**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI**

**REGIONAL BENCH – COURT NO.2**

**CUSTOMS APPEAL NO: 85213 OF 2023**

[Arising out of Order-in-Appeal No: MUM-CUSTM-PAX-APP-1809 TO 1812/2022-23 dated 22nd November 2022 passed by the Commissioner of Customs (Appeals), Mumbai Zone –III.]

**Aditi Hemendra Kothari**
57, Seaview, Worli Seaface, Mumbai- 400025 … ***Appellant***

*versus*

**Commissioner of Customs**
Chhatrapati Shivaji Maharaj International Airport Sahar
Andheri (E), Mumbai – 400099 ***…Respondent***

*APPEARANCE:*

Shri Paritosh Gupta, Advocate for the appellant

Shri Deepak Sharma, Assistant Commissioner (AR) for the respondent

**CORAM:**

**HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)**
**HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)**

**FINAL ORDER NO: 85474/2024**

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| DATE OF HEARING: | 17/01/2024 |
| DATE OF DECISION: | 08/05/2024 |

*PER: CORAM*

This appeal is before us in peculiar circumstances of seizure as well as grant of option, in appellate proceedings and for the first time, to redeem confiscated goods under section 125 of Customs Act, 1962. The foundational claim of the appellant before us is the inviolability of section 123 of Customs Act, 1962, in the restricted sphere of its legislative intent and the due discharge of onus thereof by the appellant, erasing the taint cast on the provenance of the impugned goods, from supposed 'reasonable belief' of seizing authority, to preclude even commencement of proceedings, let alone confiscation under section 111 of Customs Act, 1962, against them. It is not in dispute that goods were not seized in a 'customs area' wherein mere non-declaration, or misdeclaration suffices, to require the importer or passenger to defend themselves against one or more of the contingencies enumerated in section 111 of Customs Act, 1962. A seizure outside the 'customs area' within the territorial frontiers of the country places the onus of establishing charge of seized goods having been smuggled on customs authorities save for the sole exception of goods enumerated in section 123 of Customs Act, 1962 for which the onus for proving the goods to be not smuggled rests on the person from whom it was seized.

2. Before proceeding to consider the facts and circumstances in the appeal, and considering the narrow compass in which the appeal lies, a recollection of the statutory provision invoked against impugned goods may be worthwhile. According to

*'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.'*

in Customs Act, 1962, the coverage of the impugned goods, and the responsibility fastened therein, is unambiguously articulated. Learned Counsel for the appellant submits that the case against the goods was at one with that in the proceedings initiated against one Ms Vihari Rajesh Sheth whose interception for being in possession of allegedly smuggled jewellery led to investigations against the impugned goods owned by the appellant herein and that the strict regimen intended by section 123 of Customs Act, 1962 had been set out in the decision[1] of

[1] [final order no. A/86062-86064/2022 dated 10th November 2022]

the Tribunal in *Vihari Jewels and others v. Commissioner of Customs, Mumbai-III* in appeal[2] against order[3] of the Commissioner of Customs (Appeals), Mumbai-III at which stage the proceedings of the appellant, among others, and the principal noticees had got disengaged. Learned Authorized Representative contended that the order of the Tribunal is under challenge before the Hon'ble High Court of Bombay as is the outcome of proceedings in the Settlement Commission resorted for closure of the case pertaining to seizure from Ms Vihari Sheth.

3. The goods impugned here are 'diamond studded jewellery' seized from the possession of Ms Aditi Hemachandra Kothari in follow-up action consequent upon interception of the said Ms Vihari Sheth at Chatrapati Shivaji Maharaj International Airport (CSMIA), Mumbai upon arrival from Singapore on 30th July 2013 and the case built up against her of having travelled several times for carriage of contraband jewellery. According to the investigation, details of five purchases, including that of Ms Aditi Kothari, obtained from distinctly labelled files recovered during the search at M/s Vihari Jewels on 7th August 2013 and 8th August 2013 were found to tally with entries in the 'red diary' and 'mobile phone' seized from the person of Ms Vihari Sheth and, thus, afforded the reasonable belief that these had been smuggled into India. The articles in the possession

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[2] [customs appeal no. 86888-86890 of 2021]
[3] [order-in-appeal no. MUM-CUSTM-AMP-APP-397-405/2021-22 dated 23rd July 2021]

of the appellant, covered by two invoices for ₹76,83,169 issued in March 2013 by M/s Vihari Jewels and valued at ₹ 76,71,080, were subjected to seizure on 4th August 2014 under section 110 of Customs Act, 1962. The records do indicate that the articles seized from the nine individuals had been licitly purchased inasmuch as tax having been discharged on the transaction was documented and the payments thereof effected through banking channels.

4. The impugned goods were confiscated under section 111 of Customs Act, 1962 by the original authority but offered for redemption solely to Ms Vihari Sheth under section 125 of Customs Act, 1962 on payment of fine of ₹ 2,50,00,000 along with applicable duty. The purchasers, aggrieved by the offering of option to redeem to a person other than themselves and who had not preferred claim to those either, sought appellate remedy. Revenue was also in appeal against the offer of redemption and pleaded for absolute confiscation which did not find favour with the first appellate authority. In the impugned order[4], the cause canvassed by the purchasers from whom the goods had been seized was accepted by Commissioner of Customs (Appeals), Mumbai-III and the option of redemption was shifted to them along with the obligation to discharge duties of customs, if any, arising from operation of empowerment under Customs Act, 1962. The appellant herein was permitted to redeem the goods on payment

[4] [order-in-appeal no. MUM-CUSTM-PAX-APP-1809 to 1812/2022-23 dated 22nd November 2022]

of fine of ₹ 11,52,475 and ostensibly on the ground that disproving of the impugned goods having been smuggled to the satisfaction of legal requirements was lacking and, thus, validating the finding of the original authority that the goods had been smuggled by Ms Vihari Sheth for sale through M/s Vihari Jewels.

5. The case of the appellant herein is that there was no justification for invoking of section 111 of Customs Act, 1962 in view of proper discharge of onus placed on her having been duly concluded and, therefore, the first appellate authority acted in excess of jurisdiction to uphold the confiscation even while concurring with her plea for right to the goods as the owner.

6. The impugned order has set out the backdrop of the proceedings thus

> *'3. Investigations done of smuggled gold studded diamond jewellery sold in the past to the noticees No.4 to 12 in the present case (SCN No.2) namely Mr.Manoj Modi, Ms.Bhakti Modi, Ms.Smita Modi, Ms.Rina Jain, Ms.Aditi Hemendra Kothari (appellant no 3), Mrs.Vinita Jaipuria (appellant no 1), Mrs.Devki Jaipuria (appellant no 2), Dr.Sujata Jetley (appellant no 4) and Mr.Risabh Poddar was found to be have been sold through various invoices generated in the records of M/s.Vihari Jewels. The traces of concoted generation of these invoices was supported by evidences viz. in the Red Coloured Diary recovered from Ms.Vihari Sheth on 30/31.07.2013; from forensic analysis of electronic devices (I-pad and Mobile phone) recovered from her, from the fake*

*bills generated by Mr.Murari Mohan Pramanick for jobwork done by him which came to light from the statement recorded by DRI on 20.09.2013 during the course of investigation wherein he deposed that he had met Mr.Jiten Sheth through one person by name Dipak for job work in April 2013; that he has merely issued the job work invoices for labour charges without actually manufacturing the jewellery mentioned therein and that he issued invoices on request of and as per details given by Jiten Sheth; the bills were all issued in the name of M/s.Vihari Jewels and payments received from Jiten Sheth. It was observed that the payments for the so called job charges bills were not made immediately but completed only in last week of August 2013 i.e. after detection of the case. Further Ms.Vihari Sheth in her statement dtd.31.08.2013 divulged that the entries in the red coloured diary with names of certain persons with description of jewellery and amount (in USD) were made by her and are true and correct but she refused to explain the entries and also it was observed that whose images were found in her I-pad/mobile phone were sold through M/s.Vihari Jewels.*

*3.1 During the course of investigation, summons were issued to the persons, whose names were found mentioned in the red coloured diary of Ms. Vihari Rajesh Sheth or in the data recovered from her mobile phone or in other records taken over during investigation. In response to the summons, the concerned persons submitted their jewellery along with the invoices issued by M/s. Vihari Jewels and payment details by themselves or through their authorised persons before the investigating agency. All the jewellery items and diamonds mentioned in the invoices issued by M/s. Vihari Jewels were seized under panchanamas having different dates under the reasonable belief that these were smuggled items and hence were liable for confiscation under the provisions of Customs*

> *Act, 1962. The statements of concerned persons were recorded under Section 108 of the Customs Act, 1962 on different dates. In some cases, the private records in red diary and data recovered from the mobile phone of Ms. Vihari Sheth pertaining to these goods show their value in US $ which apparently points to the overseas origin of the goods.'*

and, having decided on pre-deposit thus

> *'7. It is observed that the appellants are noticees in the adjudication proceedings having purchased diamond jewellery from Ms.Vihari Sheth (Noticee No.l) apparently being illegally imported by her without declaration to Customs and non-payment of legitimate customs duty and sold to the appellant. I find that there is no link established against the appellants in the smuggling case of diamond studded gold jewellery seized from Ms.Vihari Rajesh Sheth on her arrival at CSMI Airport. Further, investigation by DRI has not proved that the appellants had purchased or acquired the goods with guilty-knowledge of their illicit importation and hence no penalties have been imposed on the appellant by the A/Authority vide the impugned order. Thus, as declared in the Form CA-1 no amount is required to be deposited by the appellant in terms of Section 129E of the Customs Act, 1962. Accordingly, I proceed further to decide the case on merits.',*

proceeded to hold that

> *'12.2 It has been contended by the appellants that the authorities assumed that since Ms.Vihari was a frequent traveller, the jewellery purchased by her was also smuggled into India.*

*In this regard, I find that the department has proved the smuggled nature of goods through the confessional voluntary statements of Mrs. Vihari Rajesh Sheth and Mr. Jiten Sheth. Further, analysis of the data stored in the said Samsung mobile seized from Mrs. Vihari Rajesh Sheth and entries found to be made in the red diary indicated that she had apparently indulged in smuggling of diamonds and diamond studded gold jewellery in the past. It is also revealed from the statements recorded under the Customs Act, 1962, evidences from the forensic examination and other documents that her uncle, Jiten Sheth was using M/s. Vihari Jewels, Mumbai as a front to market and sell the jewellery smuggled in the past. From the records in the red colour diary and the voluntary statements of various persons recorded under section 108 of the Customs Act, 1962, it is evident that Mrs. Vihari Rajesh Sheth was personally canvassing the sale of the smuggled diamond jewellery with most of the buyers of the smuggled jewellery whose goods were seized by the investigation. Also, Ms.Vihari in her statement recorded on 08.10.2013 stated that she has not personally purchased any jewellery in India at any time. Again, Mr. Jiten Sheth submitted fabricated and false back dated documents showing the licit acquisition of the jewellery which was unearthed by the investigation. The Government-approved Valuer also told in his report that the subject goods appear to be imported. I find A/Authority has rightly held the goods liable for confiscation. Thus, there is no merit in the contentions raised by the appellant and are unsustainable.*

*In this regard, I also rely on judgment passed by the Apex court in case of CC v. D Bhoormull 1983 (13) ELT 1546 (SC) = 1985 ECR 2284 = 1974 (2) SCC 544 = 1974 (3) SCR 833 = AIR 1974 SC 859, where it was held that "Department is not required to prove its case with mathematical precision,* *but what is required is the establishment of such a degree of probability that a prudent man may on its basis believe in the existence of facts in the issue. Prosecution is not obliged to prove as part of its primary burden the facts which are especially within the knowledge of the accused. Since smuggling is done secretly, it is impossible for the preventive department to unravel every link of the process. If a person is proved to be in possession of stolen goods, the prosecution will be deemed to have established the charge that he either was the thief or had received those goods knowing them to be stolen. If his possession was innocent and lacked the requisite incriminating knowledge, then, it is 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 facts arising against him, in discharging its burden of proof. Department would be deemed to have discharged its burden (of proof) if it adduces so much evidence, circumstantial or direct, as is sufficient to raise a presumption in its favour with regard to the existence of fact sought to be proved."*

*12.3 Further, it is contended that A/Authority has referred to forensic analysis of electronic devices but has failed to appreciate that there was no tangible evidence against the appellants*

*As discussed supra, neither Ms.Vihari Sheth nor her uncle Shri Jiten Sheth could produce any documentary evidence to prove licit procurement/manufacture of impugned items which were sold to the appellant and infact Shri Jiten Sheth was fabricating documents to show on record its licit procurement. Hence, I don't find any merit in the above contention of the appellant.'*

and dealt with requirements of section 123 of Customs Act, 1962 thus

*‘12.6 As regards contention that Section 123 of the Act is not attracted in this case as the burden to prove that goods are not smuggled is on the person from whose possession they are seized; the burden is on the department to prove that the goods were smuggled with concrete and substantive evidence.*

*As discussed supra, the investigations and evidences gathered clearly indicated smuggled nature of the goods. Further, with regard to burden of proof as required under Section 123 of the Customs Act, 1962, I find that "department is not required to prove its case with mathematical precision, but what is required is the establishment of such a degree of probability that a prudent man may on its basis believe in the existence of facts in the issue......" as held by the Apex court in case of CC v. D Bhoormull 1983 (13) ELT 1546 (SC) = 1985 ECR 2284 = 1974 (2) SCC 544 - 1974 (3) SCR 833 = AIR 1974 SC 859 as discussed in para 14.2 above.*

*12.7 The Appellants have contended that Ms.Vihari Sheth was neither the owner of the goods nor the person in whose possession the goods were found and hence the appellants were legally entitled to be given an option of redeeming the goods on payment of fine determined under the impugned order passed, but erroneously the option has been extended to Ms.Vihari and hence the impugned order is erroneous on said ground.*

*I find that the said issue of redemption has already been decided in respect of some of the appellants (other buyers of impugned jewellery from M/s. Vihari Jewels and seized by DRI) in the same case of gold/diamond jewellery smuggled by Ms.Vihari Sheth by Hon'ble Commissioner (Appeals) vide Order-in-Appeal No.MUM-CUSTM~AMP-APP-397 to 405/ 2021-22 dated 23.07.2021 wherein the option to redeem the jewellery has been extended to the bona-fide purchasers/*

> *appellants in the said case. I find it relevant to reproduce the findings of the said order as under:*
>
> *xxxxx*
>
> *In view of the above, I am inclined to take a similar view in the present appeals and totally agree with the contention of the appellants. I find that the appellant being a bona-fide purchasers are the real owners of the goods as well as goods were seized from the possession of the said bona-fide purchasers and in terms of Section 125 of the Customs Act, 1962 the redemption of the goods should only be given to the bona-fide purchasers/appellants.'*

7. Thus, a number of contradictions emerge. The goods could not have originally been 'believed' by the investigators to be without any provenance whatsoever; these were billed on purchase in a valid transaction. In the absence of discountenancing of title of M/s Vihari Jewels, the sale and tax paid on sale do, *prima facie*, validate the title and possession save for the proceedings enabled by section 123 of Customs Act, 1962 and section 111 of Customs Act, 1962 which does not vitiate ownership even while attaching taint to the goods for consequential detriment available in law. The proceedings before the original authority placed onus on Ms Vihari Sheth, and not on the owner-appellant before the first appellate authority, for discharge of onus envisaged in section 123 of Customs Act, 1962 and can only be perceived as 'vicarious' burden that, in the light of

*'17. Considering that goods had not been seized upon entry into India, the manner in which the evidence has been marshalled and confiscation ordered by recourse to section 111 (d), (j), (l) and (m) of Customs Act, 1962 by noting that*

> *'65……I find that M/s Vihari Jewellers didn't have any documents to prove licit import and possession of the said goods before sale. Further, the present owners of these jewellery also do not have any evidence/proof of licit import of these articles of jewellery…'*

*before adverting to decisions such as Collector of Customs, Madras and others v. D Bhoormull [1983 (13) ELT 1546 (SC)] and Sailesh Amulakh Jogani v. Union of India [2009 (241) ELT 348 (Bom)] and the turn adopted by appellate authority on redemption of the goods, it is abundantly clear that adverse presumption sanctified by section 123 of Customs Act, 1962 is the bedrock of the proceedings. We are, therefore, obliged to recall the scheme of Customs Act, 1962 and, more so, in the light of the submissions made by Learned Special Counsel designed to persuade us to adopt his proposition on the justifiability of penalty imposed on the appellant.*

*18. Customs Act, 1962 is not merely a legislated enactment for furtherance of Article 265 of the Constitution in conjunction with the enablement of levy in the Seventh Schedule of the Constitution – for that the charging provision of section 12 and the valuation standard in section 14 would have sufficed along with recoveries empowered by section 28 and facilitation of refund in section 27 of Customs Act, 1962; it is also not merely a legislated enactment for ensuring that only permissible goods are imported into or exported out of the country – an empowerment attached, not unnaturally, to an agency of the State concerned with policing of the frontiers. It is also replete with several procedural regulations intended to funnel all imports and exports* *towards 'proper officers' for facilitating assessment to duties and ascertaining of conformity to the permissible.*

*19. The procedural stipulations encompass control over conveyances during sojourn over Indian land, in Indian skies and on Indian waters, control over the goods contained in or carried on board such conveyances, control over custodians of imported goods and keepers of warehoused goods, oversight of goods in transit and under transshipment, control over coastal shipping and designating of responsibility for not tainting the goods. It is the breach of these procedural threads that are visited by the detriment of confiscation under the authority of section 111 and section 113 of Customs Act, 1962 and the sequence of arrangement therein reflects the progression of goods through the statutory barriers with recourse to later enumerations only upon non-recourse to the preceding cause for confiscation. We do not dwell on this aspect of confiscating power for the nonce.*

*20. These statutory norms are obligatory prescriptions devolving on person-in-charge of conveyances, custodians and keepers and importers and exporters; the contours of control leave no gap for slippage through the net. The trail on failure to comply is, thus, not difficult to establish and it is intended that only by breach in the normative dimension emplaced on inanimate goods are these to be rendered as offending in the eyes of law; the onus of proving that goods are, in consequence, smuggled lies upon the 'proper officer' proximate to the funnel. Owing to the frailty of systems and ingenuity of human behavior, provision however, must be had for 'presumptive smuggling' that shifts the onus for establishing otherwise – not as a general rule but in specified contexts. Two of the three such relate to goods that are visibly offending: goods brought near land frontier, coast and bay,* *gulf, creek or tidal river which is rendered liable for confiscation under section 113(c) of Customs Act, 1962 as presumed to be intended for smuggling out and that enumerated in section 123 of Customs Act, 1962 with the presumption of having been smuggled in unless proved otherwise. A third, with inbuilt detriment, presumes, under section 116 of Customs Act, 1962, that goods not landed after despatch from place of loading are in breach of the procedure prescribed in Customs Act, 1962. It is the second of the former that we are concerned with here for that has been cited in the show cause notice though the adjudicating authority tried to distance himself from it and as Learned Special Counsel has placed emphasis thereon in his submissions.*

*21. The particular presumption that this dispute is concerned with, viz., section 123 of Customs Act, 1962, has an interesting genealogy. It has a forebear in Sea Customs Act, 1878 albeit not in its original design; after the Republic came into being and, on the basis of*

> *'(1) to make smuggling a criminal offence, and (2) to transfer the onus of proof in respect of offences relating to smuggling to the person in whose possession any dutiable, restricted or prohibited goods are found.'*

*in the recommendations in the report of the Taxation Enquiry Commission in 1954, by Sea Customs (Amendment) Act, 1955 (Act 21 of 1955)*

> *'178A. Burden of proof . - (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 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.'*

*was incorporated in much the same manner as carried forward in Customs Act, 1962 thereafter as*

> *'**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 on the person from whose possession the goods were seized*
>
> *(2) This section shall apply to gold, diamonds, manufactures of gold or diamonds, watches, and any other class of goods which the Central Government may by notification in the Official Gazette specify.'*

*though with the intendment, manifested in sub-section (2) and (3) of section 178A of the predecessor statute, severely restricted from that contemplated in Bill no. 48 of 1954, as introduced and explained thus*

> *'Clause 14. – At present when action is taken against persons who are in possession of smuggled goods, it is not always easy for customs authorities to prove that the goods are smuggled goods. this clause places the burden of proof in such cases on persons, from whose possession suspected smuggled goods are seized. Such a provision is necessary in order to safeguard the revenues of the State.'*

*in the Notes appended thereto.*

*22. By section 4 of Act 36 of 1973, with effect from 1st September 1973, any person who claimed to be the owner of seized goods was also bought within the operational scope and by section 2 of Act 40 of 1989, with effect from 26th October 1989, 'diamonds, manufactures of gold or diamonds' were substituted for in the special provision to now read as*

> *'**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.'*

*23. The significance of legislative will, evident on the occasion of enactment of the special provision in Sea Customs Act, 1878, cannot be overemphasized while reflecting upon the scope of an intendment that runs counter to the general principle of customs authorities having to introduce sufficient evidence, other than presumption, to enable shifting the burden of response to the recipient of notice for invoking detriment of confiscation and penalty under Customs Act, 1962. In like manner, the subsequent amendments to the special provision are not just textual but contextual and deserving of particular attention. That in the report of the Select Committee of Parliament dated 12th November 1962, which considered Customs Bill, 1962 (No 56A of 1962) and overhauled some of the proposals therein, the dissenting attention of a tenth of the thirty law makers was drawn to section 123 is earnest of the extent of deviation from normative rule of law and sufficient authority for its implementation within the narrow confines of legislative articulation.*

*24. The special provision for shifting the onus from the agent of the State to an individual rests upon three pillars: that it is limited to goods enumerated in sub-section (2), that reasonable belief of being smuggled must have prompted the seizure under section 110 of Customs Act, 1962 and that onus lies on the person in possession at the time of seizure with additional obligation vesting in any other person claiming ownership. Akin to the traditional pillars of classical Greek architecture – Doric, Ionic and Corinthian – in which the functional essentiality of the first two was, by evolution, elevated to a thing beauteous by the third, the interests of the larger good are sufficed by discharge of the legislated onus in a restricted sphere while retaining the integrity of rule of law for all others generally.*

*25. From as far back as 1955, several disputes on the constitutional validity, the scope of enforcement reach and the consequences of resort to the special provision had surfaced before the constitutional courts. These, by and large, were considered by the Hon'ble Supreme Court in rendering judgment in Collector of Customs, Madras v. Nathella Sampathu Chetty [1962 SCR (3) 786] in which it was held that*

> *'(1) ...that s. 178A was constitutionally valid, (2) that the rule as to burden of proof enacted by that section applies to a contravention of a notification under s. 8(1) of the Foreign Exchange Regulation Act, 1947, by way of a notification under s. 19 of the Sea Customs Act, (3) that the preliminary requirement of s. 178 A that the seizing officer should entertain "a reasonable belief that the goods were smuggled" was satisfied in the present case....'*

*and, thereby in the second and third supra, enunciating the test of legal sanction for invoking this contrarian principle emplaced in the customs law of the land. With the constitutional vires of the provision having been upheld, it is* *but natural that most of the disputes thereafter have almost entirely been about the pre-requisite of 'reasonable belief' of the goods being smuggled having been apparent at the time of seizure. This is a critical aspect of exercise of this extraordinary power vested in officers of customs by the statute: the onus devolves on the person from whom it was seized along with coordinate onus on person, if any, claiming ownership of the said goods and it merely requires inability to establish provenance, which may well be less than sinister, for the consequence of confiscation under section 111 of Customs Act, 1962. Judgements have examined the state of 'reasonable belief' on such pleadings by referring to facts and circumstances that were considered by adjudicating authorities and appellate bodies including the Tribunal. The decision of the Hon'ble Supreme Court in* Indru Ramchand *Bharvani and ors v. Union of India [(1988) SC 247], relied upon by Learned Special Counsel, did, in the light of challenge by the appellants, examine conformity with the prescription of 'reasonable belief' as a pre-requisite for seizure of goods to which section 123 of Customs Act, 1962 is brought to bear by customs authorities. It is evident that power to seize, which flows from section 110 of Customs Act, 1962, is circumscribed by the state of mind of the officer effecting the seizure irrespective of coverage within section 123 of Customs Act, 1962 or not. This has been additionally emphasized by settled law, in relation to seizure of goods enumerated in section 123 of Customs Act, 1962, owing to the judicial obligation to protect innocent persons from this 'sledgehammer' entrusted to an agency of the State even as the imperative is acknowledged judicially.*

*26. It is, nonetheless, of import, though not directly in the matter before us, that section 110 – the power to seize – is contingent on 'reasons to believe' that goods are liable to* *confiscation while section 123 of Customs Act, 1962 is triggered upon seizure of goods in the 'reasonable belief' of having been smuggled with 'smuggling' being*

> *'(39) …. in relation to any goods, means any act or omission which will render such goods liable to confiscation under section 111 or section 113;'*

*This facet of the reversal of onus and to establish absence of offence is also parked for the nonce to be reverted if of relevance later in the proceedings. Suffice it to say that such onus is triggered upon valid seizure of goods enumerated in section 123 of Customs Act, 1962 and the proof of licit ownership is sufficient defense against proposal to confiscate such goods under section 111 of Customs Act, 1962. It is needless to state the obvious, and in the light of judicial exposition, that the presumption of such goods having been smuggled cannot, of itself, lead to confiscation but may, in circumstances of the person on whom the onus devolves having foregone sufficient opportunity of evidencing otherwise, be subjected to that detriment without interference from higher appellate authority. That is the culmination of the decision in re Indru Ramchand Bharvani which held that*

> *'...............This court…. held that the Evidence Act does not contemplate that the accused should prove the case with same strictness and rigour. But in this case the nature of the evidence on which the reliance could not be placed was rightly rejected by the Customs and the High Court held it properly that the petitioners had not discharged the onus to prove that the goods were not smuggled.*
>
> *In this case there was no denial of opportunity, the proceedings followed excluded the possibility of denial of opportunity. The proceedings taken were in order and in consonance with natural justice. The High Court was right in answering the first question by saying that the Tribunal was justified in holding that the seizing Customs had adequate material to form a reasonable belief as contemplated under Section 110 read with Section 123 of the Act and it rightly held that the appellants had failed to discharge the onus. The High Court answered the second*

*question in the negative. In our opinion, the High Court was right.*

*There is, however, one aspect of the matter which was emphasised before us, i.e. that the conclusions of the fact-finding body or statutory authority must be arrived at after giving a fair opportunity to the party to be effected by the order to be passed. As has been reiterated by a Bench decision of the Calcutta High Court in Bal Kissen Kejriwal v. Collector of Customs, Calcutta & ors., AIR 1962 Cal 460 a fair hearing has two justifiable elements. The first is that an opportunity of hearing must be given and the second is that the opportunity must be reasonable. Whether a person has a fair hearing, can be gone into by the Court and the Court's conscience must be satisfied that an Administrative Tribunal charged with the duty of deciding a dispute has conformed to the principles of natural justice….. In our opinion, judged by the aforesaid two aspects a reasonable and fair hearing was afforded to the petitioners. Hence, it cannot be accepted that there was a legitimate cause of grievance.'*

*27. Thus, it would appear from the inherent vulnerability of this special provision, the curtailment of the onus proposed in the amendment bill by legislative wisdom, the proceedings of the Select Committee of Parliament entrusted with detailed consideration of the then new and comprehensive customs statute and attention to the facts and circumstances of each such dispute carried to the Hon'ble Supreme Court that section 123 of Customs Act, 1962 is not amenable to stretching by appeal to morality or for mitigating the burden of the enforcement agency entrusted with anti-smuggling. To begin with, only a few, even if significant, goods are enumerated therein as to conjecture imminent threat to the State but for by latitude afforded to enforcement authorities to be subjected to less than rigid oversight. For another, in a vast country of teeming millions there are bound to be quite a few in possession of such goods and to subject them to criminal consequences merely for lack of diligence and meticulousness in maintaining personal records is to place a premium on an obligation that is not even contemplated by the law. The question that begs answer, therefore, is whether* *a person who was intercepted once with such goods for proceedings under the regular law and whose suggested facilitation of unaccounted stock of such goods at the premises of another is intended to be penalized by recourse to this special provision in relation to another set of such goods alleged to have been smuggled even earlier.*

*28. The 'studded jewellery' impugned in the appeal before us were not intercepted in a customs area; it is also not in doubt that it was not an interruption of a transaction of the appellants that commenced these proceedings. Under the normal procedure of confiscation under the statute, it would be necessary to present evidence, even if not necessarily direct, of the impugned goods having been in the baggage of Mrs Vihari Sheth during one or more of her inbound travels to invoke the penal provisions against the three appellants; section 123 of Customs Act, 1962 obviates that in relation to goods considered by the State as warranting such recourse. The scope for invoking of section 123 of Customs Act, 1962 must now be turned to.*

*29. Section 123 of Customs Act, 1962 is all about responsibility for discharging onus of licit possession and, in terms of the law as it stands today, it is cast on the person from whom the suspectedly smuggled goods were seized and, in the event of any such assertion, on the person claiming ownership. It is on record that the impugned goods were neither seized from any, or all, of the appellants and nor have any of them claimed to be the owner; the first is incontrovertible fact and the second is not one that can be foisted for reason of an established past, or probability of a future, incident of offence. The statute does not acknowledge putative ownership. At least, it cannot be under a law for punitive detriment that the customs statute is. It cannot also* *lend itself to being an instrument of investigation that would permit elimination in a regressive trail till a link is fastened with offence merely for being unable to establish licit possession. It is an instrument for conviction in the specific circumstances envisaged therein. The special provision is explicit in listing the persons who may have such onus devolving on them which none of the appellants can be.*

*30. Much has been made of the description of the impugned goods, including the headings and contents of the appropriate column of the First Schedule to Customs Tariff Act, 1975 which, in any case, is of relevance only for section 12 of Customs Act, 1962 and, incidentally, running counter to the proposition of jurisdictional incompetence of the Tribunal, to emphasize recourse to section 123 of Customs Act, 1962 with its near-permanent applicability to 'gold and manufactures thereof' and thereby shift the onus to the appellants herein. The goods, nonetheless, are 'studded jewellery' which is a description, in common parlance, of precious stones set in articles of precious metals, most commonly gold, and to those not familiar with the chronological mutation of section 123(2) of Customs Act, 1962 coverage of the impugned goods therein may even be acceptable. But we have taken note supra that with effect from 26th October 1989, 'diamond and manufactures' included therein was legislatively rescinded to exclude 'diamonds and manufactures' thereof. It is, therefore, moot if the presumption in section 123 of Customs Act, 1962 can continue to apply to articles that have 'diamonds' embedded in them and it would appear that legislative intent was to restrict applicability to gold in primary form and articles made of gold. The alternative proposition of Revenue reduces the rescinding to the absurdity of not fastening the presumption to 'diamonds' of themselves but to 'diamonds set* *in gold' and leaves us puzzled about the policy imperative that may have prompted this very fine line of distinction that Learned Special Counsel urges us to accept as unquestionable. Law is intended to serve a working purpose and is not for mere display in a vacuum or to exemplify sterile existence. The amendment brought about in 1989 has had the effect of alienating the presumption in section 123 of Customs Act, 1962 from the goods impugned here. For these reasons, the imposition of penalties on the appellant must find justification in the evidence that were set out in the show cause notice to be sustained.*

*31. Admittedly, there are no markings on the impugned goods that would attribute provenance outside India. The sole link of the goods with foreign sourcing is frequency of travel of Ms Vihari Sheth, an admission of shared imputation in unidentifiable jewellery dealt with in the past through Vihari Jewels by Mr Jiten Sheth, that was construed upon by the customs authorities as relating to all, and any, jewellery available and dealt with in the past, complementary statements of two job-workers – one as mere source of documents and the other as supplier operating under the radar – which advances no proof of the impugned goods not having been produced in India and the conformity of designs in a workbook of Ms Vihari Sheth, purportedly valued in foreign currency, with the goods recovered from customers to whom 'studded jewellery' had been sold by Mr Jiten Sheth. Each of these is not objectionable on its own but taken together these contain as many rents and gaps as to detract from being fabric entire of itself. There are no statements to fill these blanks and render the story complete. Absence of the persons allegedly concerned with the entire exercise from investigations should not, in the absence of legally satisfied presumption, be construed to their detriment. In the absence* *of recourse to section 123 of Customs Act, 1962, the linkage of the several inferences and suppositions must be established with material and/or oral evidence to be compliant with normative requirement of customs officials having to establish that one or the other reasons for confiscation under section 111 of Customs Act, 1962 are manifest. The essential requirement of evidencing association with goods liable for confiscation has not been discharged even by the guidelines set out in Collector of Customs, Madras and others v. D Bhoormul [1974 SCR (3) 833] which also took note that*

> *'…These goods, without exception, were all of foreign origin… They were all lying packed as if they had been freshly delivered, or were ready for dispatch to a further destination…'*

*and precluded from presuming otherwise because*

> *'..They were not lying exhibited for sale in the show cases of the shop…'*

*before going on to observe that*

> *'…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…..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.*
>
> *…..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 personem 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 licit 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 was proceeded against was concerned in the smuggling.*

*....*

*"……..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 upon 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 the fair opportunity of first rebutting the first and 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…..'*

*32. Learned Special Counsel has been selective in extracting from the judgement in re D Bhoormull to urge as the authority for even remote evidence to suffice in departmental proceedings; no greater disservice could be rendered to rule of law for the enduring framework of adjudicatory responsibility spelt out by the Hon'ble Supreme Court as obligations on the part of customs authorities and the persons charged are, often and thus, conveniently glossed over. The sequential logic that found favour in the decision in re D Bhoormull has been stood on its head here; while there, it was the goods that were shown to have been smuggled with the person concerned obligated to establish his lack of illicit association thereto, here the attempt has been to impute that Ms Vihari Sheth is a smuggler, abetted by Mr Jiten Sheth, of the goods associated with them which, unable to defend themselves, are assumed as having been smuggled. The distinct cleavage from the harmonious construct in the decision in re D Bhoormull cannot be more glaring.*

> *33. Licit possession in the course of domestic transaction having been satisfactorily furnished, without being controverted by the lower authorities, on the part of owners of the impugned goods, the arbitrary arrogation of empowerment to subject the sellers to the presumption of having been in possession of 'smuggled goods' sans authority of law to do so deprives the finding of liability to penalty under section 112 of Customs Act, 1962 of legal sanctity. Without evincing illicit trafficking, in the form in which it was recovered from customers, from outside the country, even by the stretched framework of preponderance of probability, there is no onus on the appellants to establish that the conjectures entertained by customs authorities are incorrect.'*

as held by the Tribunal in *re Vihari Jewels and others,* is untenable.

8. In appellate proceedings of M/s Vihari Jewels, Ms Vihari Rajesh Sheth and Shri Jiten Sheth, the entirety of burden, as proposed in the show cause notice, was decided, in relation to the very same goods among others, without reference to the status of the appellant herein *vis-à-vis* the impugned goods. The consequences of the approval of the order of the original authority, which had kept the appellant herein out of its ken and as upheld in entirety against those persons, was set aside by the Tribunal in *re Vihari Jewels*. Despite that, and notwithstanding the decision of the Tribunal having been rendered before finalisation of the order impugned here, the first appellate authority proceeded to give a different treatment to the goods already impugned before the Tribunal. The impugned order is,

thus, in ignorance of essential facts that impinge upon the options available to the first appellate authority at the time deciding the appeal impugned now.

9. In these circumstances, it would be appropriate to set aside the impugned order and restore the dispute to the first appellate authority to decide the appeal afresh in the light of law – as legislated and judicially determined – after affording fresh opportunity to the appellant herein to make written and oral submissions. The appeal is, thus, disposed off by remand to Commissioner of Customs (Appeals), Mumbai.

*(Order pronounced in the open court on 08/05/2024)*

**(AJAY SHARMA)**
***Member (Judicial)***

**(C J MATHEW)**
***Member (Technical)***

**/as*