

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

REGIONAL BENCH – COURT NO.1

Customs Appeal No.77223 of 2019

(Arising out of Order-in-Original No.CCP/NER/12/2019 dated 19th July, 2019 passed by Commissioner of Customs (Preventive), Shillong)

Shri Vinay Agrawal

(1306, New Ray Ganj, Behind Jarmani Hospital, Sipri Bazar, Jhansi Khas, Mauraniur, Jhansi, Uttar Pradesh-284003)

Appellant

VERSUS

Commissioner of Customs (Prev.), Shillong

(NER, 110, Mahatma Gandhi Road, Shillong-793001)

Respondent

WITH

Customs Appeal No.77220 of 2019

(Arising out of Order-in-Original No.CCP/NER/12/2019 dated 19th July, 2019 passed by Commissioner of Customs (Preventive), Shillong)

Shri Suraj Prakash Saraf

(Ganapati Apartment, 5, Vidyasagar Road, Khalpara, Opp. Vishal Mega Mart, Siliguri-734005)

Appellant

VERSUS

Commissioner of Customs (Prev.), Shillong

(NER, 110, Mahatma Gandhi Road, Shillong-793001)

Respondent

AND

Customs Appeal No.77221 of 2019

(Arising out of Order-in-Original No.CCP/NER/12/2019 dated 19th July, 2019 passed by Commissioner of Customs (Preventive), Shillong)

Shri Vijay Verma

(Kalimpong Jewellers, Seth Srilal Market, Ward No.11, Near Agarwal Brothers, Siliguri-734001)

Appellant

VERSUS

Commissioner of Customs (Prev.), Shillong

(NER, 110, Mahatma Gandhi Road, Shillong-793001)

Respondent

Customs Appeal Nos.77220,77221 & 77223 of 2019**Appearance:**

S/Shri Arijit Chakrabarti and Shri N. Chowdhury, both Advocates, for the Appellant(s)
Shri A.K.Choudhary, Authorized Representative for the Appellant

CORAM:**HON'BLE MR. ASHOK JINDAL, MEMBER (JUDICIAL)****HON'BLE MR. K.ANPAZHAKAN, MEMBER (TECHNICAL)****FINAL ORDER NO.75764-75766/2026**DATE OF HEARING : 25 MAY 2026DATE OF PRONOUNCEMENT : 24 JUNE 2026**Per Ashok Jindal :**

The appellants are in appeal against the impugned Order-in-Original dated 19.07.2019, challenging the order of absolute confiscation of the gold bars in question and the imposition of penalties upon them under the provisions of the Customs Act, 1962.

1.1. Customs Appeal No. 75223 of 2019 has been filed by Shri Vinay Agrawal (appellant no. 1 herein) challenging the order of confiscation in respect of 6 (six) gold bars weighing 996.020 grams and the penalty imposed upon him under Section 112(b)(i) of the Customs Act, 1962.

1.2. Customs Appeal Nos. 75220 and 75221 of 2019 have been filed by Shri Suraj Prakash Saraf and Shri Vijay Verma (appellant no. 2 and appellant no. 3 respectively) have challenged the impugned order to the extent it imposed penalties imposed upon them under Section 112(b)(i) *ibid*.

2. Briefly stated, the facts of the case are that on 27.10.2017, at about 19:00 hours, officers of the Directorate of Revenue Intelligence, Guwahati Zonal Unit, intercepted Shri Vinay Agrawal near City Bus Stop, Pan Bazar, Guwahati and recovered 6 (six) pieces of gold bars collectively weighing 996.020 grams. The said goods were seized under Section 110(1) of the Customs Act, 1962 vide Seizure Case No. 18/CL/IMP/GOLD/DRI/GAU/2017-18 dated 28.10.2017.

Customs Appeal Nos.77220,77221 & 77223 of 2019

3. It was recorded in the Inventory-cum-Seizure List that the seized gold bars bore a "diamond marking of foreign origin", though the alleged inscriptions thereon were stated to have been deliberately defaced. The Inventory-cum-Seizure List was drawn on 27.10.2017.

4. It is the case of the appellants that Shri Vinay Agrawal was detained at the office premises of DRI, Guwahati and statements dated 27.10.2017 and 28.10.2017 came to be recorded prior to his arrest under Section 104 of the Customs Act, 1962 on 28.10.2017. According to the appellants, the said statements having been recorded at the pre-arrest stage and during prolonged interrogation cannot, by themselves, constitute the sole basis for drawing adverse conclusions against the appellants.

5. Subsequently, on 01.02.2018, another 4 (four) gold bars collectively weighing 664.220 grams along with Indian currency amounting to Rs.1,53,320/- were recovered from the residential premises of Shri Vivek Sethi situated at Kumarpara, Athgaon, Guwahati. The said recovery was thereafter linked with the earlier seizure proceedings initiated on 28.10.2017.

6. It is the case of the appellants that statements dated 01.02.2018 and 02.02.2018 were recorded from Shri Vivek Sethi prior to his arrest under Section 104 of the Customs Act, 1962 and that the said statements also came to be relied upon during the course of adjudication proceedings.

7. Thereafter, a Show Cause Notice vide DRI F. No. 39/DRI/SEIZ/GAU/2017-18 dated 13.04.2018 was issued proposing, inter alia, confiscation of the aforesaid gold bars and imposition of penalties upon the noticees. It was alleged therein that Shri Vivek Sethi had procured 10 (ten) gold bars from Imphal and had delivered 6 (six) gold bars to Shri Vinay Agrawal while retaining the remaining four bars. It was further alleged that Shri Vijay Verma and Shri Suraj Prakash Saraf had facilitated the transactions and were associated with the movement and delivery of the said gold. Accordingly, confiscation of the

Customs Appeal Nos.77220,77221 & 77223 of 2019

seized goods under the provisions of the Customs Act, 1962 and imposition of penalties upon the noticees were proposed.

7.1. In response thereto, the appellants filed detailed replies dated 13.11.2018 denying the allegations levelled in the Show Cause Notice. It was, inter alia, contended that:

- (i) the statements recorded during the course of investigation could not, in the absence of independent corroboration, constitute the sole basis for adjudication;
- (ii) there was no material on record evidencing any illegal importation or conscious involvement of the appellants in any activity rendering the goods liable to confiscation;
- (iii) the six gold bars recovered from Shri Vinay Agrawal had allegedly been acquired locally at Guwahati and no cogent material had been brought on record establishing their foreign origin;
- (iv) the test report pertaining to the seized gold bars indicated purity ranging between 995.9 and 996.5 and, according to the appellants, the same by itself did not establish the foreign origin of the seized gold.

8. Personal hearings were granted and the matter was adjudicated by the Ld. Commissioner of Customs (Preventive), Shillong vide the impugned Order-in-Original No. CCP/NER/12/2019 dated 19.07.2019, the adjudicating authority ordered absolute confiscation of all the 10 (ten) gold bars collectively weighing 1660.240 grams and valued at Rs.50,70,386/- under Sections 111(b) and 111(d) of the Customs Act, 1962. Penalties were also imposed upon the noticees, including a penalty of Rs.3,00,000/- upon Shri Vinay Agrawal, Rs.1,50,000/- upon Shri Vijay Verma and Rs.2,00,000/- upon Shri Suraj Prakash Saraf under Section 112(b)(i) of the Customs Act, 1962.

Customs Appeal Nos.77220,77221 & 77223 of 2019

8.1. Being aggrieved by the aforesaid Order-in-Original dated 19.07.2019 and being dissatisfied with the findings and conclusions recorded therein, Shri Vinay Agrawal has come in appeal challenging, inter alia, the order of absolute confiscation in respect of the 6 (six) gold bars weighing 996.020 grams and the penalty imposed upon him under Section 112(b)(i) of the Customs Act, 1962. Shri Vijay Verma and Shri Suraj Prakash Saraf have also preferred separate Appeals assailing the penalties imposed upon them.

9. The Ld. Counsel appearing on behalf of the appellants, reiterates the grounds taken in the respective Appeals. The Ld. Counsel principally advances submissions on behalf of appellant No. 1, Shri Vinay Agrawal, in relation to the order of confiscation of the six gold bars and the penalty imposed upon him. The Ld. Counsel for the appellant Nos. 2 and 3, namely Shri Suraj Prakash Saraf and Shri Vijay Verma, also adopt the said submissions insofar as the issue of imposition of penalties upon them is concerned and prayed for consequential relief.

9.1. At the outset, the Ld. Counsel for the appellants submits that there are serious doubts regarding the manner in which the Panchanama was drawn. The Appellants submits that the addresses of the panch witnesses themselves indicate that they were not local independent witnesses and appear to have been pre-arranged. It is contended that a plain reading of the Panchanama reveals that the same is a dictated and typed document, which has merely been signed by the witnesses without any meaningful verification of its contents. The Appellants submits that the signatures of the panch witnesses are in a crude form and do not inspire confidence that the detailed proceedings recorded in English, as stated in the Panchanama, were actually read over and explained to them. It is, therefore, contended that the Panchanama lacks the attributes of an independent contemporaneous record and the same appears to have been prepared in a mechanical manner. Accordingly, it is submitted by the Ld. Counsel for the appellants that the evidentiary value of the Panchanama itself becomes doubtful and deserves to be viewed with circumspection.

9.2. The submissions made by the Learned Counsel on behalf all the Appellants are summarized below:

- (i) It is submitted that the interrogatory statements recorded by the DRI cannot be considered as voluntary statements under Section 108 of the Customs Act, 1962. At best, such statements may be regarded as statements under Section 107 of the Customs Act, 1962, which, according to the Learned Counsel, have no evidentiary value in law. It is further submitted that the initial statements of Appellant No. 1 as well as Shri Vivek Sethi were recorded at the pre-arrest stage after prolonged detention at the office of DRI, Guwahati and, therefore, do not satisfy the test of voluntariness. Hence, according to him, such statements cannot form the basis of any adverse conclusion in the present case.
- (ii) It is further submitted that the subsequent recovery allegedly effected from Shri Vivek Sethi was admittedly made on 01.02.2018, i.e., after more than three months from the date of the original seizure. It is contended that such recovery was nevertheless made part of the Seizure Case dated 28.10.2017, even prior to recording of the alleged statements of Shri Vivek Sethi dated 01.02.2018 and 02.02.2018. According to the Learned Counsel, such merger of recoveries into one case is not only bad in law but also mala fide and, therefore, unsustainable.
- (iii) It is further submitted that, in an attempt to corroborate the allegation of illegal importation of the six gold bars seized from Appellant No. 1, the subsequent recovery from Shri Vivek Sethi and his purported statements were relied upon by the investigating authority. It is contended that such an exercise is futile inasmuch as the initial statements of the co-accused/co-noticee, Shri Vivek Sethi, remained wholly uncorroborated. According to the Learned Counsel, there is not a single piece of evidence on record to establish the truthfulness of such statements. It is also submitted that the mandatory requirements of Section 138B of the Customs Act, 1962 were not complied with

Customs Appeal Nos.77220,77221 & 77223 of 2019

during adjudication and, therefore, the said statements have no relevance in the present proceedings. Consequently, the order of confiscation of the six gold bars belonging to Appellant No. 1, founded upon such statements of the co-noticee, cannot be sustained in law and deserves to be set aside.

- (iv) It is further submitted that the six pieces of gold bars seized from Appellant No. 1 did not bear any foreign markings or serial numbers. It is also pointed out that the Test Report dated 10.11.2017 in respect of the said gold bars indicated the purity of gold to be ranging between 995.9 and 996.5 and, therefore, according to the Learned Counsel, the same cannot even be presumed to be of foreign origin. It is contended that unless the foreign origin of the seized gold is established by cogent and positive evidence, the provisions of Section 123 of the Customs Act, 1962 cannot be invoked. Accordingly, it is submitted that the order of confiscation of the six gold bars seized under the Inventory dated 28.10.2017 deserves to be set aside.
- (v) It is further submitted that since the goods seized from Appellant No. 1 are not liable to confiscation under Section 111 of the Customs Act, 1962, the imposition of penalty upon him under Section 112 of the Customs Act, 1962 is also unsustainable. It is further contended that invocation of clause (i) of Section 112 of the Customs Act, 1962 in respect of the goods in question, namely gold bars, is bad in law, since gold is not a "prohibited goods" under the Customs Act, 1962 or under any Rules, Regulations or Notifications issued thereunder. It is also submitted that the order directing absolute confiscation of the seized gold is legally unsustainable.
- (vi) In support of the aforesaid contentions, the Learned Counsel places reliance upon the following decisions:

(a) Commissioner of Customs, Patna v. Lalit Krishna Agrawal reported in 2024 (387) E.L.T. 437 (Tri.-Kol.);

Customs Appeal Nos.77220,77221 & 77223 of 2019

(b) Commissioner of Customs (Preventive), Kolkata v. Bajrang Ingole reported in 2024 (387) E.L.T. 437 (Tri.-Kol.);

(c) Shri Naresh Kumar Agarwalla v. Commissioner of Customs (Prev.), Kolkata in Customs Appeal No. 76723 of 2016 vide Final Order Nos. 75643-75645/2025 dated 07.03.2025.

9.3. In view of the above submissions, the Ld. Counsel for the Appellant Shri Vinay Agrawal (appellant no. 1) prays that the order of absolute confiscation in respect of the six pieces of gold bars seized under Inventory dated 28.10.2017, along with the penalty imposed upon Shri Vinay Agrawal, vide the impugned order, be set aside with consequential relief, in accordance with law. The appellant Nos. 2 and 3, namely, Shri Suraj Prakash Saraf and Shri Vijay Verma, while adopting the submissions made on behalf of appellant No. 1 to the extent applicable to them, also prayed for setting aside the penalties imposed on them vide the impugned order.

10. On the other hand, the Ld. Authorized Representative of the Revenue reiterated the findings in the impugned order.

11. Heard the parties and considered their submissions.

12. Having gone through the rival submissions advanced on behalf of the parties and perused the records of the case, we would like to first briefly analyze the objections raised by the appellants regarding the manner in which the Panchanama came to be drawn. Upon perusal thereof, we find that certain circumstances highlighted by the appellants, including the identity and addresses of the panch witnesses and the manner in which the proceedings have been recorded, do raise some doubt as to whether the Panchanama bears the character of an entirely independent and contemporaneous record. We also find that no cogent material has been placed on record by the Revenue to effectively dislodge the objections raised by the appellants in this regard. Thus, we are of the view that the contents thereof cannot be accepted mechanically and are required to be appreciated with due caution and in conjunction with other independent evidences available on record.

Customs Appeal Nos.77220,77221 & 77223 of 2019

12.1 We find that the principal issue which falls for our determination pertains to the confiscation of 6 (six) gold bars collectively weighing 996.020 grams, claimed by appellant No. 1, Shri Vinay Agrawal. Upon hearing the parties and examining the records, we find that certain issues arise for our consideration, the first and foremost being whether the officers of the Department had entertained the requisite "reasonable belief" in terms of Section 110 of the Customs Act, 1962 for effecting seizure of the impugned gold bars.

12.2. We find that the case of the Department, insofar as the seizure effected from appellant No. 1 is concerned, proceeds on the premise that the six gold bars in question were of foreign origin and had been illicitly imported into India. However, from the records available before us, it is noticed that the gold bars recovered from appellant No. 1 admittedly did not bear any foreign markings, inscriptions or serial numbers. On the contrary, the Inventory-cum-Seizure List itself records that the alleged foreign inscriptions stood defaced and only certain diamond-shaped markings were visible. We also note that the Test Report dated 10.11.2017 indicates the purity of the seized gold to be ranging between 995.9 and 996.5. The gold of foreign origin normally have a purity of 999.9, which is not the case on hand.

12.3. At this stage, it is relevant to bear in mind that the expression "reasonable belief" occurring under Section 110 of the Customs Act, 1962 cannot be equated with mere suspicion or conjecture. Such belief must be founded upon some tangible material and objective circumstances available with the proper officer at the time of seizure. The existence of reasonable belief is a condition precedent for exercise of powers under Section 110 and cannot be founded on surmises or assumptions alone.

12.4. In the facts of the present case, apart from the statements recorded during investigation, which have been dealt with separately elsewhere in this order, we do not find any contemporaneous material indicating that the six gold bars recovered from appellant No. 1 bore identifiable foreign markings or possessed any distinctive characteristics

so as to prima facie establish their foreign origin. We further find that the purity indicated in the Test Report, namely between 995.9 and 996.5, by itself cannot constitute a determinative circumstance for entertaining a belief regarding the foreign character of the gold, particularly when gold of comparable purity is also available in the domestic market.

12.5. Therefore, we are of the considered view that the mere absence of explanation regarding possession, coupled with the purity of the metal, cannot, ipso facto, furnish the basis for formation of a 'reasonable belief' that the gold in question represented smuggled goods. The expression "reasonable belief" postulates the existence of some objective material capable of leading a prudent person to such conclusion and not a mere suspicion, however strong it may be.

12.6. 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.

12.7. We, therefore, proceed to examine the other issues arising in the present appeals, particularly the evidentiary value of the statements recorded during investigation and whether the Department has otherwise been able to establish the foreign origin and smuggled character of the impugned gold so as to attract the provisions of Sections 111(b) and 111(d) of the Customs Act, 1962.

Customs Appeal Nos.77220,77221 & 77223 of 2019

12.8. In the present case, we find that apart from the statements recorded during the course of investigation, no independent or contemporaneous material has been brought on record to establish that the six gold bars recovered from appellant No. 1 were of foreign origin or represented smuggled goods. It is the consistent case of the appellant that the said gold bars had been purchased at Guwahati itself and that there was no question of any importation, whether legal or otherwise, on his part. We find that the seized gold bars admittedly did not bear any discernible foreign markings or serial numbers and the purity reflected in the Test Report dated 10.11.2017, by itself, cannot be regarded as sufficient to infer foreign origin.

12.9. In these circumstances, we find that the requisite "reasonable belief" contemplated under Section 110 of the Customs Act, 1962 did not exist at the time of seizure. Mere suspicion, however grave, cannot substitute the statutory requirement of reasonable belief founded upon objective material. Once the very foundation for seizure under Section 110 is found to be lacking, the burden contemplated under Section 123 of the Customs Act, 1962 cannot be shifted upon the person from whose possession the goods were recovered. In other words, in the absence of a valid and reasonable belief regarding the smuggled character of the goods, the provisions of Section 123 would have no application to the facts of the present case.

12.10. In this regard, we find that a similar view has been expressed by the Tribunal, Kolkata in Customs *Commissioner of Cus (Prev.), Patna v. Lalit Krishna Agarwal* [Final Order No. 77506 of 2023 dated 08.11.2023 in Customs Appeal No. 75499 of 2022 – CESTAT, Kolkata], wherein it was observed as under:-

"6. In fact, during the course of investigation, it is a fact on record that boondi silver and silver jewellery were recovered from the shop of the respondent. So, the question arises that in the absence of any seizure of Port or Airport or not having any foreign markings on the goods seized from the respondent, how the officers came to the conclusion that the goods are third country origin goods. Therefore, first, onus on the Revenue is to make a reasonable belief that the goods are of third

Customs Appeal Nos.77220,77221 & 77223 of 2019

country. Admittedly, no such evidence has been produced by the Revenue to allege that to make a reasonable belief, the goods are of third country origin. In the absence of that, the goods in question cannot be confiscated."

12.11. We find that the department has not established that there was a 'reasonable belief' that the goods were of foreign origin and smuggled in nature. Consequently, we observe that the initial burden to establish the foreign origin and smuggled character of the impugned gold continues to rest upon the Department. However, except for the statements recorded during investigation, the evidentiary value whereof shall be examined separately, we do not find any cogent or independent evidence having been adduced by the Revenue to discharge such burden.

12.12. It is also a settled position of law that presumption cannot be a substitute to evidence. In the absence of foreign markings, there should be cogent evidence to establish that the gold is of foreign origin. Moreover, the issue of town seizure of unmarked gold is no longer res integra as there have been numerous laid down ratio squarely applicable to the case in hand. We find that a similar issue came up for consideration before this Tribunal in the case of *Balwant Raj Soni & ors. v. Commissioner of Cus. (Prev.), Patna [Final Order Nos. 75455-75457 of 2023 dated 18.05.2023 in Customs Appeal No. 75414 of 2022 – CESTAT, Kolkata]*, wherein it was held as under: -

"31. We find that the Impugned Order mainly relied upon the statements of the Noticees 1 to 5 to establish the foreign origin nature of the gold. Other than the statements, there is no other evidence available on record to show that the gold were smuggled into the country from Bangladesh. It is incorrect to rely only on the statements of the co-accused without any corroboration, to prove the smuggled nature of the gold. It is a settled law that the statement of the co-accused cannot be relied without any independent corroboration.

31.1 In the case of Commissioner of Customs (Preventive), Lucknow vs Shakil Ahmad Khan, it has been held that confiscation based on retracted statements not sustainable. The gist of the order is reproduced below:

Customs Appeal Nos.77220,77221 & 77223 of 2019

Smuggling Burden of proof Retracted confessional statements of co-accused No efforts made to prove that confessional statements were voluntary Accused were not examined during adjudication - HELD: Confiscation and penalty order based only on retracted statements of accused persons were not sustainable - It was contrary to settled legal position, illegal, arbitrary and liable to be set aside Sections 108, 111, 112 and 123 of Customs Act, 1962. (paras 22, 25, 26]

Evidence Confessional statement of co-accused - It is not substantive evidence against another co-accused- It can at best be used for assurance to Court In absence of any substantive evidence, it was inappropriate to base conviction of accused on statements of co-accused Section 108 of Customs Act, 1962. [para 25]

31.2 The Tribunal in the cases of Principal Commissioner of Customs (Prev.), Delhi Vs. Ahmed Mujjaba Khaleefa [2019 (366) ELT 337 (T) dismissed the appeal of Revenue holding that jewellery not bearing any foreign marking other than statement of passenger no other proof produced by Revenue to substantiate the claim that jewellery were smuggled into India.

31.3 In view of the above discussion and relying upon the the decisions cited above, we hold that the gold bars/pieces cannot be confiscated based on the retracted statements alone. Accordingly answer to question no (iii) is negative."

12.13. Further, in the case of Commissioner of Cus (Prev.), Patna v. Lalit Krishna Agarwal [Final Order No. 77506 of 2023 dated 08.11.2023 in Customs Appeal No. 75499 of 2022 – CESTAT, Kolkata], it has been observed that: -

*"6. In fact, during the course of investigation, it is a fact on record that boondi silver and silver jewellery were recovered from the shop of the respondent. **So, the question arises that in the absence of any seizure of Port or Airport or not having any foreign markings on the goods seized from the respondent, how the officers came to the conclusion that the goods are third country origin goods. Therefore, first, onus on the Revenue is to make a reasonable belief that the goods are of third country.** Admittedly, no such evidence has been produced by the Revenue to allege that to make a reasonable belief, the goods are of third country origin. In the absence of that, the goods in question cannot be confiscated."*

(Emphasis supplied)

12.14. We also find that a similar case has been dealt with by the Tribunal in the case of *Commissioner of Cus., Chennai-III v. Mohammed Ali Jinnah* [Final Order No. 40289 of 2023 dated 20.04.2023 in Customs Appeal No. 40099 of 2020 – CESTAT, Chennai]. The relevant observations of the Tribunal in the said case are as follows: -

"38. The evidence put forward by the department to allege that the gold is smuggled from Sri Lanka is too flimsy to be accepted. The Commissioner (Appeals) in para 34 has held as under:-

"34. In view of the above findings, it is held that the essential things for confiscation namely proof of the gold having been smuggled into India was not proved. The investigation has assumed that the impugned gold was smuggled from Sri Lanka and no corroborative evidence was produced by the DRI. More so, it was certified by the Court that the gold bars do not have foreign markings. AA has proceeded on wrong premises that the impugned crude Gold bars are of foreign origin. There was no positive evidence except the statement of the appellant. The retracted statement has not been corroborated with findings/evidence/statements of others ie the person supposed to have handed over the same to the appellant for transporting and the person who was supposed to receive. The burden of proof has not been discharged by the department. It has been proved that there was a violation of principles of natural justice by not allowing cross examination. Respectfully following the ratio of the Hon'ble Supreme Court in *M/s. Oudh Sugar Mills Vs. UOI*, I am constrained to set aside the order of the adjudicating authority confiscating the impugned gold and imposing penalty on the appellant. It is ordered to release the two crude gold bars weighing 3.097 kg to the appellant Mohammed Ali Jinnah

39. After appreciating the facts and evidence discussed above, we are of the opinion that the view arrived by the Commissioner (Appeals) is legal and proper and does not require any interference. The issue on merits is found against the appellant / Revenue and in favour of the respondent. We make it clear that in this appeal we have not addressed the issue as to whether the Show Cause Notice issued by DRI is valid and proper."

12.15. By relying on the decisions cited supra, we hold that the Department has failed in establishing the foreign origin or smuggled character of the six gold bars so as to attract the provisions of Sections 111(b) and 111(d) of the Customs Act, 1962.

13. We find that the next limb upon which the case of the Revenue substantially rests is the series of statements attributed to Shri Vivek Sethi, a co-noticee/co-accused in the present proceedings. We find considerable force in the contention advanced on behalf of the appellants that the evidentiary value of such statements deserves to be examined with circumspection, especially when the same emanate from a co-accused and were recorded while he remained under the control and custody of the investigating agency.

13.1. We further find considerable force in the contention of the appellants that the circumstances surrounding the recording of the said statements cannot be ignored. From the records, it appears that Shri Vivek Sethi was detained at the office of DRI, Guwahati and his statement dated 01.02.2018, continued on 02.02.2018, came to be recorded prior to his formal arrest. Such statements, having been recorded during prolonged detention and in the absence of any material brought on record by the Revenue to dispel the possibility of threat, coercion or duress, cannot be mechanically accepted as voluntary and truthful. More so, when the person whose statement has been relied upon in the proceedings himself stands implicated in the same proceedings, the same cannot, without independent corroboration, constitute a safe basis for drawing adverse conclusions against the appellants.

13.2. We further find that the subsequent recovery effected from Shri Vivek Sethi on 01.02.2018 was sought to be linked with the earlier seizure proceedings dated 28.10.2017 and his statements have been relied upon by the investigating agency in an attempt to lend corroboration to the allegations concerning the six gold bars recovered from appellant No. 1 / Shri Vinay Agrawal. However, except for the statements themselves, we do not find any independent or

contemporaneous evidence having been brought on record to establish the truthfulness of the allegations contained therein. Mere reiteration of allegations in successive statements, in the absence of corroborative evidence, cannot elevate such statements to the status of substantive evidence.

13.3. We also take note of the fact that Shri Vivek Sethi, whose statements are heavily relied upon by the Revenue, is himself a co-noticee and a person against whom penal consequences have been visited under the impugned order. Being a co-accused, his statements, in the absence of independent corroboration, cannot be treated as conclusive against the present appellants.

13.4. More importantly, we find that the mandatory requirements prescribed under Section 138B of the Customs Act, 1962 have not been complied with during adjudication. There is nothing on record to indicate that the procedure contemplated under the said provision was followed before treating the statements as relevant evidence in the proceedings. It is now well settled that a statement recorded during investigation does not automatically acquire the character of substantive evidence unless the conditions stipulated under Section 138B of the Customs Act, 1962 are duly satisfied. In the absence of compliance with the said provision, such statements lose much of their evidentiary significance and cannot, by themselves, constitute the sole foundation for sustaining serious consequences such as confiscation and imposition of penalties.

13.5. Therefore, we are of the considered view that the statements attributed to Shri Vivek Sethi, being untested and remaining substantially uncorroborated by any independent evidence, cannot be accorded decisive evidentiary value so as to establish the allegations levelled against the appellants. Consequently, we hold that the reliance placed upon such statements by the adjudicating authority, without complying with the mandate of Section 138B of the Customs Act, 1962, cannot be sustained in law.

13.6. We further find that the Department has failed to establish the foreign origin or smuggled character of the six gold bars by any cogent or positive evidence. Though it has been recorded in the Inventory-cum-Seizure List dated 27.10.2017 that the seized gold bars were "with diamond marking of foreign origin (foreign inscription deliberately defaced, however a diamond marking is visible)", we find that no foreign markings, serial numbers or inscriptions have been brought on record or shown to exist on the seized gold bars. The mere presence of a "diamond marking", by itself, cannot be equated with proof of foreign origin, particularly when the alleged foreign inscriptions are stated to have been defaced and no further evidence has been adduced by the Department in support thereof. Significantly, the Test Report dated 10.11.2017 reveals the purity of the gold to be ranging between 995.9 and 996.5, which, in our considered view, is by no means determinative of the foreign origin of the gold.

14. In view of the foregoing discussions, we find that the Revenue has failed to establish, by cogent and legally admissible evidence, the foreign origin or smuggled character of the six gold bars recovered from appellant No. 1, Shri Vinay Agrawal. We have already held that the requirement of "reasonable belief" for invoking Section 110 of the Customs Act, 1962 is absent and, consequently, the presumption under Section 123 is also unavailable to the Department. Further, the statements relied upon by the Revenue suffer from serious evidentiary infirmities and remain uncorroborated. Accordingly, we hold that the six gold bars weighing 996.020 grams are not liable to confiscation under Sections 111(b) and 111(d) of the Customs Act, 1962 and the order of absolute confiscation thereof cannot be sustained.

15. Now we proceed to examine the issue of imposition of penalties on the appellants under Section 112(b)(i) of the Customs Act, 1962. In this connection, it would be appropriate to reproduce Section 112(b)(i) of the Customs Act, 1962, insofar as relevant: -

"112. Penalty for improper importation of goods, etc.

Any person, -

(a) ...

(b) 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, shall be liable,-

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding the value of the goods or five thousand rupees, whichever is the greater"

15.1. A plain reading of the above provision reveals that three essential ingredients are required to be satisfied before any penalty can be imposed thereunder. Firstly, the goods concerned must themselves be liable to confiscation under Section 111 of the Customs Act, 1962. Secondly, the person sought to be penalized must have acquired possession of or otherwise dealt with such goods in any of the modes contemplated under the statute. Thirdly, and most importantly, such person must have knowledge or reason to believe that the goods in question are liable to confiscation. Thus, the existence of mens rea forms an indispensable ingredient for attracting the penal consequences under Section 112(b)(i) of the Act.

15.2. In the present case, we have already held that the six gold bars recovered from appellant No. 1, Shri Vinay Agrawal, are not liable to confiscation under Sections 111(b) and 111(d) of the Customs Act, 1962. Once the very foundation for confiscation fails, the consequential penalties imposed under Section 112(b)(i) cannot survive. It is trite law that when the goods themselves are not liable to confiscation, the question of penalizing any person in relation thereto does not arise.

15.3. Even otherwise, we find that there is no material on record to establish that any of the appellants possessed the requisite knowledge or had reason to believe that the goods were liable to confiscation. Apart from the statements recorded during investigation, which we have already found to be afflicted with serious evidentiary infirmities, there is no independent or corroborative evidence brought on record by the Revenue to establish conscious involvement or guilty knowledge on the part of any of the appellants. Mere suspicion, however grave, cannot substitute legal proof, particularly in proceedings entailing penal consequences.

15.4. Insofar as appellant Nos. 2 and 3, namely, Shri Suraj Prakash Saraf and Shri Vijay Verma respectively are concerned, we find that there is no evidence whatsoever showing that they had acquired possession of, carried, removed, deposited, concealed, sold, purchased or otherwise dealt with the impugned gold in any manner contemplated under Section 112(b)(i) of the Act. In the absence of any evidence demonstrating conscious knowledge regarding the alleged smuggled character of the goods, the penalties imposed upon them cannot be sustained.

15.5. Accordingly, we hold that the essential ingredients required for invocation of Section 112(b)(i) of the Customs Act, 1962 are absent in the facts and circumstances of the present case. Consequently, the penalties imposed upon appellant No. 1, Shri Vinay Agrawal, appellant No. 2, Shri Suraj Prakash Saraf and appellant No. 3, Shri Vijay Verma under Section 112(b)(i) of the Customs Act, 1962 are liable to be set aside.

Customs Appeal Nos.77220,77221 & 77223 of 2019

16. In view of the foregoing discussions and findings, we pass the following order:

(i) We hold that the Department has failed to establish the foreign origin and smuggled character of the six gold bars weighing 996.020 grams, seized from appellant No. 1, Shri Vinay Agrawal. Accordingly, the order directing absolute confiscation of the said six gold bars under Sections 111(b) and 111(d) of the Customs Act, 1962 is held to be unsustainable and is hereby set aside.

(ii) The penalty of Rs.3,00,000/- imposed upon appellant No. 1 / Shri Vinay Agrawal, penalty of Rs.2,00,000/- imposed on appellant No. 2 / Shri Suraj Prakash Saraf and the penalty of Rs. 1,50,000/- imposed on appellant No. 3 / Shri Vijay Verma under Section 112(b)(i) of the Customs Act, 1962 are unsustainable and are accordingly set aside.

17. Consequently, the impugned Order-in-Original dated 19.07.2019 is set aside to the aforesaid extent and the appeals are allowed with consequential relief, if any, as per law.

(Pronounced in the open court on **24.06.2026**)

(Ashok Jindal)
Member (Judicial)

(K. Anpazhakan)
Member (Technical)

Mm/Sdd