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

REGIONAL BENCH – COURT NO. 2

Customs Appeal No. 75787 of 2023

(Arising out of Order-in-Appeal No. KOL/CUS/CCP/AKR/04-05/2022 dated 21.01.2022 passed by the Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1, Strand Road, Kolkata – 700 001)

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

VERSUS

Shri Prashant Mishra : Respondent
S/o. Shri Amarjeet Mishra,
D-36/45, Augusta Kunda, Dashashwamedh,
City – Varanasi, Uttar Pradesh – 221 001

AND

Customs Appeal No. 75788 of 2023

(Arising out of Order-in-Appeal No. KOL/CUS/CCP/AKR/04-05/2022 dated 21.01.2022 passed by the Commissioner of Customs (Appeals), 3rd Floor, Custom House, 15/1, Strand Road, Kolkata – 700 001)

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

VERSUS

Shri Laxmi Prasad : Respondent
S/o. Shri Ram Avtar,
C/o. Shop: M/s. Alankar Jewellers, Behind Tulsi Lodge,
Mohalla Kabir Ganj, P.O.: Sasaram,
District: Rohtas, Bihar – 821 115

APPEARANCE:

Shri Faiz Ahmed, Authorized Representative,
For the Appellant / Revenue

Shri Nilotpal Chowdhury, Advocate,
Ms. Sweety Jha, Advocate,
for the Respondent(s)

CORAM:

HON'BLE SHRI R. MURALIDHAR, MEMBER (JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NOs. 77555-77556/ 2025

DATE OF HEARING: 25.09.2025

DATE OF DECISION: 16.10.2025

ORDER: [PER SHRI K. ANPAZHAKAN]

Customs Appeal No. 75787 of 2023 has been filed by Principal Commissioner of Customs (Preventive)(herein after referred as the Revenue) against Order-in-Appeal No. KOL/CUS/CCP/AKR/04-05/2022 dated 21.01.2022 passed by the Commissioner of Customs (Appeals), Kolkata, wherein the Ld. Commissioner (Appeals) had set aside the penalty imposed on the Respondent under Section 112(b) of the Customs Act, 1962.

Customs Appeal No. 75788 of 2023 has been filed by Principal Commissioner of Customs (Preventive)(herein after referred as the Revenue) against Order-in-Appeal No. KOL/CUS/CCP/AKR/04-05/2022 dated 21.01.2022 passed by the Commissioner of Customs (Appeals), Kolkata, wherein the Ld. Commissioner (Appeals) had set aside the penalty imposed on the Respondent under Section 112(b) of the Customs Act, 1962.

As both the appeals mate from the same Order-in-Appeal, both are taken up together for decision by a common order.

2. The brief facts of the case are that on the basis of specific information, the officer of Customs (P&I Branch, CCP,WB) Kolkata, iintercepted Shri Prashant Mishra, (the Respondent herein) who was about to travel by 12321 Howrah-Mumbai mail on 25.05.2018. On personal search of Shri Prashant Mishra, Officers of Customs recovered one piece of gold bar and six cut pieces of gold, collectively weighing 1856.070 grams valued at Rs 59,57,985/ On asking, Shri Prashant Mishra was not able to produce any licit document in support of legal

possession/transporting/carrying of the said gold . Accordingly, the said gold was seized on the reasonable belief that the said gold were smuggled into India through unauthorized route violating provisions of Customs Act 1962.

2.1. On 26.06.2018, prayer for release of the seized gold was submitted by a person by name Shri Laxmi Prasad of Mohalla kabir gunj, P.O. Sasaram, Bihar-8211152, (the Respondent herein) stating that his deceased son Shri Aniket Kumar Soni used to run a shop named M/s Alankar Jewellers at Sasaram. On 05.04.2017, the said shop was closed with the closing stock of gold as 1183.529 grams. Another 500.00 grams of old and used gold ornaments were given by him to the widow, Smt. Monica Soni for settling down. All the ornaments were converted into the rectangular shape bar of 99% purity and were sent to Kolkata through Shri Prashant Mishra. While he was returning with the said gold, he was intercepted by the Officers of Customs and the said gold was seized by the officers.

2.2. On completion of investigation, a show cause Notice was issued, *inter alia,* proposing confiscation of the gold and imposing penalties on the Respondents herein.

2.3. After due process, the Notice was taken up for adjudication. The adjudicating authority (Additional Commissioner of Customs (Preventive), CC(P) W.B) vide OIO No. 25/ADC(P)/CUS/WB/20-21 dtd. 26.08.2020 ordering for:-

(i) Absolute confiscation of one piece of gold bar and six cut pieces of gold collectively weighing 1856.070 grams valued at Rs. 59,57,985/- u/s 111(b) & 111(d) of the Customs Act 1962under provisions of section 112 of Customs Act.

(ii) Imposed Penalty of Rs. 6,00,000/- (Rs. Six Lakhs) upon Shri Prashant Mishra in terms of Section 112(b) of the Customs Act 1962 for their act of omission and commission.

(iii) Imposed of Penalty of Rs. 6,00,000/- (Rs. Six Lakhs) upon Shri Laxmi Prasad in terms omission and of Section 112(b) of the commission Customs Act 1962 for their act of omission and commission

2.4. Aggrieved by the said Order-in-Original, Shri Prashant Mishra and Shri Laxmi Prasad filed separate appeals before Commissioner of Customs (Appeals). The Ld.Commissioner of Customs (Appeals) vide Order-in-Appeal No. KOL/CUS/CCP/AKR/04-05/2022 dated 21.01.2021 has modified the OIO and ordered as under:

- The confiscation of one piece of gold bar and 06 cut pieces of gold collectively weighing 1856.070 grams u/s 111(b) & 111(d) of the C A'1962 was set aside with consequential benefits.

- The Penalty imposed on Shri Prashant Mishra in terms of Section 112(b) of the Customs Act'1962 was set aside with consequential benefits.

- The Penalty imposed on Shri Laxmi Prasad in terms of Section 112(b) of the Customs Act'1962 was set aside with consequential benefits.

2.5. Aggrieved against the imposition of penalties on both the Respondents herein, Revenue has filed these appeals.

3. In their Grounds of Appeal, Revenue has made the following submissions:

A. The Commissioner of Customs (Appeal), Kolkata has failed to appreciate the fact that the one piece of gold bar and six cut pieces of gold collectively weighing 1856.070 grams valued at Rs. 59,57,985/- were seized on reasonable belief that the gold believed to be foreign origin, had been smuggled into India through unauthorized route and also failed to appreciate the fact that the offence was committed in violation of Section 7 (C) of the Customs Act 1962 read with section 11 of the Customs Act 1962 i.e. possession and transport of foreign origin gold without any documents.

B. The commissioner of Customs (Appeal), Kolkata has failed to appreciate the fact that the statement given before the Customs is legal and valid as per the Customs Act 1962. As per statement of Sri Prashant Mishra u/s 108 of the Customs Act 1962, the said seized gold were recovered from his possession. Sri Prashant Mishra stated that one person Sri Laxman Kant Sony of Varanasi had sent him to Kolkata to receive the gold from Kolkata. He had gone to Sonapatty of Burrabazar by bus where one unknown person delivered him above said 07 (seven) pieces of gold without any documents in support of seized gold.

C. As per prayer letter of Sri Laxmi Prasad on 26.06.2018 that he gave the melted gold to Sri Prashant Mishra at Bihar to exchange with gold ornaments form Kolkata. The above contention of Sri Laxmi Prasad, appears to be an attempt to cover up the illegal procurement and possession of the gold which was smuggled into the country The absence of any document, except a purported stock account, without any documents evidencing legal procurement, the claim of the seized gold to be the stock of the deceased son's shop appears to be a fabricated and false.

D. As per RBI guidelines, Gold/Platinum/Silver is/are allowed to be imported by nominated agencies/banks only subject to strict regulation/conditions. As per Section 2(33) of the Customs Act, 1962, "prohibited goods" means any goods the import or export of which is subject to any prohibition under this act or any other law for time being in force but does not include any such goods in respect of which the condition subject to which the goods are permitted to be imported or exported have been complied with.

E. As per the notification and circulars/instructions as mentioned above, it is evident that exhaustive conditions and restrictions are imposed on the import of various forms of gold and silver by nominated banks/nominated agencies/premier of Star Trading House/SEZunits/EoUs. These conditions are nothing but restrictions imposed on the import of gold & silver. In the subject case, no document has been produced showing legal possession of the gold by the accused. And as such conditions for import do not seem to have been satisfied and it being a clear case of smuggling. It is pertinent to mention here that Hon'ble Supreme Court of India in Sheikh Mohd Omer Vs. Collector of Customs, Calcutta (1983(13) ELT 1439 clearly laid down that any prohibition applies to every type of prohibitions which may be complete or partial and even a restriction on import or export is to an extent a prohibition. Hence the restriction imposed on the import of gold and silver is to an extent a prohibition and any documents could be produce by the person possessing that gold and also by the claimant in support of legal importation/possession/transportation of the same. Hence, it seems a settled fact that the seized gold were illegally brought into India from abroad by any route other than the route, specified in a notification issued under clause (c) of Section 7 for the import of such goods, which rendered the said seized gold liable for confiscation under Section 111(b) and 111(d) of the Customs Act, 1962.

F. In view of the above mentioned facts, Revenue prayed for setting aside the Order No. KOL/CUS/CCP/AKR/04-05/2022 dated 21.01.2022.

4. The Respondents herein submits that gold belonged to Shri Laxmi Prasad of Mohalla kabir gunj, P.O. Sasaram, Bihar-8211152. It is their submission that his deceased son Shri Aniket Kumar Soni used to run a shop named M/s Alankar Jewellers at

Sasaram. On 05.04.2017, the said shop was closed with the closing stock of gold as 1183.529 grams. Another 500.00 grams of old and used gold ornaments were given by him to the widow, Smt. Monica Soni for settling down. All the ornaments were converted into the rectangular shape bar of 99% purity and were sent to Kolkata through Shri Prashant Mishra. While he was returning with the said gold, he was intercepted by the Officers of Customs and the said gold was seized by the officers.

4.1. The Respondents submits that the provisions of Section 123 of the Customs Act, 1962 are not applicable to this case. As the gold in question was seized from the domestic area, the onus is on the Revenue to prove that the said gold was of smuggled in nature. The Revenue has no evidence on record to establish that the gold in question was smuggled. Accordingly, the Respondents submits that the Ld. Commissioner (Appeals) had rightly set aside the confiscation of the gold as well as the penalties imposed on them. Thus, they prayed for rejection of the appeals filed by the Revenue.

5. Heard both sides and perused the appeal documents.

6. We observe that the Revenue has filed these appeals against dropping of the penalties imposed on the Respondents herein. It is observed from the records that the Respondents have been implicated in the alleged offence of smuggling of gold biscuits on the basis of their own statements. The Ld. Commissioner (Appeals) found that there is no evidence available on record to establish that the gold was smuggled in nature. Accordingly, he set

aside the confiscation of the gold in question and the penalties imposed on the Respondents herein.

6.1. Thus, in the present case, the following issues emerge for our consideration: -

(i) Whether the evidences available on record indicate that the Respondents were involved in the alleged offence of smuggling of gold bars, or not.

(ii) Whether the burden of proof under Section 123 of the Customs Act, 1962, can be shifted on the Respondents in the absence of any conclusive evidence proving the foreign origin of the gold, or not.

(iii) Whether the dropping of the penalties against the respondents in the impugned order is legally justified, or not.

7. **Issue No. (i) Whether the evidences available on record indicate that the Respondents were involved in the alleged offence of smuggling of gold bars?**

7.1. In the present case, we observe that the gold in question was seized from the domestic area. We find that the officers did not derive any subjective satisfaction that the gold was of foreign origin and smuggled. The seizure inventory fails to disclose any material evidence justifying a 'reasonable belief' for seizure of the gold. In this regard, we observe that mere finding of gold does not render it liable for seizure unless there is cogent and positive evidence proving its foreign origin as the first condition, as precursor to seizure.

7.2. The Hon'ble Supreme Court in the case of *Tata Chemicals Ltd. v. Commissioner of Customs (Preventive), Jamnagar reported in (2015) 11 SCC 628 = 2015 (320) E.L.T. 45 (S.C.),* explained the meaning of the phrase 'reason to believe' as under:-

> *"reason to believe" by opining it to be not the subjective satisfaction of the officer concerned, for "such power given to the officer concerned is not an arbitrary power and has to be exercised in accordance with their strains imposed by law" and that such belief must be that of an honest and reasonable person based upon reasonable grounds. Further, if the authority would be acting without jurisdiction or there is no existence of any material or conditions leading to the belief, it would be open for the Court to examine the same, though sufficiency of the reasons for the belief cannot be investigated.*

7.3. We find that the Hon'ble Delhi High Court in the case of *Shanti Lal Mehta v. Union of India & Ors. [1983 (14) E.L.T. 1715 (Del.)],* has elaborately dealt with town seizures and the evidences required to have the 'reasonable belief' that the goods are smuggled in nature, in such cases. The relevant portion of the said decision is reproduced below: -

> *"54. The other question which was argued before me was that the customs officer did not act on any reasonable belief when he searched the petitioner's premises on 15-12-1967 and seized the goods. Section 110 opens with the words "if the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such*

goods". What is the meaning of "reasonable belief"? Did the officer entertain reasonable belief in the facts and the circumstances of this case? This is the other question to be decided. The Supreme Court has said that reasonable belief is a pre-requisite condition of the power of seizure that the statute confers on the officer. (See Collector of Customs v. Sampathu Chetty, AIR 1962 S.C. 316). The preliminary requirement of Section 110 is that the officer seizing should entertain a reasonable belief that the goods seized were smuggled.

55. Reasonable belief as required by Section 110 refers to the point of time when the goods in question are seized and not to a stage subsequent to the act of seizure. (M.G. Abrol v. Amichand, AIR 1961 Bom. 227). The condition precedent that there was such a reasonable belief anterior to the seizure must exist before the presumption under section 123 can be invoked. Section 123 says:

7.4. The Hon'ble Supreme Court, in *Gian Chand v. State of Punjab (1962 AIR 496),* has categorically held that mere suspicion is not sufficient to justify seizure, and the prosecution must provide substantive evidence of foreign origin. Further, we observe that in *Union of India v. Mahesh Raj (1990 SCC (3) 115),* the Hon'ble Supreme Court ruled that the burden under Section 123 arises only if there is prima facie evidence indicating foreign origin, which is entirely absent in this case. Also, in *D. Bhoormull (1974 AIR 859),* the Hon'ble Supreme Court emphasized that suspicion alone is not a substitute for evidence. In *Umrao Lal v. Commissioner of*

Customs (2016 (331) E.L.T. 216 (Tri.-Del.), it was held that in the absence of markings or material evidence proving foreign origin, confiscation is not sustainable.

7.5. Thus, we are of the considered opinion that the evidences available on record do not indicate that the Respondents were involved in the alleged offence of smuggling of gold bars. Accordingly, we hold that the evidences available on record does not indicate that the Respondents were involved in the alleged offence of smuggling of gold. Thus, we answer to the question (i) framed at paragraph 6.1 supra, in the negative.

8. **Issue (ii): Whether the burden of proof under Section 123 of the Customs Act, 1962, can be shifted to the appellants in the absence of any conclusive evidence proving the foreign origin of the gold, or not.**

8.1. Section 123 of Customs Act, 1962, prescribes that the burden of proving that goods which have been seized under the Act are not smuggled in nature is on the person who claims the ownership of the goods. For the sake of ready reference, the said Section is extracted below: -

> ***"SECTION 123.Burden of proof in certain cases.*** *— (1) Where any goods to which this section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be -*
>
> *(a) in a case where such seizure is made from the possession of any person, -*

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

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

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

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

8.2. We observe that the provisions of Section 123 of the Customs Act, 1962 are applicable only when it is established that the gold in question were of smuggled in nature. In the present case, we find that the investigation has not brought in any evidence on record to establish that the gold in question was smuggled in nature. As the gold in question was seized from the domestic area, we observe that the provisions of section 123 of Customs Act, 1962 are not applicable in this case and hence the onus is on the Revenue to prove that the said gold was of smuggled in nature. We observe that the Revenue has no evidence on record to establish that the gold in question was smuggled. Accordingly, we find that the Ld. Commissioner (Appeals) had rightly set aside the confiscation of the gold and the penalties imposed on the Respondents herein.

8.3. In this regard, it is relevant to cite the judgement of the Hon'ble Supreme Court in *Ganesh*

Das v. Collector of Central Excise [1994 (70) ELT 441 (SC)] wherein it was held that before the burden shifts to the person from whom the goods were seized, it must first be established that the goods were of foreign origin and mere suspicion or presence of certain disputed markings is not sufficient. Further, the Hon'ble Supreme Court in *Commissioner of Customs v. Abdul Gani [2012 (278) ELT 474 (SC)]* has reiterated that reasonable belief must be backed by sufficient evidence of foreign origin. If there are no foreign markings or documentation, the Customs authorities cannot simply assume that the gold in question were of smuggled in nature.

8.4. In the facts and circumstances of the case, we observe that the burden of proof under Section 123 of the Customs Act does not shift on the Respondents herein. The Customs authorities must first establish the foreign origin before invoking the presumption of smuggling. So, we are of the view that in this case, the responsibility is on the Department to show that the gold in question was smuggled into the country without payment of appropriate duties of Customs thereon, which the Department has failed to discharge in this case.

8.5. Thus, we hold that the burden of proof under Section 123 of the Customs Act does not shift to the Respondents herein. Accordingly, we answer the issue (ii) framed at paragraph 6.1 supra, in the negative.

9. **Issue (iii): Whether the dropping of the penalties against the respondents in the impugned order is legally justified, or not.**

9.1. We observe that the penalties imposed on the appellants under Section 112(b) of the Customs Act 1962 have been set aside by the Ld. Commissioner (Appeals). We find that there is no evidence available on record to show that the gold bars were of foreign origin and smuggled into the country. In the absence of any evidence to establish that the gold bars were smuggled ones, penalty under Section 112(b) of the Customs Act, 1962 cannot be imposed. In the present case, it is not proved that the gold bars were smuggled in to the country. As the gold bars found were not established as smuggled in nature and hence on the face of it, the same cannot be treated as prohibited goods. Thus, we observe that when the gold in question is not considered as 'prohibited goods', the provisions of section 112 (b) cannot be invoked to impose penalty. Hence, in these facts and circumstances, we are of the opinion that no penalty is imposable on the Respondents herein under Section 112(b) of Customs Act, 1962 and the Ld. Commissioner (Appeals) has rightly set aside the penalties imposed on the Respondents.

9.2. In support of the above view, we refer to the decision of this Tribunal in the case of *R.K. Swami Singh v CC(Preventive), Shillong [(2024) 18 Centax 459 (Tri.-Cal)]* wherein under similar facts and circumstances, this Tribunal has set aside the penalty imposed under Section 112(b)(ii) of the Customs Act 1962. The relevant portion of the said decision is reproduced below:

> *"12.11 Regarding penalty imposed under section 112(b)(ii) of the Customs Act 1962, the appellant stated that the gold was purchased*

by his father and he inherited the gold from his father. There is no evidence on record to show that the gold bars/pieces were of foreign origin and smuggled into the country. In the absence of any evidence to establish that the gold bars/pieces were smuggled ones, no penalty is imposable under section 112(b)(ii) of the Customs Act, 1962. The appellant cited various decisions of the Tribunals and High Courts to support this claim. We find merit in the argument of the Appellants. Section 112 of the Customs Act, 1962 details the circumstances under which penalty is imposable under this section. Under Section 112(b), penalty is imposable when the person is found to be dealing with goods for which prohibition is in force or the goods are liable for confiscation. The gold bars/pieces found in possession of the appellant were not established as smuggled in nature and hence they are not prohibited goods. The gold bars/pieces were seized at Imphal, away from the Indo-Myanmar international border. The appellant was carrying the gold which he claimed that they were domestically purchased by his father and he inherited the same. We observe that the investigation has not brought in any evidence to counter this claim. Hence, we find merit in the argument of the appellant that penalty is not imposable on him under Sction 112(b)(ii) of Customs Act, 1962. Accordingly, the answer to question no. (iv) in paragraph 12 above, is in the negative."

9.3. Thus, by relying on the decision cited supra, we hold that the penalties imposed on the

Respondents have been rightly set aside by the Ld. Commissioner (Appeals). Hence, we answer the question (iii) raised in paragraph 6.1 supra in the affirmative.

10. We summarise the answers to the questions raised at paragraph 6.1 (supra) as below: -

(i) The evidences available on record do not indicate that the Respondents herein were involved in the alleged offence of smuggling of gold bars.

(ii) The burden of proof under Section 123 of the Customs Act does not shift to the Respondents herein.

(iii) The Ld. Commissioner (Appeals) has rightly set aside the penalties imposed on the Respondents herein under section 112(b) of the Customs Act, 1962.

11. In view of the above findings, we do not find any merit in the appeals filed by the Revenue and hence the same are rejected.

(Order pronounced in the open court on **16.10.2025**)

(R. MURALIDHAR)
MEMBER (JUDICIAL)

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

RKP