of investigation are not at all relied upon by this Tribunal to hold that the gold in question is liable for confiscation. Therefore, we are of the view that denial of an opportunity of cross-examination to the appellants will not vitiate the proceedings.

23.1. With regard to the imposition of penalties, as Shri Raju Arora, appellant no. 3, has produced fake evidence in support of procurement of the gold in question, we hold that penalty has been rightly imposed on Shri Raju Arora. As regards the penalties imposed on the co-appellants, namely, Shri Ramesh Kumar Agarwal and Shri Rajan Kumar Jha, who were actively involved in the activity of smuggling of the gold in question, as Shri Ramesh Agarwal has admitted that he had introduced the appellant no. 3 to the appellant no. 1 for transportation of the gold and Shri Rajan Kumar Jha / appellant no. 1 was involved in receiving and transportation of the gold by issuing courier receipt which he was not entitled to do, therefore, we find that penalties have been rightly imposed by the ld. adjudicating authority in the impugned order in this matter as their roles are self-explanatory in this case.

24. In view of the above, we do not find any infirmity in the impugned order and accordingly, the same is upheld.

25. In the result, the appeals filed by the appellants are dismissed.

(Order pronounced in the open court on **29.07.2025**)

Sd/-
(ASHOK JINDAL)
MEMBER (JUDICIAL)

Sd/-
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

Sdd