

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH**

Customs Appeal No. 87807 of 2019

(Arising out of Order-in-Original No. PCCP/ADJ/CCP/NC/5/2019 dated 18.07.2019 passed by Commissioner of Customs (Preventive), New Custom House, Mumbai)

Shri Jetmal Bhav Singh

Appellant

Director of M/s. Jstar Mobile Accessories
Pvt. Ltd., Room No.701, 7th floor,
Mhada Building, Ghodapdev,
Byculla East, Mumbai

Vs.

Commissioner of Customs (Prev.), Mumbai

Respondent

New Custom House,
Ballard Estate,
Mumbai.

Appearance:

Shri Anil Balani, Advocate, for the Appellant

Shri K.K. Srivastava, Additional Commissioner (Authorised Representative) for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. **A/85890/2020**

Date of Hearing: 27.10.2020

Date of Decision: 18.11.2020

PER: SANJIV SRIVASTAVA

This appeal is directed against the order in original No PCCP/ADJ/CCP/NC/5/2019 dated 18th July 2019 of the Commissioner Customs (Preventive), Mumbai. By the impugned order Commissioner has held as follows:

"1. I hold that the seized 16 Chopard brand watches, 63 Ulysse Nardin brand watches, 33 Rolex brand watches, 18 Guess brand watches, 258 Counterfeit of Tissot brand watches, 17 Counterfeit of Rado brand watches, 28 Counterfeit of Armani brand watches, 305 Counterfeit of Calvin Klein brand watches, 48 Counterfeit of

Michael Kors brand watches, 39 Counterfeit of Swarovski watches, 163 Counterfeit of Longines brand watches, 5543 smart watches, 8 V8 Stick Kit (Smok), 8 V8 Stick Kit (Alien) and 4370 mobile back covers are smuggled goods under Section 2(39) and section 2(33) of the Customs Act, 1962;

2. I hold that 16 Chopard brand watches, 63 Ulysse Nardin brand watches, 33 Rolex brand watches, 18 Guess brand watches are liable to confiscation under Section 111(f), (h), (i), (j) and (m) of the Customs Act, 1962;

3. I hold that the seized 258 Counterfeit of Tissot brand watches, 17 Counterfeit of Rado brand watches, 28 Counterfeit of Armani brand watches, 305 Counterfeit of Calvin Klein brand watches, 48 Counterfeit of Michael Kors brand watches, 39 Counterfeit of Swarovski watches, 163 Counterfeit of Longines brand watches are liable for absolute confiscation under Section 111(d), (f), (h), (i), (j) and (m) of the Customs Act, 1962 read with Rule 6 of the Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007 further read with Section 11 of the Customs Act, 1962;

4. I hold that the seized 5543 smart watches are liable to confiscation under Section 111(d), (f), (h), (i), (j) and (m) of the Customs Act, 1962 read with Rule 3 of the Information Technology Goods (Requirements for Compulsory Registration) Order, 2012;

5. I hold that 8 V8 Stick Kit (Smok), 8 V8 Stick Kit (Alien) and 4370 mobile back covers are liable to confiscation under Section 111(f), (h), (i), (j) and (m) of the Customs Act, 1962;

6. I do not extend any option in terms of Section 125(1) of the Customs Act, 1962 in respect of the seized 258 Counterfeit of Tissot brand watches, 17 Counterfeit of Rado brand watches, 28 Counterfeit of Armani brand watches, 305 Counterfeit of Calvin Klein brand watches, 48 Counterfeit of Michael Kors brand watches, 39 Counterfeit of Swarovski watches, 163 Counterfeit of Longines brand watches and direct their disposal in

accordance with Rule 11 of the Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007

7. I extend the option in terms of Section 125(1) of the Customs Act, 1962 to pay a fine of Rs. 10,00,00,000/- (Rupees ten crore only) in lieu of liability to confiscation of the seized 16 Chopard brand watches, 63 Ulysse Nardin brand watches, 33 Rolex brand watches, 18 Guess brand watches under Section 125(1) of the Customs Act, 1962, if any person(s) come forward to claim ownership of these watches;

8. I extend the option in terms of Section 125(1) of the Customs Act, 1962 to pay a fine of Rs. 45,00,000/- (Rupees forty five lakh only) in lieu of liability to confiscation of the seized 5543 smart watches and upon fulfilling the prescription stated in Rule 3 of the Information Technology Goods (Requirements for Compulsory Registration) Order, 2012, if any person(s) come forward to claim ownership of these smart watches;;

9. I extend the option in terms of Section 125(1) of the Customs Act, 1962 to pay a fine of Rs. 1,00,000/- (Rupees one lakh only) in lieu of liability to confiscation of the seized 8 V8 Stick Kit (Smok) and 8 V8 Stick Kit (Alien), and upon fulfilment of his obligations under the Drugs and Cosmetics Act, 1930 and the rules made thereunder, as stated in the advisory issued by the Ministry of Health and Family Welfare under F. No. P-16012/ 19/ 2017-TC dated 26.08.2018 on Electronic Nicotine Delivery Systems (ENDS) including e-cigarettes etcetera, if any person(s) come forward to claim ownership of these watches;;

10. I extend the option in terms of Section 125(1) of the Customs Act, 1962 to pay a fine of Rs. 5,00,000/- (Rupees five lakh only) in lieu of liability to confiscation of the seized 4370 mobile back covers, if any person(s) come forward to claim ownership of these mobile covers;

11. I determine and confirm the demand of evaded amounts of chargeable and payable customs duty of Rs. 2,21,62,347/- (Rupees two crore twenty one lakh sixty two thousand three

hundred forty seven only) under Section 28(8) of the Customs Act, 1962 and such person(s), who make a claim of ownership to these seized goods to pay the same forthwith;

12. I also determine and order payment of interest, at the applicable rates, on the determined and confirmed demand of customs duty of Rs. 2,21,62,347/ (Rupees two crore twenty one lakh sixty two thousand three hundred forty seven only), in terms of Section 28(10) read with Section 28AA of the Customs Act, 1962;

13. I impose a penalty equal to the determined amounts of payable customs duty of Rs. 2,21,62,347/- (Rupees two crore twenty one lakh sixty two thousand three hundred forty seven only) plus determined amounts of payable interest under Section 28(10) and Section 28AA of the Customs Act, 1962 upon such person(s), who come forward to make a claim to these seized goods, under Section 114A of the Customs Act, 1962;

14. I impose a penalty of Rs. 1,00,00,000/- (Rupees one crore only) upon Jetmal Bhav Singh, Room # 701, 7th Floor, MHADA Building, Ghodapdev, Byculla (East), Mumbai - 400033 and Director, JStar Mobile Accessories Private Limited, Office # 103, 1st Floor, Besto Chambers, Plot 301, Simlim Square, Dr Dadasahab Bhadkamkar Marg, Lamington Road, Grant Road, Mumbai - 400007 under Section 114AA of the Customs Act, 1962;

15. I impose a penalty of Rs. 10,00,000/- (Rupees ten lakh only) upon Bipin Gajo Singh, At Behradih, PO Pathaldiha, District Koderma, Jharkhand - 825410 under Section 114AA of the Customs Act, 1962;

16. I do not impose any penalty upon Kishore Vishnu Malusare, resident of Room number 1124, B Wing, B/ 33, C/ 130, PMGP Colony, Dharavi, Mumbai - 400017 under Section 112(b) of the Customs Act, 1962."

1.2 Appellant in the present appeal is challenging the impugned order in respect of confiscation of 5543 smart watches

and redemption fine imposed, valuation of these smart watches and duty demand in respect of these watches and the penalty imposed on him vis a vis these smart watches. Other persons mentioned in the impugned order are not party to this appeal and hence we are concerned with only paras 1, 4, 8, 11, 12, 13 & 14 of the impugned order, to the extent it is related to 5543 smart watches.

1.3 Appellants have along with the appeal filed an application for early hearing of the appeal. This application has been allowed, vide the Miscellaneous Order No M/86095/2019 dated 8th November 2019. After that the matter was listed for hearing on 20.12.2019, 06.02.2020 and 17.03.2020. Now on the request of the Appellant the matter has been listed for e-hearing and was heard on 26th and 27th October 2020.

2.1 Acting on the intelligence, tempo bearing registration number MH 04 FP 7421, was intercepted at CSMT Railway Station, Mumbai on 05.04.2018. Kishore Malusare was the driver of the vehicle, who was accompanied by Jetmal Bhav Singh. Jetmal Bhav Singh claimed ownership of the goods, found in the tempo, in 23 cartons. On examination the goods loaded in the tempo were suspected to be of foreign and Shri Jetmal Bhav Singh was not in position to produce any documents in respect of these goods, the goods were inventorised and detained under a panchnama dated 05.04.2018. Details of the goods seized and the duty demand on them is as indicated in table below:

S No	Description	CTSH	No	Assessable Value	Custom Duty Payable
1	Chopard Brand Watches	91011100	16	11318208	4762702
2	Ulysse Nardin brand watches	91011100	63	15966720	6718796
3	Rolex brand watches	91011100	33	22367400	9412202
4	Guess brand watches	91011100	18	78480	33024

5	Counterfeit of Tissot brand watches	91011100	258	98040	41255
6	Counterfeit of Rado brand watches	91011100	17	6800	2861
7	Counterfeit of Armani brand watches	91011100	28	8960	3770
8	Counterfeit of Calvin Klein brand watches	91011100	305	97600	41070
9	Counterfeit of Michael Kors brand watches	91011100	48	23040	9895
10	Counterfeit of Swarovski watches	91011100	39	1560	656
11	Counterfeit of Longines brand watches	91011100	163	61940	26064
12	Smart watches	91011100	5543	2325843	978715
13	V8 Stick Kit (Smok)	85437099	8	13920	3861
14	V8 Stick Kit (Alien)	85437099	8	36000	9985
15	Mobile Phone Back Covers	39231023	4370	279680	117689
Total				52684191	22162347

2.2 Appellant was examined and his statement recorded under Section 108 of the Customs Act, 1962 on 05.04.2018, 19.06.2018 and 14.09.2018.

2.3 Appellant had vide letter dated 25.05.2018 from M/s Advani Sachwani and Hira, Advocates, first made claims to be the owner of the seized goods, which was revised by him to the seized foreign brand wrist watches and the smart watches, contained in 17 of the 23 cartons. This claim was subsequently revised to 5000 smart watches, stated by him to be contained in 17 cartons. Finally, he further revised his claim to the seized 5543 smart watches, contained in the 10 of the 23 cartons by stating that these seized smart watches had been imported from China at Chennai Cargo Complex under bill of entry 3140294/

07.09.2017. He admitted that he could not satisfactorily correlate the seized 5543 smart watches with the 20,000 pieces of the DZ09 smart watches, imported under the said bill of entry.

2.4 Further investigations were made and statements of others, including the representative of the courier company recorded under Section 108. Since, the investigation in this case could not lead to identification of the person(s), who were involved in the smuggling of the seized goods and no person had come forward to make a legal and valid claim of ownership of the seized goods, the subject notice, in omnibus, called upon those person(s), who come forward to claim the ownership of the seized goods to show their cause as to why -

- The 858 pieces of counterfeit of the foreign brand watches, having transaction value of Rs. 2,97,940 and present market value of Rs. 7,44,850/- be not absolutely confiscated under Section 111(d), (f), (h), (i), (i) and (m) of the Customs Act, 1962 read with Rule 6 and 11 of the Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007;
- The seized 130 pieces of foreign brand watches, having transaction value of Rs. 4,97,30,808/- and present market value of Rs. 12,43,27,020/-; 5543 pieces of smart watches, having transaction value of Rs. 23,25,843/- and present market value of Rs. 58,14,607/-; 16 pieces of V8 Stick Kit e-cigarettes, having transaction value of Rs. 49,920/- and present market value of Rs. 1,24,800/-; and 4370 mobile phone back covers, having transaction value of Rs. 2,79,680/- and present market value of Rs. 6,99,200/- be not held liable to confiscation under Section 111(f), (i), (h) and (m) of the Customs Act, 1962;
- The evaded amounts of unpaid customs duties totaling Rs. 2,21,62,347/ be not demanded and recovered from them under Section 28(4) of the Customs Act, 1962;
- The amount of interest at the applicable rates on the above amounts of demanded unpaid customs duty of Rs.

2,21,62,347/- be not recovered under Section 28AA read with Section 28(10) of the Customs Act, 1962; and

- Penalty be not imposed under Section 114A of the Customs Act, 1962 be not imposed;

2.5 The subject notice also called upon Jetmal Bhav Singh (Appellant) and Bipin Gajo Singh to show their cause as to why penalty be not imposed upon them under Section 114AA of the Customs Act, 1962. It also called upon Kishore Vishnu Malusare to show his cause as to why the penalty should not be imposed upon him under Section 112(b) of the Customs Act, 1962.

2.6 The show cause notice has been adjudicated by the Principal Commissioner vide the impugned order referred in para 1, supra.

2.7 Aggrieved by the impugned order appellant have preferred this appeal.

3.1 We have heard Shri Anil Balani Advocate for the Appellant and Shri K K Srivastava, Additional Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the Appellant, learned counsel submitted that:

- He is in appeal only for the confiscation of 5543 smart watches under Section 111(d),(f), (h), (i),(j) & (m), on which a Redemption Fine of Rs.45 lakhs has been imposed and it has been directed that the IT Goods (Requirement for Compulsory Registration) Order, 2012 be complied with. Further a penalty of Rs.1 crore under Section 114AA on the Appellant. Also a duty demand of Rs.9,78,715/- has been made on these goods and imposed equal penalty under Section 114A.
- It is significant to note that no notification under Section 11B of the Customs Act covers "Smart Watches". Smart watches have never been notified under Section 123 and therefore the burden is entirely on the department. The burden to prove that smart watches are smuggled goods, has not been discharged by the department at all. In the

cases of Aakash Enterprises [2006 (205) ELT (Bom.) and Lakhpatri [2016 (343) ELT 78 (Del.)] the Hon'ble High Courts of Bombay and Delhi have held that the burden of proving smuggled nature of non-notified goods is entirely on the department.

- The watches were seized on 05.04.2018 along with other goods in a tempo. In Advocate's letter dated 25.05.2018, the following facts were placed on record:
 - The Appellant had taken original Bill of Entry No.3140294 dated 7.09.2017, filed at Chennai for import of 20,000 smart watches to the Marine and Preventive office at Marine Lines.
 - However instead of releasing the watches, signature of the Appellant was taken on certain statements.
 - Panchnama of seizure was not supplied.
 - The import value was Rs.244 per piece. The total market value was about Rs.13 lakhs for all the watches under seizure. Copies of the Bill of Entry & Invoice were once again placed on record.
 - The watches were depreciating and deteriorating and it was prayed that they should be released at the earliest.
- Admittedly and undisputedly, this letter was never rebutted by the department. If the claims were false, and if the Bill of Entry was not produced on the spot, the department should have immediately issued a point by point rebuttal.
- Bipin Gajo Singh in his statement dated 16.07.2018, (Para 4 of impugned order) stated as under:
 - He was an employee of Sun Cargo, a courier firm.
 - His firm transported 23 cartons from Chennai to Mumbai by train on 4.04.2018.
 - 10 belonged to the Appellant. The rest belonged to one Kamal Kant. After arrival he loaded the cartons in a hired tempo.
- By producing Bill of Entry on the spot the Appellant had discharged the burden under Section 123 (para 21 of the

impugned order). The identification “DZ09” on the watches and on the Bill of Entry established co-relation.

- The challenge to the panchnama was not made for the first time after 10 months as alleged in para 22 of the impugned order. In fact, it was admittedly made on 25.05.2018 in the advocate’s letter. The panchnama dated 5.04.2018 and the entire case, was fabricated by Deepak Pandit, Assistant Commissioner.
- The finding in para 18, that the Appellant initially claimed ownership of all seized goods is completely false, baseless and unsubstantiated. The advocate’s letter dated 25.05.2018 was never rebutted. Bipin of Sun Cargo also stated that only 10 cartons belonged to the Appellant. Hence, the penalty under Section 114AA is not sustainable and strictures must be passed against the department.
- It is significant to note that, although the goods were detained on 5.04.2018, they were officially seized only on 12.09.2018 as recorded in Para 12 of the SCN.
- The objection regarding IMEI No. and BIS should have been directed to Chennai Customs who had cleared the Bill of Entry.
- Although there was confusion about the number of cartons 10 or 17 and the number of watches 5000 or 5543 this proved the genuineness of the claim.
- The allegation in Para 14E on Page 6 of the SCN that “while the goods intercepted consist of 4 items, the documents submitted only refer to 1 item i.e. smart watch. The documents thus produced appear to be a afterthought to claim the valuable goods.” In fact, the smart watches claimed are not as valuable as the Rolex and other watches which have been valued at over Rs.5 crores on page no. 10 of the SCN. Incidentally, it will be worth ascertaining the value which these watches fetched for the department.
- In para 8 of the order, value is determined under Rule 9 of CVR, 2007 by taking 40% of market value from E-commerce website Flipkart. The market value is

Rs.58,14,607/- and the transaction value is Rs.23,25,843/-. Both are exaggerated, inflated and illusory. NIDB data is deliberately suppressed as if smart watches have never been cleared by Customs. In his reply to the SCN the Appellant inter alia submitted that the smart watches were available at Snapdeal for Rs.649/- per piece. (Print out at Page 97). Currently such smart watches are sold by Flipkart at Rs.503/- per piece.

3.3 Arguing for revenue learned Authorized Representative while reiterating the findings recorded in the impugned order submits that:-

- Watches are specifically covered by Section 123 of the Custom Act, 1962. Smart watches are watches and hence the burden to prove legal acquisition of the smart watches of foreign origin will rest on the appellant;
- The goods were detained and seized from the tempo, and undisputedly the appellant was present in the tempo along with the driver and he claimed the ownership of all the goods present in the tempo, only subsequently he kept on changing his stand;
- The investigations revealed that no person had come forward claiming the ownership of any of the seized goods;
- The Bill of Entry produced by the appellant could not be correlated with the smart watches seized. A fact that has been admitted by the Appellant:
- The fact that appellant was never able to establish with proper documents his claim over the seized and confiscated goods is established and the option of redemption of these smart watches has been extended to any person who comes forward claiming the ownership of these goods.
- It has been held by the Hon'ble Apex Court in the case of D Bhurmal [1983 (13) ELT 1546 (SC)], that cases of smuggling of the goods which are covered under section 123 of Custom Act, 1962, need not be established with mathematical precision, and even preponderance of the

probability that these goods are smuggled goods is enough to proceed against the concerned person from whose possession the goods have been seized.

4.1 We have considered the impugned order along with the submissions made in the appeal and during the course of argument of the appeal.

4.2 While considering the facts of this case as have been narrated in para 2.1 to para 2.3 above we find striking similarity in the facts of the present case and the facts as recorded by the Apex Court in the case of D Bhoormal {1983 (13) ELT 1546 (SC)]. The facts as recorded in the case of Bhoormal are reproduced below:-

“On receiving information that some packages containing smuggled goods had been left by a person in the premises of M/s. Sha Rupaji Rikhabdas at 98, Narayana Mudali Lane, Madras-1 and that these packages were about to be despatched to Bangalore for disposal, a posse of Preventive Officers of the Customs House went to the said shop on June 4, 1962. They found ten packages in that shop. Baboothmull of M/s. Sha Rupaji Rikhabdas was present there. The officers questioned Baboothmull about those packages. Baboothmull replied that he was not the owner of those packages and that somebody next to his shop had left them outside the premises and since that person had not returned for a considerable time, he got them removed into the shop. Baboothmull was unable to throw any light with regard to the owner or the contents of the packages.

After getting a consent letter from Baboothmull, the officers opened the packages which contained these articles of the total value of Rs. 12,255/-.

1. Parker Fountain Pens (19 Made in Canada)	28 Doz	Rs 3,360
2. Master hair clippers (Made in Germany)	5 Doz	Rs 600
3. Oster Hair Clippers (Made in Germany)	3-1/2 Doz	Rs 400
4. Venus pencils (Made in England)	760 Doz	Rs 2,250

5.	K. 55 Out thread razors (Made in Germany)	68 Doz	Rs 4,080
6.	Nylon buttons (Made in Japan)	47 Gross	Rs 705
7.	Gillette Razor Blades (Made in England)	1000 PCs	Rs 120
8.	7 O'clock Razor sets (Made in England)	12 Doz	Rs 730

Rs 12,255

The Officers seized these goods under a mahazarnama. On June 9, 1962, a letter was addressed by the said Baboothmull to the Collector, Customs, informing that on that date, the owner of the packages, one Mr. D. Bhoormull turned up to claim the goods; that his other partner was absent at the time of the seizure of the goods who knew about this affair and that he had subsequently learnt from this partner that those goods belonged to D. Bhoormull who left instructions for their storage in the shop. Subsequently the name of this partner was given as Indermul. The Custom Officers attempted to find out and contact this Indermul but without success.

Eight days after the seizure, a letter dated June 12, 1962, was received by the Collector of Customs from one D. Bhoormull (Poonawala, temporarily at 98, Narayana Mudali Lane, Madras-1), claiming ownership of the goods. In this letter it was stated that he had purchased these goods on June 3, 1962 in the local market at Madras through brokers; that he was packing the same till late in the evening, and since he was forced to leave for Bangalore on the call of a friend immediately, he instructed one of the staff of Sha Rupaji Rikhabdas to keep the goods in their shop until his return. This letter of Bhoormull did not contain the names or the particulars of the brokers from whom the goods were allegedly purchased; nor did it refer to any bill, voucher or other document to support the allegation of their having been purchased locally in the normal course of business. On receipt of this letter, the Collector made an attempt to contact Bhoormull for further investigation. Bhoormull, however, could not be contacted as he had gone away to Poona which was said to be

his normal place of activity. Another letter, dated June 25, 1962, was received by the Collector from Bhoormull urging for release of his goods at an early date.

On July 3, 1962, a letter was received by the Collector from M/s. Gagrath & Co., Solicitors, Bombay on behalf of Bhoormull, requesting for disclosure of the grounds for the seizure of the goods, and for supply of the copies of the Mahazarnama and other relevant documents relating to the seizure. It was reiterated that the goods had been bona fide purchased-by Bhoormull in the course of business, and as such, were not liable to seizure or confiscation. This was followed by another letter dated September 14, 1962 from M/s. Gagrath & Co., addressed to the Assistant Collector of Customs wherein the request for supply of the necessary information, was reiterated.

The importation of goods shown as items 1, 4 and 7 had been prohibited since December 1957 and of those at items 2, 3, 5, 6 and 8 since March 1960, save under a licence issued by the Import Trade Control Authorities under s. 19 of the Sea Customs Act read with s. 3(1) of the Imports and Exports Control Act, 1947.

The Assistant Collector of Customs on October 26, 1962 issued a notice to Bhoormull through his solicitors, M/s. Gagrath & Co., Bombay requiring him to produce evidence of bona fide acquisition of the goods in question failing which to show cause within a week as to why those goods valued at Rs. 12,255/- be not confiscated under S. 167(8) of the Sea Customs Act read with s. 3(2) Imports and Exports Control Act, 1947. It was added that in case no reply was received within the specified period the case would be decided ex- parte on the basis of the facts already on record without further reference to him.

In reply, a letter, dated December 13, 1962, was written by the Solicitors in which, it was inter alia stated that on June 4, 1962, at Madras, the goods, being items 2 and 4 to 8, were purchased by their client from Broker Ram Lal for a total price of Rs. 10,675/-, and those shown as items 1 and 3, from Broker

Shanthi Lal for a sum of Rs. 4872/-, and that these brokers had not issued any bills or receipts regarding those goods. Any further particulars or addresses of the brokers were not disclosed.

On March 27, 1963, a revised show-cause notice was sent under registered cover by the Collector of Customs to Bhoormull through his solicitors requiring him to produce within a week the purchase receipts, bills, vouchers, Customs auction-receipts, Central excise auction receipts, licences or any other documents in his possession and to furnish the names of the brokers in the market, their addresses etc. from whom the goods were purchased by him, failing which to show cause against confiscation of the goods.

The information called for was not supplied, nor did Bhoormull appear personally before the Collector at any stage. However, on his behalf the Solicitors wrote to the Collector, a letter, dated April 30, 1963, contending that the burden of proving that the seized goods had been illegally imported into India lay on the Customs Department and the non-production of the documents or non-furnishing of the information asked for by the Collector could not justify an inference of illicit importation of the goods. It was added that such goods had been imported as late as 1959/1960 as personal baggages and had in fact been sold by the Customs Department at Madras and elsewhere and as such were being freely bought and sold in the market. A date was fixed by the Collector for personal hearing of Bhoormull. But he did not personally appear. However, on August 1, 1963, Shri J. R. Gagrath, of M/s Gagrath & Co. appeared before the Collector with a representative of Bhoormull, and contended that unless the Department had any other indication, it would not be necessary for Bhoormull to establish ownership of the goods; that there were no purchase vouchers; nor was he in a position to produce the broker who was supposed to have left the goods near the shop of Baboothmull.

While conceding that the burden of proving the goods to be

smuggled goods, was on the Department, the Collector held that such burden prima facie stood discharged as the circumstances of this case irresistibly led to the conclusion that the goods had been illicitly imported. The main circumstances, taken into account by the Collector, in raising such an inference, may be arranged as under :

(i) The import of such goods has been totally prohibited since 1957 except in the case of hair clippers and Venus Pencils, which were allowed on a highly restricted quota basis till October 1959/March 1966, Policy period', 'when their import too was banned;''

(ii) The highly suspicious circumstances of the seizure and the dubious conduct of the parties in relation thereto

(a) There is large number of goods, all of foreign origin, worth over Rs .12,000/-, were found fully packed and ready for despatch.

(b) Baboothmull from whose possession they were seized gave conflicting and evasive explanations in regard thereto. At the time of seizure on June 4, 1962, he disclaimed all knowledge about the ownership and contents of those packages, and said they were left outside the shop by a broker whom he, could not identify. Some days later, he , appeared in the arena (garb ?) of an anonymous (fictitious ?) person, one Bhoormull'.

(c), It was eight days after the seizure that one Bhoormull by a letter claimed ownership of the goods, and Baboothmull, also confirmed this. "This Bhoormull..the alleged owner of the goods has never been seen Even at the personal hearing a representative from him came.. All the correspondence was exchanged with the firm of Solicitors, namely M/s. Gagrath & Co. of Bombay".

(d) Despite repeated requisitions made and two show cause notices- given by the Collector, no bill, voucher or other documentary evidence, whatever, regarding purchase of the goods in the recognised markets of the country was produced. At

first, even the names of the seller were not disclosed. Later on M/s. Gagrath & Co. cited two brokers whose addresses were not furnished."

4.3 While considering that case Hon'ble Supreme Court has recorded the legal provisions as they existed then in form of Sea Customs Act, in following manner:

"Before dealing with the contentions canvassed, we would refer briefly to the relevant, statutory provisions. Section 167(8) of the Sea Customs Act provides for offences punishable to the extent mentioned in the 3rd column of the Schedule appended to that section. Clause (8) of that Schedule provides that if any goods the importation or exportation of which is for the time being prohibited or restricted by order under Ch. IV of this Act be imported into or exported from India contrary to such prohibition or restriction, then (i) such goods "shall be liable to confiscation, and (ii) any person concerned in any such offence shall be liable to a penalty not exceeding three times of the value of the goods, or not, exceeding 1000/- rupees."

Section 171-A specifically empowers the Customs Officers employed in the prevention of smuggling to summon any person whose attendance be considers necessary either to give evidence or to produce a document or thing in an enquiry in connection with the smuggling of any goods and such person shall be bound to state the truth and produce that document or thing and would be liable to prosecution if he made a false statement.

A reading of s. 167(8) and the related provisions indicates that proceedings for confiscation of contraband goods are proceedings in rem and the penalty of confiscation under the first part of the entry in column (3) of clause (8) of the Schedule, is enforced against the goods irrespective of whether the offender is known unknown. But, imposition of the other kind of penalty, under the second part of the entry in column 3, is one in personam; such a penalty can be levied only on the "person concerned" in any offence described in column I of the Clause.

Goods found to be smuggled can, therefore, be confiscated without proceeding against any person and without ascertaining who is their real owner or who was actually concerned in their illicit import.

Section 168 empowers an officer of the Customs or anti-smuggling staff to seize any thing liable to confiscation. Section 178(A) provides for burden of proof. It says "(1) Where any goods to which the section applies are seized under this Act in the reasonable belief that they are smuggled goods, the burden of proving that. they are not smuggled goods shall be on the person from whose possession the goods were seized;

(2) This section shall apply to gold, gold manufactures, diamonds and other precious stones, cigarettes and cosmetics and any other goods which the Central Government may, by notification in the Official Gazette, specify in this behalf, (3) Every notification issued under sub- section (2) shall be laid before both Houses of Parliament as soon as may be after it is issued."

Large scale smuggling of gold or other goods into India may pose a threat to the economic and fiscal interests and policies of the State. Such illicit trade is often carried on by organized international smugglers in the secrecy of the underworld. The more it is organized, the less are the chances of its detection, and greater the difficulty of proving the offences relating thereto. Laws have therefore been enacted in most countries, which mark a partial or wholesale departure in matters relating to smuggling, from the general principle of penal law, viz., that it is for the State or its Department to prove the offence against the accused or the defendant. Thus in England, S. 290(2) of the Customs and Excise Act, 1952 provides that where in any proceeding relating to Customs or Excise any question arises as to the place from which any goods have been brought or as to whether or not any duty has been paid or any goods have been lawfully imported etc., then the burden of proof shall lie upon the other party to the proceeding. In India, Parliament inserted s. 178-A by the

Amending Act 10 of 1957, but it did not, in its wisdom, go as far as s. 290(2) of the English Act. Section 178-A in terms applies to "gold, gold manufacture, diamonds and other precious stones, cigarettes and cosmetics". With regard to these specified goods if seized under this Act in the reasonable belief that they are smuggled goods, the burden of proof that they are not such goods shall be on the person from whose possession, they are seized. But with regard to any other goods, the rule in sub-section (1) of Section 178-A would not apply unless the Central Government had specifically applied the same by notification in the Official Gazette. It is common ground that at the material time, no such notification applying the section to the categories of the goods in question had been issued. In respect of such goods the provisions of the Evidence Act and the Code, of Criminal Procedure, do not, in terms, govern the onus of proof in proceeding under s. 167(8) of the Act. In conducting these penal proceedings, therefore, the Collector of Customs is to be guided by the basic canons of criminal jurisprudence and natural justice. With the above prefatory remarks, we now advert to the contentions canvassed before us."

Similarly worded provisions which are *pari materia* with above referred provisions of Sea Custom Act, exist in Custom Act, 1962, in form of Section 108, 110, 111, and 112 and 123.

4.4 While considering the similar arguments advanced in the case of Bhurmal referred above, which was having similar or identical facts, Hon'ble Apex Court has laid down the law clearly stating as follows:

"Mr. Sanghi, learned Counsel for the appellants, has advanced these arguments-

(a) Bhoormull had no locus standi to invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution because there was not even prima facie evidence to show that at the time of seizure, he was in ownership or juridical possession of the goods;

(b) The onus of proving the goods to be smuggled goods that initially lay on the Department, stood sufficiently discharged by the inevitable inference arising out of the totality of the circumstances in this case, which were appraised by the Collector in the light of the conduct of Baboothmull and Bhoormull, who, gave conflicting and incredible explanations as to how they had come by these goods;

(c) The source from which and the circumstances in which Bhoormull or Baboothmull acquired these goods, were, facts especially within their knowledge and on the principle underlying s. 106, Evidence Act, these facts had to be proved by them. They deliberately failed to disclose those facts or to give the necessary particulars of the persons from whom the goods were allegedly purchased, although such information was repeatedly requisitioned from Bhoormull by the Collector, and they were duty bound under s. 171-A disclose it. This contumacious conduct of Baboothmull and Bhoormull strongly pointed towards the conclusion that the goods were smuggled stocks, and in that sense, the inference arising from the circumstances had shifted the onus on the Bhoormull to prove to the contrary. (In this connection, reliance has been placed upon Issardas Daulat Ram and ors. v. The Union of India and ors. [[1962] Supp. 1, SCR 355] and M/s.Kanungo and Co. v. Collector of Customs (Calcutta) [AIR 1972 SC 2136];

(d) The Order of the Collector did not suffer from any apparent error or defect of jurisdiction. His order was based on an appraisal of the circumstantial evidence before him and was consistent with the rules of natural justice. He had given the fullest opportunity, to the Respondent to put forth his case and had issued two show- cause notices to him through his Solicitors. The Division Bench of the High Court exercising jurisdiction under Art. 226 was not competent to go into the question of the adequacy of that evidence, and act as if it was a court of appeal.

Mr. Ramamurthi, learned Counsel for the Respondent, contends

in. reply, that all proceedings were conducted by the Collector on the assumption that Bhoormull was the claimant or the supposed owner of the goods,; that at no stage, before the High Court an, objection was taken that he had no, locus standi to maintain the writ petition, because he had no interest in the confiscated goods and consequently, this objection should not be entertained for the first time in this Court. Learned Counsel further submits that proceedings of confiscation being penal in nature, the burden was on the Department to show by cogent and convincing evidence that the goods had been illicitly imported into India and that no part of this burden could be shifted to the person claiming the goods. It is emphasised that in the present case, no evidence whatsoever was produced by the Department to show that the goods in question were smuggled goods. The Collector's order-proceeds are the argument-calling upon Bhoormull to prove that he had purchased these goods in the normal course of business was contrary to the law laid down by this Court in Amba Lal v. Union of India[(1961) 1, S.C.R. 933] Reference has also been made to several decisions of the High Courts, but most of them turn on their own facts and do not elucidate the principle beyond what was laid down in Amba Lal's case (supra) It cannot be disputed that in, proceeding for imposing penalties. under Clause (8) of S.167 to which S. 178-A-does not apply, the burden of proving that the goods are smuggled goods, is on the Department. This is a fundamental rule relating to proof in all criminal or quasi-criminal proceedings, where there is no statutory provision to. the contrary. But in appreciating its scope And the nature of the onus. cast by it, we must pay due regard to other kindred principles, no less fundamental, of universal application. One of them is that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable degree; for, in all human affairs. absolute certainty is a myth, and-as Prof. Brett felicitously puts it, all exactness is a fake" El Dorado of absolute proof being unattainable, the law accepts for it, probability as a working substitute in this work-a- day world. The law does not require the prosecution to prove the impossible. All that it requires is the

establishment of' such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus, legal proof is not necessarily perfect proof.; often it is nothing more than a prudent man's estimate as to the probabilities of the case. The other; cardinal principle having an important bearing on the incidence of burden of proof is that sufficiency and weight of the evidence is to be considered-to use the words of Lord Mansfield in Batch v. Archer (1) [(1774) 1, Cowp. 63 at p. 65] "according to the proof which it was in the power of one side to prove, and in the power of the other to have contradicted". Since it is exceedingly difficult, if not absolutely impossible, for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as parts of its primary burden. Smuggling is clandestine conveying of goods to avoid legal duties. Secrecy and stealth being its covering guards, it is impossible for the Preventive Department to unravel every link of the process. Many facts relating to this illicit business remain in the special or peculiar knowledge of the person concerned in it. On the principle underlyings. 106, Evidence Act, the burden to establish those facts is cast on, the person concerned; and if he fails to establish or explain those facts, an adverse inference of facts may arise against him, which coupled with the presumptive evidence adduced by the prosecution or: the Department would rebut the initial presumption of innocence in favour of that person, and in the result prove him guilty. As pointed out by Best in 'Law of Evidence', (12th Edn. Article 320, page 291),. the ".Presumption of innocence is, no doubt, presumption juris, but every day's practice shows that it may be successfully encountered by the presumption of guilt arising from the recent (unexplained) possession of stolen property", though the latter is only a presumption of fact- Thus the burden on the prosecution or the Department may be considerably lightened even by such presumption of fact arising in their favour. However, this does not mean that the special or peculiar knowledge of the person proceeded against will relieve the prosecution or the Department altogether of the burden of producing some evidence in respect

of that fact in issue. It will only alleviate that burden to discharge which very slight evidence may suffice.

Another point to be noted is that the incidence, extent and nature of the burden of proof for proceedings for confiscation under the first part of the entry in the 3rd column of Clause (8) of s. 167, may not be the same as in proceedings when the imposition of the other kind of penalty under the second part of the entry is contemplated. We have already alluded to this aspect of the matter. It will be sufficient to reiterate that the penalty of confiscation is a penalty in rem which is enforced against the goods and the second kind of penalty is one in personam which is enforced against the person concerned in the smuggling of the goods. In the case of the former, therefore, it is not necessary for the Customs authorities to prove that any particular person is concerned with their illicit importation or exportation. It is enough if the Department furnishes prima facie proof of the goods being smuggled stocks. In the case of the latter penalty, the Department has to prove further that the person proceeded against was concerned in the smuggling.

The propriety and legality of the Collector's impugned order had ;to be judged in the light of the above principles.

It is not correct to say that this is a case of no evidence. While it ,is true that no direct evidence of the illicit importation of the goods was adduced by the Department, it had made available to the Collector several circumstances of a determinative character which coupled with the inference arising from the dubious conduct of Baboothmull. and Bhoormull, could reasonably lead to the conclusion drawn by the Collector, that they were smuggled goods. These circumstances have been set out by us earlier in this judgment. We may recapitulate only the most salient among them.

The importation of such goods into India had been banned several years, earlier, i.e. of some of them in 1957 and of others in 1960. These goods, without exception, were all of foreign origin. They were of large value of over Rs. 12,000/-. They were

all lying packed as if they had been freshly delivered, or were ready for despatch to a further destination. They were not lying exhibited for sale in the showcases of the shop. Baboothmull from whose apparent custody or physical possession, they were seized disclaimed not only their ownership but also all knowledge about the contents of the packages. He could not give a satisfactory account as to how those packages came into his shop. 'At first, he said that some next-door unknown broker had left them outside his shop. Some days later, he came out with another version viz., that one Bhoormull had left them there. Eight days after, one mysterious person who gave out his name as Bhoormull, laid claim to these goods. Despite repeated requisitions, Bhoormull did not furnish any information regarding the source of the alleged acquisition of the goods. He never appeared personally before the Collector. He remained behind the scenes. He did not give addresses or sufficient particulars of the brokers who had allegedly sold the goods to him on the 3rd June. Whatever cryptic information was given by him, was also conflicting. Despite two show-cause notices, Bhoormull intransigently refused to disclose any further information. Apart from making a bare claim, he did not furnish evidence of his ownership or even juridical possession of the goods. The totality of these circumstances reinforced by the inferences arising from the conduct of Baboothmull and Bhoormull could reasonably and judicially lead one to conclude that these goods had been illicitly imported into Madras, a sea port. Even if the Division Bench of the High Court felt that this circumstantial evidence was not adequate enough to establish the smuggled character of the goods, beyond doubt, then also, in our opinion, that was not a good ground to justify interference, with the Collector's order in the exercise of the writ jurisdiction under Art. 226 of the Constitution. The function of weighing the evidence or considering its sufficiency was the business of the Collector or the appellate authority which was the final tribunal of fact. "For weighing evidence and drawing inferences from it", said Birch J. in R. Madhub Chander [(1874) 21, W.R. Cr. 13, at 19] "there can be no canon. Each case presents its own peculiarities and in each

common sense and shrewdness must be brought to bear upon the facts elicited." It follows from this observation that so long as the Collector's appreciation of the circumstantial evidence before him was not illegal, perverse or devoid of common sense, or contrary to rules of natural justice there would be no Warrant for disturbing his finding under Art. 226. The collector's order was not of this kind. In the view that the initial 'onus of proof on the Department can be sufficiently discharged by circumstantial evidence, we are supported by the decision of this Court, in Issardas Daulat Ram's case (supra). There, on September 14, 1954, that is, long before the insertion of s. 178-A in the Act, a quantity of gold to a refinery in Bombay was sent for the purpose of melting, The Customs authorities seized this gold when it was being melted. The gold was found to be of foreign origin and had been imported into India in contravention of the Foreign Exchange Regulations Act, 1947. The Collector of Customs confiscated it under S. 167(8) of the'-Act. The legality of confiscation was challenged by a petition under art. 226 of the Constitution before the High Court, on the ground that there was no evidence before the Collector to show that the gold had been imported into India after restrictions had been imposed in March 1947 on its importation. The High Court rejected this contention and dismissed the petition. The same argument was advanced before this Court in appeal by special leave. This Court also negatived this contention. While conceding that there was no direct evidence that the gold had been smuggled after March 1947, it was held that a finding to that effect could be reached by referring to "the conduct of the appellant in connection with (a) the credibility of the story about the purchase of this gold from three parties, (b) the price at which the gold was stated to have been purchased which was less than the market price and (c) the hurry ,exhibited in trying to get the gold melted at the refinery with a small bit of silver added,' so as reduce, the fineness of, the, gold and thus approximate the resultant product to licit gold found in the market." The rule in Issardas Daulat Ram's case was reiterated with amplification in M/s. Kanungo & Co.'r case (supra). Therein, the appellant was a firm carrying on

business, as dealer, importer and repairer of watches. On a search of the firm's premises on October 17, 1959, the Customs authorities seized 390 watches out of which 250 were confiscated on the ground that they had been illicitly imported into India. The firm's petition under Article 226 of the Constitution was allowed by a learned single Judge of the High Court and the order of confiscation was quashed on the ground that the customs authorities had failed to prove illicit importation of the watches. On appeal, by the Department, the Division Bench of the High Court reversed the decision of the single Judge with these observations "The watches were seized from the possession of the respondent No. 1 (appellant) who had not obtained a licence or a customs clearance permit for importation of the same. They were of foreign make and must have been imported across the customs frontier. The explanations offered by the Respondent regarding its coming, into possession of, the same between 1956 and 1957 were found upon enquiries by the customs authorities, to be false, the result of these enquiries were communicated to the Respondent No. 1 who was thereafter heard by the adjudicating officer. Yet no attempt was made by the respondent No. 1 to substantiate its claim regarding lawful importation of the watches..... The customs authorities came to the conclusion that the said 280 watches were illegally imported and thereupon made an order for confiscation of the same. It is not for this Court, in exercise, of its jurisdiction under Art. 226 of the Constitution to revise, set aside or quash this order, in the facts of this case."

In appeal on certificate, it was contended before this Court that there was no evidence that these watches had not been illicitly imported 'into India and that the impugned order wrongfully placed the burden on the appellants. Sikri C.J., speaking for the Court, repelled this contention thus "There is also no force in the second point because we do not read the impugned order as having wrongly placed the burden on the appellant. What the impugned order does is that it refers to the evidence on the record which militates against the version of the appellant and

then states that the appellant had not been able to meet the inferences arising therefrom. In our opinion, the High Court was right in holding that the burden of proof had shifted on to the appellant after the Customs Authorities had informed the appellant of the results of the enquiries and investigations.

This also disposes of the first point. As we have said, the burden was on the Customs Authorities which they discharged by falsifying in many particulars the story put forward by the appellant..... It cannot be disputed that a false denial could be relied on by the Customs Authorities for the purpose of coming to the conclusion that the goods had been illegally imported."

In the case before us, the circumstantial evidence suggesting the inference that the goods were illicitly imported into India, was similar and reasonably pointed towards the conclusion drawn by the Collector. There was no violation of the rules of natural justice. The Collector had given the fullest opportunity to Bhoormull to establish the alleged acquisition of the goods in the normal course of business. In doing so, he was not throwing the burden of proving what the Department had to establish, on Bhoormull. He was simply giving him a fair opportunity of rebutting the first and the foremost presumption that arose out of the tell-tale circumstances in which the goods were found, regarding their being smuggled goods, by disclosing facts within his special knowledge.

Amba Lal's case (supra) strongly relied upon by Mr. Ramamurthi, is clearly distinguishable on facts. There, Amba Lal was originally a resident of Pakistan. He migrated into India on the partition of the Indian Sub-continent before March 1948 when the customs barrier between India and Pakistan was raised for the first time. The Department did not lead any evidence, circumstantial or direct, that the goods seized from Amba Lal had been illicitly imported. Amba Lal gave plausible explanation that he had brought those goods along with him in 1947, when there were no restrictions on their importation. The Department however,

tried to take advantage of certain alleged discrepancies in the statements of Amba Lal which were recorded in English. Amba Lal did not know English. He was not supplied with copies of those statements, nor allowed to inspect them. This Court, therefore, held that the Department was not entitled to rely on those discrepancies. Quoting from Shambhu Nath Mehra v. State of Ajmer [(1956) S.C.R. 199] the Court said that S. 106. Evidence Act "cannot be used to undermine the well established rule of law that, save in a very exceptional class of cases, the burden is on the prosecution and never ,sifts." It was added "If S. 106 of the Evidence Act is applied, then, by analogy, the fundamental principles of criminal jurisprudence must equally be invoked".

If we may say so with great respect, it is not proper to read into the above observations more than what the context and the peculiar facts of that case demanded. While it is true that in criminal trials to which the Evidence Act, in terms, applies, this section is not intended to relieve the prosecution of the initial burden which lies on it to prove the positive, facts of its own case, it can be said by way of generalisation that the effect of the material facts being exclusively or especially within the knowledge of the accused, is that it may proportionately with the gravity or the relative triviality of the issues at stake, in some special type of cases, lighten the burden of proof resting on the prosecution. For instance, once it is shown that the accused was travelling without a ticket, a prima facie case against him is proved. If he once had such a ticket and lost it, it will be for him to prove this fact within this special knowledge. Similarly, if a person is proved to be in recent possession of stolen goods, the prosecution will be deemed to have established the charge that he was either the thief or had received those stolen goods knowing them to be stolen. If his possession was innocent and lacked the requisite incriminating knowledge, then it will be for him to explain or establish those facts within his peculiar knowledge, failing which the prosecution will be entitled to take advantage of the presumption of fact arising against him, in

discharging its burden of proof.

These fundamental principles, shorn of technicalities, as we have discussed earlier, apply only in a broad and pragmatic way to proceedings under s. 167(8) of the Act. The broad effect of the application of the basic principle underlying s. 106 Evidence Act to cases under s. 167(8) of the Act, is that the Department would be deemed. to have discharged its burden if it adduces only so much evidence, circumstantial or direct, as is sufficient to raise a presumption in its favour with regard to the existence of the facts sought to be proved. .Amba Lal's case was a case of no evidence. The oily circumstantial evidence viz., the conduct of Amba Lal in making conflicting statements, could not be taken into account because he was never given an opportunity to explain the alleged discrepancies. The status of Amba Lal viz. that he was an immigrant from Pakistan and had come to India in 1947 before the customs barrier was raised bringing along with him the goods in question, had greatly strengthened the initial presumption of innocence in his favour. Amba Lal's case thus stands on its own facts.

The present case is in line with the decisions in Issardas Daulatram v. Union of India and. M/s. Kanungo & Co. v. Collector of, Customs (supra)."

4.5 Section 123 of Custom Act, 1962 reads as follows:

"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.”

4.6 In case of the **“watches”**, the Section 123 of the Customs Act, 1962 is applicable and the burden to prove that the watches of foreign origin seized by the Customs Authority have been licitly imported, will squarely rest on the person from whose possession the watches are seized or on the person who claims to be the owner of such watches. Learned Counsel for appellant submits that the smart watches, the bone of contention in the present case are not watches and has stated as follows in support of his contention-

➤ *“As per the decision of Harmonized System Committee (HSC) in its 55th session held in March, 2015 determined HS classification of wrist wearable device (“Smart Watch”) under CTH 8517.62 and it was mentioned that „Smart Watch“ is effectively wearable computer. It is a battery operated device in the form of a wrist watch, incorporating a touch sensitive, active matrix, organic light-emitting diode (Amoled) display, a central processing unit (CPU), random-access memory, flash memory, radio transceiver, electronic watch module, motion sensor(accelerometer) agyro-sensor, digital camera module with auto focus, speaker and two microphones. The radio transceiver utilizes the open wireless technology standard (Bluetooth), which enables the device to communicate wirelessly with certain mobile devices, such as mobile phones for cellular networks or tablet computers. The device independently performs functions such as recording and reproducing sound, taking and recording photos and videos, measuring and displaying*

step counts and heart rates apart from displaying time and information embedded in the watch module. Further, as per Notification No.57/2017-Cus. dated 30.6.2017 (copy attached) Smart Watches are classified under CTH 85176290/85176990.

- *The SCN and the impugned Order are misconceived and void ab-initio because they proceed on the fallacious assumption that “smart watches” are covered by the term „watches“. Watches are classified under CTH 9101. Smart Watches are classified under CTH 8517. Smart watches have a completely different and distinct identity from watches. Unlike watches, smart watches do not contain any watch movements.”*

We are not in position to agree with above contentions of the learned counsel, for the reason that issue for consideration in the present case is vis a vis the applicability of Section 123 to the smart watches and not the question of determination of correct classification as per Harmonized System or the Customs Tariff Act, or the admissibility of benefit under Notification No 57/2017-Cus. Admittedly the items under seizure are having a watch module which is for displaying the time. In our view the essential character of the item under consideration is that of a watch and is bought and sold as a watch in the trade. Just because certain other functions are inscribed in the said device it will not essentially go beyond the meaning of word watch as used in section 123. Smart watch has been described at “<https://www.ebuyer.com/blog/2015/06/what-does-a-smartwatch-do/>” stating as follows:

*“Traditional timepieces just seem so outdated these days. If you want more for your money that just something that tells the time, smart watches are a great solution. **Of course, smart watches do predominantly keep you informed of the current time**, but with the added capabilities for customisation and personalisation.*

Smartwatches comes with a variety of different faces, from

traditional stylish analogue dials, to more modern and outlandish digital options. Featuring a number of different designs, you can pick a face you like and just get a new one when you get bored of it. With changeable straps, including causal, formal and sporty, you can mix and match your face and strap combos to fit any context.”

Thus in our view the burden to establish that the seized smart watches are covered by the expression “watch” used in the Section 123 of the Customs Act, 1962.

4.7 Once we hold that Section 123 is applicable to facts of this case, then the next question which needs to be answered is whether Appellants have discharged the necessary burden to establish that these smart watches have been licitly imported into India. To establish the licit import appellants produced a Bill of Entry No.3140294 dated 7.09.2017, filed at Chennai for import of 20,000 smart watches, and have claimed that the smart watches under seizure are part of this consignment. However when asked to establish the correlation between the goods imported under said bill of entry and the seized goods, appellant failed to establish the same. The relevant extracts from the statements of Appellant recorded under Section 108 are reproduced below:

Statement dated 19.06.2018

“Q. Please go through your statement recorded on 5 April, 2018.

Ans. I have gone through the statement recorded on 5th April, 2018 and placed my dated signature of having seen and confirmed the same.

Q. In your statement you have claimed the ownership of 10 cartons containing Smart Watches & 07 cartons containing duplicate copy of branded watches, what you have to say?

Ans. I have gone through the statement given by me on 5th April, 2018. I have found that I had claimed 17 cartons out of 23 cartons. On that day, I did not have any documents. However, I

have approached my CHA and I am producing following documents relating to my goods which had been imported by me under IEC Code 0316967190 issued to my Company Jstar Mobile Accessories Private Limited:

- i. Bill of Entry number 3140294 dated 07.09.2018 for the import of smart watches*
- ii. Customs examination dated 16.10.2017 issued by AAI Cargo Logistic and Allied Services Company Limited*
- iii. Airway Bill No. 160-87836641 by Cathay Pacific Airway*
- iv. Packaging List for the invoice No. MAA0905*
- v. Commercial Invoice Number MAA0905 dated 2017.09.05 issued by Zoe Win International Group Co. Limited*
- vi. E-Payment transaction status receipt for the payment of 10,53,119/-.*

Q. in your statement dated 05th April, 2018, you had claimed duplicate branded watches contained in 07 cartons. What you have to say?

Ans. I had claimed duplicate watches on the basis of my brother's information, who had said that I had to be at CST for the watches on 5th April, 2018. I thought that all the cartons containing watches belongs to me. However, I could not contact my brother for the next few days as he resides in China. Also, this was my first experience with the customs officials and I was misguided by my fellow trade men that I shall run as I had claimed the import of smuggled copy of duplicate copy of branded watches. When I contacted him on next week, he informed that he had only informed about smart watch. However, I could not come to this office to inform about the same as I was in my home town, with my 9th month pregnant wife. Further, I received a Summons to appear on 05.06.2018. As I was in my home town, I could not come. Post delivery of my wife, I contacted one lawyer who informed me to approach this office with all the import related documents. I submit that the copy of duplicate watch claimed by me out of confusion, do not belongs to me and I do not claim the ownership of the copy of

duplicate watch which is contained in 07 cartons. I own a shop which deals in mobile accessories only and I am producing the original copies of the following documents to substantiate my claim that I have never dealt in watches.

- i. All the import related documents*
- ii. Tax invoice for the last six months*

Q. Please go through the summons dated 29.05.2018. Have you brought the documents sought in the Summons?

Ans. I am producing following documents:

- i. My company maintains two bank accounts: 1st is Axis Bank account number 916020022751713 for the period 1.1.2018 to 11.06.2018 2nd is kotak Mahindra Bank Account Number 1712330430 for the period 1.4.2017 to 10.06.2018.*
- ii. I don't have any purchase order placed to the foreign country.*
- iii. The details of payment made to the foreign party is reflected in the Bank statement*
- iv. I have already submitted the import related documents as quoted above.*
- v. I have stored my smart watches with my friend Shri Shiva. Earlier I used to visit him and used to sell the goods to some of the parties who operate in Chennai or used to bring to Mumbai via train. However, this time, I could not go due to my family problem, he had transported this balance 5,500 smart watches through Sun Cargo via train.*
- vi. I have no documents in relation to the transportation of the 20,000 smart watches. I submit that some part of the consignment was sold to the entity situated at Chennai. Also, I had made personally visited Chennai and bring the smart watches on train. For that, I used to contact the contractor available at Chennai Railway station who charges at the rate of Rs. 15 per kg for the parcel. I use to travel in the same train and collect the smart watches at CST railway station and further transported the smart*

watches by tempo standing outside CST. I could not visit Chennai this time as I had some family problem. I call my brother to arrange the transportation of the same. I shall provide you the ledger copy of the smart 20,000 smart watches tomorrow.

Q. How you pay to Shri Shiva?

Ans. No, he is my friend and did not charge any money for storing the balance smart watches contained in 10 cartons.

Q. Is he your business partner?

Ans. No, he is not my business partner.

Q. How you have paid to the contractor in Train?

Ans. i have paid them in cash.

Q. How you have paid Sun Cargo?

Ans. I have not paid any amount to Sun Cargo, as I have not received my goods till date.

Q. Who had booked goods for transportation via train to Mumbai?

Ans. Shri Shiva.

Q. How he had transported the goods this time?

Ans. He has also approached the railway contractor to book the courier in the same way how I used to booked in earlier cases.

Q. If Shri Shiva had booked the courier, why did you not contacted Shri Shiva to clarify next day?

Ans. I asked him why there is copy of duplicate branded watches in my cartons but he said that he had not opened the cartons so he was not aware about the contents of the cartons. So, I had to rely on the information passed by my brother. However, he was not approachable, I could not confirmed the same. Also, I was made too scared by neighbors as well as my fellow trades men. Also, I was in lot of mental stress due to my

wife critical situation.

Q. How you contacted Sun Cargo. What is the address of M/s Sun Cargo?

Ans. I met one representative of Sun Cargo at CST, Mumbai named Shri Bipin (mobile number 8210500543). He informed me that they have arranged a tempo bearing registration number MH-04 FP 7421 to send me my consignment. I don't have the address of M/s Sun Cargo.

Q. Why didn't you confirm from Shri Bipin about the cartons at CST?

Ans. He said that the cartons belonging to me and others have already loaded in Tempo No. MH04 FP 7421 and I can unload my cartons at my location. However, I reiterate that I was under the impression that all the cartons other than mobile covers belongs to me. So, I did not enquire further. Also, I was in lot of stress due to my family problem. But at this point of time I can confidently claim that only the smart watches contained in 10 cartons belong to me.

Q. Where is your brother?

Ans. Earlier he was one of the two directors in my Company. His DSC expired on 24.02.2018. Now he has gone to China for employment and he has informed that he can come to India after 8 months as per the contract entered the company. As he is no more in my company and I am in problem, he is not answering my call."

Statement dated 14.09.2018

"Q. Please go through the statement dated 05.04.2018 of Shri Kishore Malusare, Driver of Tempo bearing registration number MH-04-FP-7421 recorded u/s 108 of Customs Act, 1962. What you have to say?

Ans. I have gone through the statement dated 05.04.2018 of Shri Kishore Malusare and placed my dated signature of having

seen and understanding the same. I state that Shri Kishore Malusare was the driver of the tempo on which my goods were loaded.

Q. Shri Kishore Malusare, driver of the said tempo has deposed that all the goods contained in the said tempo belong to you and you were accompanying him as owner of the goods. What you have to say?

Ans. I agree that I was accompanying him in the said tempo but I claimed only the smart watch which is contained in 10 cartons.

Q. Please go through your statement dated 05.04.2018 & 19.06.2018. What you have to say?

Ans. I have gone through the statement dated 05.04.2018 & 19.06.2018 and I have placed my dated signature of having seen and deposed by me on the respective dates. I find that I had claimed smart watches and wrist watches contained in 10 cartons and 07 cartons but had not claimed goods contained in other cartons on 05.04.2018. I had only claimed only smart watches on 19.06.2018 and had not claimed other items viz. wrist watches, V8 stick kit & mobile back covers on 19.06.2018.

Q. It is seen that you have engaged a lawyer to represent your case who have himself confirmed (attested by you) that 17 cartons containing watches detained by this office on 05.04.2018 belongs to M/s Jstar Mobile Accessories Private Limited. What you have to say?

Ans. I don't have anything to say on that part.

Q. You have deposed in your statement dated 05.04.2018 that 10 cartons of smart watch & 07 cartons of wrist watch belongs to you. The reply of your authorized representative confirms the same thing that 17 cartons belongs to M/s Jstar Mobile Accessories Pvt. Ltd. What you have to say?

Ans. I admit that in my statement dated 05.04.2018 wherein I had claimed total 17 cartons. I had claimed 10 cartons of smart watch & 7 cartons of wrist watch in my statement dated

05.04.2018. Also, letter produced by my authorized representative confirms that 17 cartons belongs to M/s Jstar Mobile Accessories Pvt. Ltd. Therefore, in both, i.e. my statement dated 05.04.2018 & authorized letter certified by me confirm as the sarce number of cartons i.e. 17 cartons.

Q. Shri Kishor, Driver of the said tempo has deposed that all the goods belong to the person accompanying him ie. you. What you have to say?

Ans. I have gone through the statement of Shri Kishore and I placed my dated signature of having seen the same. I don't have anything to say on the statement of Shri Kishore Malusare.

Q. Please go through the Bill of Entry No. 3140294 dated 07.09.2017 submitted by you. The model shown against the description of goods is DZ09. Do you deals in smart watches? What do you know about the DZ09 smart watches?

Ans. I have gone through the Bill of Entry no. 3140294 dated 07.09.2017 submitted by me. Yes. I deal in Smart watches of different type procured from local market and imported by my company. I want to submit that Dz09 is smart watch.

Q. Can you identify and co-relate 20,000 DZ09 smart watches as mentioned in the Bill of Entry no. 3140294 dated 07.09.2017 with those of 5543 smart watches detained by this office on 05.04.2018?

Ans. DZ09 brand and other smart watches available at approximately same cost do not bear any mark/ logo or sign on the body of the smart watches. Hence, I cannot co-relate the DZ09 smart watches imported under Bill of Entry no. 3140294 dated 07.09.2017 with 5543 smart watches detained by this office. But these smart watches have unique IMEI number on the basis of which we can differentiate between two smart watches of different model.

Q. Please go through commercial invoice produced by your Authorized representative. What you have to say?

Ans. I have gone through the Commercial invoice produced by me. I have to say that the commercial invoice only give details the total number of smart watches imported by my company i.e. Jstar Mobile Accessories Pvt. Ltd.. There is no detail of IMEI number on the basis of which I can say that the commercial invoice issued pertains to the 5543 smart watches detained by your office.

Q. Please go through the Customs Duty payment details produced by you. What you have to say?

Ans. I have gone through the extract of payment details as available in the ICEGATE. As the commercial invoice does not give details of IMEI number of 20,000 smart watches, I cannot substantiate my claim that the customs duty payment details is in respect of 5543 smart watches.

Q. Please go through the Airway Bill No. 160-87836641 issued by Cathay Pacific Airway produced by you in support of your claim of 5543 smart watches detained by this office on 05.04.2018. What you have to say?

Ans. I have gone through the Airway Bill. As commercial invoice issued by Zoewin International Group Co. Limited has no mention of individual IMEI number, I cannot substantiate my claim that the Airway Bill pertains to the 5543 detained smart watches,

Q. Please go through the Foreign Bills transaction advice transacted produced by you. What you have to say?

Ans. As the of Bill of Entry no. 3140294 dated 07.09.2017 is in respect of 20,000 smart watches and in absence of any details of IMEI number on the commercial invoice, I cannot substantiate my claim that the 5543 smart watches is the remaining of 20000 smart watches for which I have paid Rs. 48,87,298/-.

Q. Can you co relate the 5543 smart watches detained by this office with 20000 Dz09 smart watches detailed by any other way/mean?

Ans. No.

Q. What is shelf life of Smart Watches?

Ans. As per my experience, shelf life of smart watches is 3-4 months. After that there are chances of battery leakage, un-functionality due to drying out of battery & not saleable due to software update issue.

Q. Where and why you have stored your smart watch from September, 2017 to 5.4.2018, which is a long time as far as shelf life of smart watches are concerned, as stated by you?

Ans. Thad stored my smart watches in Chennai with one of my friend. I don't have any proof of storage as ! had stored it with my friend house. I did not get any customer for these 5543 smart watches.

Q. As per the tax invoice furnished by you, it is seen that you have sold goods from your registered office situated at Mumbai. Why you have stored your goods at Chennai if your registered office is at Mumbai?

Ans. Beside from registered premise located at Mumbai, I had sold some quantity of smart watches from Chennai. However, I was not getting any customer for those remaining smart watches.

Q. Do you have any proof of payment i.e. rent or any other consideration made to Shri Shiva?

Ans. No.

Q. How the smart watches have been transported?

Ans. I have transported these goods via train.

Q. Do you have any documentary proof to establish your claim that the smart watches have indeed been transported from Chennai to Mumbai via train?

Ans. No. I don't have any proof to claim that the goods have been transported via train from Chennai to Mumbai. Also, I don't

have any receipt of booking by the representative of Sun Cargo at Chennai railway station and also from Shri Bipin, Manager of M/s Sun Cargo at CST, Mumbai.

Q. As the smart watches detained by this office has a good value. How you would have claimed in case of theft or any other mishaps during the transportation?

Ans. I have earlier transported goods from Chennai to Mumbai with the help of M/s Sun Cargo. There is mutual faith between us.

Q. Do you have any proof of transportation made by your firm on earlier occasion?

Ans. No. I have paid them in cash. I don't maintain record of the same.

Q. As per the Sales ledger produced by you for the "Smart Watch" it is seen that you have left with 5656 smart watches. Do you have any details of IMEI number of those 5543 smart watches?

Ans. No.

Q. Can you co relate the 5543 smart watches detained by this office in any other mean with 20000 smart watches imported under Bill of Entry no. 3140294 dated 07.09.2017? Ans. No.

Q. Can you claim on the basis of Bill of Entry no. 3140294 dated 07.09.2017, Commercial invoices produced by you and in absence of any documents in relation to storage of goods in Chennai & transportation from the place of import i.e. Chennai to Mumbai? Do you have any other supportive documents for your claim of 5543 smart watches detained by this office?

Ans. No.

Q. It is seen that other than smart watch, the said tempo was loaded with wrist watches of various brand, V8 stick kit & mobile backs covers. It is seen that some of the brands of wrist watches has been found to be counterfeit. What you have to say?

Ans. I know that the selling/ possessing and dealing in the counterfeit items & prohibited item is an offense.

Q. Do you have any documents to in relation to other goods viz. wrist watches of various brands, V8 Stick Kit and Mobile back covers?

Ans. No. I don't have any documents for these goods. I don't claim these goods."

4.7 Evidentiary value of the statement recorded under section 108 of the Customs Act, 1962 has been accepted by the Hon'ble Supreme Court in number of cases. In case of K I Pavunny [1997 (90) ELT 241 (SC)] Hon'ble Court referring to its earlier judgements recorded as follows:

"In Naresh J. Sukhawani V/s. Union of India [(1995) Supp. 4 SCC 663] a two-Judge Bench [to which one of us, K. Ramaswamy, J., was a member] had held in para 4 that the statement recorded under Section 108 of the Act forms a substantive evidence inculcating the petitioner therein with the contravention of the provisions of the Customs Act as he had attempted to export foreign exchange out of India. The statement made by another person inculcating the petitioner therein could be used against him as substantive evidence. Of course, the proceedings therein were for confiscation of the contraband. In Surjeet Singh Chhabra vs. Union of India [1997 (89) ELT 464], decided by a two Judge bench to which one of us, K. Ramaswamy J., was a member the petitioner made a confession under Section 108. The proceedings on the basis thereof were taken for confiscation of the goods. He filed a writ petition to summon the panch (mediator) witnesses for cross-examination contending that reliance on the statements of those witnesses without opportunity to cross-examine them, was violative of the principle of natural justice. The High Court had dismissed the writ petition. In that context, it was held that his retracted confession within six days from the date of the confession was not before a Police Officer. The Custom Officers are not police officers. Therefore, it was held that "the

confession, though retracted, is an admission and binds the petitioner. So there is no need to call Panch witnesses for examination and cross-examination by the petitioner". As noted, the object of the Act is to prevent large-scale smuggling of precious metals and other dutiable goods and to facilitate detection and confiscation of smuggled goods into, or out of the country. The contraventions and offences under the Act are committed in an organised manner under absolute secrecy. They are white-collar crimes upsetting the economy of the country. Detection and confiscation of the smuggled goods are aimed to check the escapement and avoidance of customs duty and to prevent perpetration thereof. In an appropriate case when the authority thought it expedient to have the contraveners prosecuted under Section 135 etc., a separate procedure of filing a complaint has been provided under the Act. By necessary implication, resort to the investigation under Chapter XII of the Code stands excluded unless during the course of the same transaction, the offences punishable under the IPC, like Section 120-B etc., are involved. Generally, the evidence in support of the violation of the provisions of the Act consists in the statement given or recorded under Section 108, the recovery panchnama (mediator's report) and the oral evidence of the witnesses in proof of the offences committed under the Act has consistently been adopting the consideration in the light of the object which the Act seeks to achieve."

Appellants have not shown at any time that these statements had been retracted by him at any time. The letter of Advocate to which the Appellant Counsel have referred is dated much before these two statements and cannot be said to be a retraction of the statements made subsequently. In absence of any retraction we find these statements as reliable pieces of evidence wherein the appellants have themselves been asked to establish correlation between the Bill of Entry produced by them and the goods seized have failed to establish any such correlation and have admitted that such correlation cannot be established.

4.8 In absence of any evidence to show that these smart

watches have been licitly imported into India, and in view of the Section 123 of Customs Act, 1962, we hold that these 5543 smart watches have been illicitly imported and are liable for confiscation under Section 111 of the Customs Act, 1962 as has been held by the Commissioner. Commissioner has allowed the redemption of these 5543 smart watches on payment of redemption fine of Rs 45 lakhs. For imposing the redemption fine of Rs 45 lakhs, Commissioner has in para 54 of impugned order recorded as follows:

“54. The next comes the issue of the 5543 smart watches. Rule 3 of the Information Technology Goods (Requirements for Compulsory Registration) Order, 2012 provides these watches to be in conformity with the IS 13252(Part I): (2010) and carry a self-declaration of its being in conformity with such standards and its being registered therefor with the Bureau of Indian Standards. The Rule 3(2) of this Order provides that if the smart watches are not in conformity with such standards than these watches would be the sub-standard or defective goods and would have to be deformed beyond its use by such importer and disposed of as a scrap. Thus, import of these watches is not wholly prohibited; but is subject to the prescribed conformity and registration in terms of Rule 3 of the Order. In view thereof, I extend an option to such future claimant(s) of these smart watches to redeem them upon payment of a fine to be determined under Section 125(1) of the Customs Act, 1962. The present market value of these 5543 smart watches have been ascertained to be Rs. 58,14,607/-. The evaded amounts of chargeable and payable customs duty on these watches have been ascertained to be Rs. 9,78,715/-. The difference thereof would be Rs. 48,35,892/-. In view thereof, I determine the redemption fine to Be Rs. 45,00,000/- under Section 125(1) of the Customs Act, 1962. The person(s), who come forward to claim these smart watches are, thus, extended an option to redeem these seized smuggled 5543 smart watches upon payment of a redemption fine of Rs. 45,00,000/- and upon fulfilling the prescription stated in Rule 3 of the Information

Technology Goods (Requirements for Compulsory Registration) Order, 2012. They would, in addition, be also liable to pay the ascertained customs duty liability of Rs. 9,78,715/- in terms of Section 125(2) thereof."

At S No 12 in para 46 Commissioner has recorded the assessable value of these 5543 smart watches as Rs 23,25,843/- and duty payable on the same as Rs 9,78,715/-. In para 54, he has recorded that the present market value of the smart watches is Rs 58,14,607/-. That being so if the redemption fine of Rs 45 lakhs is held to be appropriate then the total cost to the person redeeming these 5543 watches will be Rs 78,04,558/- which is much higher than the present market value of these goods. Thus in our view the redemption fine as determined by the Commissioner is prohibitive and hence cannot be held to be correct. In our view the ends of justice will be met if the redemption fine is determined after deducting the assessable value as determined and duty payable from the present market value of these goods (i.e. $58,14,607 - 23,25,843 - 9,78,715 =$ Rs 25,10,049). Thus in our view the end of justice will be met if we reduce the redemption fine to Rs 25 lakhs.

4.9 Appellants have contended that the assessable value determined by the Commissioner in the present order is not correct, as it is based on the value determined on the basis of internet price of the seized/ confiscated watches. He also states that these watches have been cleared by the Chennai Customs at much lower assessable as is evident from the Bill of Entry No 3140294 dated 07.09.2017. We are not in agreement with the arguments advanced by the Appellant Counsel, for the reason that it has been categorically admitted by the appellant in his statements referred above that there exists no correlation between the smart watches imported under the said bill of entry and those seized and confiscated. Further Appellant has not been able to produce any document in respect of legal acquisition of these smart watches. He has not produced any trade invoice in respect of these smart watches, for determining the transaction value for determination of the assessable value under Section 14

of the Customs Act, 1962. Rejecting the arguments advanced Commissioner has determined the assessable value in the manner as indicated in para 45 and 46 of his order in following manner:

“45. The transaction values of the seized goods, in the absence of any declared transaction values, would be determinable in accordance with the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007, in a sequential manner, as propounded by Rule 3(4) thereof. Rule 4 and Rule 5 thereof would not apply in the absence of any contemporaneous data. The deductive method of determining valuation of the seized goods under Rule 7 would also not apply for the same reason. Even computed value under Rule 8 would not be ascertainable in the absence of the cost data. In the circumstances, the value of the seized goods would be determinable under the residual method by determining them using reasonable means under Rule 9 thereof.

46. The ascertainment of the value of the seized goods have been undertaken in the subject notice. The values of 5543 smart watches, 16 e cigarettes, i.e., 8 V8 Stick Kit (Smok) and 8 V8 Stick Kit (Alien), and 4370 mobile back covers have been ascertained by ascertaining their market values from the e commerce platforms and then taking 40% values thereof to ascertain the transaction values. ...”

Appellants have stressed that these smart watches namely DZ09, are available at much cheaper price on certain websites, namely Flipkart. For ascertaining the correctness of the claim made by the appellants we have seen price range of these smart watches, on amazon.in, and found that:-

- DZ09, can never be the identification factor of these smart watches, as DZ09 is neither a brand name owned by a particular manufacturing company (manufactured by various manufacturers and sold in their brand name as Padgene Smartwatch, Qiufeng Dz09 Bluetooth Smart Watch, GZDL, Qidoou, 321OU, Sazooy, Heshi etc.). It is

simply an identification of the microprocessor which power these smart watches.

- DZ09 is the cheapest MediaTek powered Chinese smartwatch model. All of them have the same specifications (processor) but they are each taken in a different direction by their brand and the hardware they use.
- The prices vary from manufacturer to manufacturer and are available in range from Rs 800 per piece to Rs 5000 per piece.

Hence market value and the assessable value determined by the Commissioner in absence of any other data, seem to be based on the lower of the values available and could not be disputed on this account.

4.10 Commissioner has by the impugned order imposed a penalty of Rs 1 crore on the Appellant under Section 14 AA of the Customs Act, 1962. For imposing this penalty Commissioner has in his order in para 57 of his order recorded as follows:

"57. The next comes the issue of imposition of penalty upon Jetmal Bhav Singh under Section 114AA of the Customs Act, 1962. This a case of smuggling of the seized goods, which have been found to be liable to confiscation under Section 111(f) and (m) of the Customs Act, 1962 for having failed to make declaration requisite under Section 32 and Section 46 of the Customs Act, 1962. Further, consequent to the interception of the seized goods, there has been an attempt on the part of Jetmal Bhav Singh to make misstatements, misdeclaration and masking of the true and complete facts in this case, as has been found supra. In view thereof, Jetmal Bhav Singh would be liable to imposition of penalty under Section 114AA of the Customs Act, 1962, which has been proposed in the subject notice. Section 114AA of the Customs Act, 1962 speaks of imposition of this penalty for use of false and incorrect material, including statements and documents, which is writ large in the facts and circumstances of this case against Jetmal Bhav Singh. It

provides for imposition of a penalty, which may extend to a maximum of five times the value of the seized goods, which is Rs. 26,34,20,955/-. Considering the facts and circumstances of the case, I impose a penalty of Rs. 1,00,00,000/- upon Jetmal Bhav Singh under section 114AA of the Customs Act, 1962."

Commissioner has himself in his order recorded and held that none has come forward claiming the ownership of the seized/ confiscated goods. He has himself held that the appellant is not the owner of these goods and the facts as narrated in the order, clearly establish, that appellants had not produced any documents in respect of any goods other than 5543 smart watches. Section 114 AA of the Customs Act, 1962 reads as follows:

"SECTION 114AA. Penalty for use of false and incorrect material. - If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods."

If the Appellant is not even claiming ownership of any other goods and has not produced any documents in respect of any goods other than these 5543 smart watches at any time, the logic for taking market value of those goods in which appellant has not transacted at all is not understood. Even if we uphold the order of the Commissioner imposing penalty under section 114AA of the Customs Act, 1962, then the quantum of penalty needs to be determined by taking into account the market value of the goods in respect of which appellant has transacted and produced the documents. The market value of the 5543 smart watches has been determined by the Commissioner himself as Rs 58,14,607/- and five times of this will be **Rs.2,90,73,035 / -**. In his order against the five time value determined as **Rs.26,34,20,955 / -**, the Commissioner has imposed a penalty of Rs 1 Crore. Applying the same yardstick as the penalty if five

time the value of the goods come to Rs 2,90,73,035/- the penalty that can be imposed will be Rs 11,03,672/- ($2,90,73,035 \times 1,00,00,000/26,34,20,955 = 11,03,672.07$) or say Rs 11 Lakhs. Thus we reduce the penalty of Rs 1 Crore imposed by the Commissioner under Section 114 AA to Rs 11 lakhs (Rupees Eleven Lakhs).

4.11 Commissioner has in impugned order determined the duty payable in respect of these 5543 smart watches, as Rs 9,78,715/- and imposed a penalty equivalent to the duty evaded plus interest payable on the duty evaded under section 114A of the Customs Act, 1962 on any person who comes forward to claim these goods. In our view such a n approach of the Commissioner in imposing a penalty equivalent to duty and interest under section 114 A on the claimant of goods who is yet to be identified, is totally erroneous. Section 114 A is for the cases where in respect of the goods assessed to duty, subsequently certain short payments/ non payments determined. In case where the goods are not assessed to duty at the time of clearance but subsequently held liable for confiscation in terms of Section 111 under Section 125 (1) of the Custom Act, 1962, the duty become payable on the redemption of confiscated goods by the person redeeming the goods as per section 125 (2). This is the ratio of the decision of the Hon'ble Apex Court in case of Jagdish Cancer and Research Centre [2001 (132) ELT 257 (SC)]

“Whenever an order confiscating the imported goods is passed, an option, as provided under Sub-section (1) of Section 125 of the Customs Act, is to be given to the person to pay fine in lieu of the confiscation and on such an order being passed according to Sub-section (2) of Section 125, the person shall in addition be liable to any duty and charges payable in respect of such goods. A reading of Sub-section (1) and (2) of Section 125 together makes it clear that liability to pay duty arises under Sub-section (2) in addition to the fine under Sub-section(1). Therefore, where an order is passed for payment of customs duty along with an order of imposition of fine in lieu of confiscation of

goods, it shall only be referable to Sub-section (2) of Section 125 of the Customs Act. It would not attract Section 28(1) of the Customs Act which covers the cases of duty not levied, short levied or erroneously refunded etc.. The order for payment of duty under Section 125 (2) would be an integral part of proceedings relating to confiscation and consequential orders thereon, on the ground as in this case that the importer had violated the conditions of notification subject to which exemption of goods was granted, without attracting the provisions of Section 28(1) of the Customs Act. A reference may beneficially be made to a decision of this Court reported in *Mohan Meakins Ltd. Versus Commissioner of Central Excise, Kochi* (2000) 1 S.C.C. 462 wherein it has been observed in Para 6 Therefore there is a mandatory requirement on the adjudicating officer before permitting the redemption of goods, firstly, to assess the market value of the goods and then to levy any duty or charge payable on such goods apart from the redemption fine that he intends to levy under sub-section (1) of that section. In this view of the matter the objection raised by the Centre that Section 28 of the Customs Act would be attracted is not sustainable. The next question which falls for consideration is, as to whether or not a new ground or case for confiscation has been carved out as found by the CEGAT. According to the CEGAT, Para 3 of the notice relates to confiscation of goods under Section 111(o) of the Customs Act on the ground of non-submission of certificate under Condition 4(iii) of the Notification. Therefore, confiscation could be ordered only on the ground of non-submission of certificate and on no other ground. It is further pointed out by the CEGAT that Para 5 of the notice relates to payment of customs duty only, on the ground of violation of conditions relating to providing free treatment as well as on account of non-submission of certificate under condition No.4(iii) of the Notification. In connection with the above argument, it would be relevant to refer to para 7 of notice, a perusal of which would indicate that confiscation of the subject goods was intended for violation of various conditions of Notification No.64/88 dated 1.3.1988. We find, that various conditions which were violated

are indicated earlier in paragraphs 3 and 5 of the notice. Para 3 contained only one condition not various conditions. We, therefore, feel that reading the notice parawise and confining it watertight within each paragraph, would not be a correct way of construing a notice. It is to be read as a whole to find out as to whether the person concerned is made aware of the various grounds on the basis of which action is proposed to be taken as well as nature of the action. The view taken by the CEGAT on the point indicated above is erroneous and cannot be upheld."

Since in view of the above decision of the Apex Court the duty in respect of the confiscated goods on redemption become payable in terms of Section 125 (2) of the Custom Act, 1962, and is not a subject matter of Section 28 of the Customs Act, 1962, we are not in position to uphold the penalty imposed under Section 114 A of the Customs Act, 1962. In our view in cases where the goods are held liable for confiscation under Section 111, a penalty should have been imposed under Section 112 of the Customs Act, 1962.

5.1 In view of the discussions as above we dispose of the appeal filed by the appellant modifying the impugned order, in respect of the appellant who has come forward to claim 5543 smart watches which were detained and seized from his possession as follows:

1. Order confiscating the 5543 smart watches is upheld. However the redemption fine of Rs 45 Lakhs imposed is reduced to Rs 25 Lakhs.
2. Custom Duty amounting to Rs 9,78,715/- shall be paid by any person coming forward to claim these 5543 confiscated smart watches, in terms of Section 125 (2) of Customs Act, 1962.
3. Penalty imposed under Section 114A is set aside.
4. Penalty of Rs 1 Crore imposed under Section 114AA is reduced to Rs 11 Lakhs.

5.2 This order is limited to the Appeal filed by the Appellant only in respect of 5543 confiscated smart watches detained and

seized from his possession. No part of this order should be held as a pronouncement in respect of any other goods or person against whom impugned order has been passed and which is not subject matter of this appeal.

(Order pronounced in the open court on 18.11.2020)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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