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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1862 OF 2012

Rajendra S. Bajaj,
Aged 49 years,
Residing at 104-60, Apartment 20J,
Queens Boulevard, Forest Hills,
New York – 113 75 and at present
Residing at 46, Ganesh Villa,
9th Road, Nutan Laxmi Society
JVPD Scheme, Vile Parle (W),
Mumbai – 400049.

...Petitioner

Versus

1. The Union of India,
Aaykar Bhavan, Ministry of Law,
Branch Secretariat, Annex, 2nd Floor,
Maharishi Karve Road,
Mumbai – 400 020.
2. The Joint Secretary,
Ministry of Finance,
14, HUDCO Vishala Building (B Wing),
Bhikaji Cama Place,
Government of India,
New Delhi – 110066.
3. The Commissioner of Customs,
(C.S.I. Airport), Awas Corporate Point,
Makwana Lane, Andheri-Kurla Road,
Andheri (E), Mumbai – 400 099.

...Respondents

Mr. Marmik Jamdar a/w. Mr. Mayank Jain i/b. M/s. Khaitan & Co. for
Petitioner.

Mr. Siddharth Chandrashekhar for Respondents.

CORAM : K. R. SHRIRAM,
JITENDRA JAIN, J.J.

DATED : 5th JULY 2024

JUDGMENT: (Per Jitendra Jain, J.)

1. By this petition under Article 226 of the Constitution of India, the Petitioner seeks to challenge an order dated 21st February 2012 passed by Revisional Authority (Joint Secretary to the Government of India), whereby the said authority did not give full relief but reduced redemption fine from Rs.25,00,000/- to Rs.20,00,000/- and personal penalty under Section 112 (1) of the Customs Act, 1962 ("the Act") was reduced from Rs.20,00,000/- to Rs.15,00,000/-.

2. **Brief Facts:-**

- (i) On 6th May 2007, Petitioner a USA citizen of Indian origin and USA passport holder arrived by Delta Airlines flight from New York to Mumbai. The said flight by landed at about 22:04 hours.
- (ii) Petitioner did not have any check-in-baggage, but was carrying a handbag. Petitioner declared two bottles of whiskey as the value of good imported by him and passed through green channel.
- (iii) A Customs Officer for some reason stopped Petitioner and searched his handbag. On a personal search of Petitioner, he was found wearing a gold chain with a gold pendant embedded with 12 diamonds. On questioning, Petitioner stated that the said gold chain was purchased in the year 1989 by him from a Jeweller in US for around USD 25,000/- which, at the exchange rate prevailing on date of his arrival i.e., 6th May 2007 would work out

to about Rs.10,02,500/-.

- (iv) On 7th May 2007, statement of Petitioner was recorded under Section 108 of the Customs Act. It is recorded that Petitioner stated that he was a resident of New York, U.S.A and staying with his family. His parents and sisters were staying in Mumbai. He further stated that he was carrying on jewellery business and used to visit India regularly to meet his parents and siblings living in India and also for business purpose. He further stated that he was living in U.S.A. since 25 years and had an annual income of USD 1,50,000/-.
- (v) On 7th May 2007, a panchnama was drawn in the presence of two witnesses namely, one Pradeep Sawant and one Mukesh Khanna. The Customs Officer, thereafter, introduced the panchas to one Prashant Sangvi and one Sarju Shah who, as per the Customs Officer, were experts in diamonds trade from “SEEPZ”. What he meant by “experts” is not clear. Mr. Sangvi and Mr. Shah, as trade representatives, ascertained the value of diamonds embedded in the pendant at Rs.1,20,35,000/-. These trade representatives have further opined that the finishing of prongs were not upto the mark and, therefore, the diamonds could be removed easily. The Customs Officer, thereafter, seized the chain alongwith diamonds on the basis that Petitioner has attempted to smuggle the said

diamonds into India and, therefore, same was liable for confiscation.

(vi) On 12th October 2007, a show cause notice was issued by the Commissioner of Customs proposing confiscation of 12 diamonds under Section 111(d), (l) and (m) of the Act and further to show cause as to why penalty should not be imposed upon Petitioner under Section 112 of the Act. The show cause notice also invoked Rule 6 of the Baggage Rules, 1998 which prescribes that a person residing abroad for over a year and returning to India is allowed to import free of duty jewellery upto an aggregate value of Rs.10,000/- in case of a male passenger.

(vii) On 15th April 2008, Petitioner replied to the aforesaid show cause notice inter alia stating therein that Petitioner was entitled to carry the used gold chain with the gold pendant embedded with diamonds as per Baggage Rules without payment of any duty. Petitioner also submitted that Rule 6 of the Baggage Rules is not applicable and the correct Rule applicable is Rule 7 and since gold chain with pendant was his “used personal effect”, there is no violation of provision of any law in wearing the said chain with pendant and bringing in India without payment of any duty. Petitioner, also stated that the said gold chain with pendant was purchased from a US Jeweller 25 years ago and further there is no

provision to declare re-export baggage as per disembarkation card required to be filled in by the passenger entering India. Petitioner, therefore, prayed for dropping the show cause notice.

(viii) On 24th November 2008, the Commissioner of Customs rejected Petitioner's contentions and passed an order confiscating the gold chain with pendant valued at Rs.1,20,35,000/- under Section 111 of the Act read with provisions of the Foreign Trade Policy and Rules 11 and 14 of the Foreign Trade (Regulation) Rules, 1993. The Commissioner also imposed a penalty of Rs.1,20,00,000/- on Petitioner under Section 112 (a) of the Act.

(ix) The aforesaid order was challenged by Petitioner by filing an appeal to the Customs, Excise, Service Tax, Appellate Tribunal ("Tribunal"). On 8th October 2009, the Tribunal disposed the appeal by remanding the matter back to the original authority for *denovo* consideration and for giving an opportunity to cross-examine the witnesses. An additional reason for remanding the matter back was to give an opportunity to Petitioner to establish that the jewellery was his "personal effects" by relying upon the Baggage Rules of 1994 since the Baggage Rules of 1998 did not define the expression "personal effects". The Tribunal, in the said order, also observed that Rule 6 of the Baggage Rules is not applicable to the case of Petitioner and the same has been

misapplied to Petitioner's case. The Tribunal observed that Rule 7 would apply to Petitioner's case, but however, neither in the show cause notice nor in the Commissioner's order was the said Rule invoked. Further the Tribunal observed that Petitioner, in his reply to the show cause notice, has pleaded his case based on Rule 7, but there was no finding by the Commissioner of Customs.

(x) The aforesaid order of the Tribunal was challenged by Petitioner in Writ Petition No.390 of 2010 and Respondent in Customs Appeal No.31 of 2010. On 13th April 2010, the Co-ordinate Bench of this Court disposed the Customs Appeal and the Writ Petition dismissing the appeal of Respondent challenging the directions given by the Tribunal for cross-examination. Insofar as Petitioner's Writ Petition is concerned, the Co-ordinate Bench held that the Tribunal could not have given a direction to the Adjudicating Authority to decide the matter afresh on the basis of Baggage Rules, 1994 which stood repealed, but the said finding to decide afresh was modified by replacing Baggage Rules, 1994 with the Baggage Rules, 1998 which was applicable at that point of time.

(xi) Pursuant to above, orders passed by the Tribunal and the High Court, the Commissioner of Customs granted opportunity of cross-examination and also considered the matter afresh. The Commissioner of Customs rejected the contention of Petitioner

with regard to invoice filed by Petitioner to prove the purchase of chain alongwith diamond pendant *inter alia* on the ground that same is unsigned. The Commissioner also rejected the letters of persons filed by Petitioner, who stated that this pendant was regularly polished by them. The Commissioner, therefore, came to a conclusion that Petitioner has not corroborated purchase of the seized jewellery as his “personal asset”. With regard to Baggage Rules, 1998, the Commissioner of Customs once again relied upon Rule 6 of the Baggage Rules and observed that since Petitioner stayed in foreign territory beyond one year, the said rule is applicable even to a tourist or a non-resident Indian. The Commissioner of Customs further held that Petitioner has violated Rule 11 and Rule 14 of the Foreign Trade (Regulation) Rules, 1993. With respect to Rule 7, the Commissioner of Customs observed that the Appendix-E(a)(ii) read with Rule 7 refers to Rule 3 or 4, and Rule 3 in turn refers to Appendix-A which speaks of used personal effects excluding jewellery and, therefore, even Rule 7 read with Appendix-E and Rule 3 read with Appendix-A did not provide for duty free clearance of the seized jewellery. The Additional Commissioner of Customs passed an order confirming confiscation of the jewellery valued at Rs.1,20,35,000/- and imposed a penalty of Rs.1,20,00,000/- under Section 112(a) of the Act.

(xii) Petitioner challenged the aforesaid order by filing an appeal with the office of Commissioner of Customs (Appeals) who vide his order dated 26th July 2011 allowed the jewellery to be re-exported on payment of reduced fine, in lieu of confiscation under Section 125 of the Act, amounting to Rs.25,00,000/- and further reduced the penalty to Rs.20,00,000/-. The Commissioner of Customs (Appeal) allowed re-export on payment of reduced fine and penalty by treating Petitioner as a tourist.

(xiii) Being aggrieved by the said appellate order, Petitioner and Respondent both challenged the same by filing a revision application before the Government of India, Ministry of Finance. Petitioner's Revision Application was numbered as 371/71/B/11-RA and Respondents' Revision Application was numbered as 380/44/B/11.

(xiv) On 24th February 2012, the Revisional Authority disposed both the aforesaid Revision Applications by a common order. The Revisional Authority dismissed the Revision Application filed by Respondent, but allowed partly the Revision Application filed by Petitioner by permitting re-export of the chain alongwith pendant on payment of reduced fine of Rs.20,00,000/- and personal penalty of Rs.15,00,000/-. It is this order which is challenged by Petitioner before us. Respondents have not challenged the order of the

Revisional Authority.

(xv) On 30th March 2012, Petitioner has made a payment of Rs.35,00,000/- (20,00,000 + 15,00,000) as per the order of the Revisional Authority and has re-exported the gold chain with diamonds.

3. Submissions of Petitioner:-

Petitioner submits that the gold chain with pendant in which diamonds were embedded was purchased more than 25 years ago and at the time of disembarking from flight, he was wearing the same. Petitioner submits that he had provided invoice in support of proof that the same was purchased from US jeweller in the year 1989 and that Respondents were not justified in rejecting the said evidence merely on the solitary ground that invoice was not signed by the seller. Petitioner submits that the said gold chain with pendant is his “personal effects” and therefore, under Rule 7 of the Baggage Rules, 1998 read with Appendix-E, same was allowed to be brought into India free of duty. Petitioner further submits that in the show cause notice, Rule 7 was not even invoked and therefore, Respondents are not justified in relying upon the said Rule while confirming the seizure, confiscation and imposition of redemption fine and penalty. Petitioner further relied upon Circular No.72 of 1998 issued by the Government of India, Ministry of Finance which clarified that the personal jewellery will fall

within the expression “personal effects.” The said circular further clarified that it is not the intention of the Board to verify the newness of every product, which a traveler brings so long as it is not *prima facie* new goods in their original packaging, which can be disposed of off hand. Petitioner further submits that rate of import duty on the diamond is Nil and therefore, there cannot be an intention to smuggle the same to evade any duty. Petitioner further reiterated the submission made before the Adjudicating Authority vide letter dated 15th April 2008 to contend that there is no violation of any Act, Rules or Regulations. Petitioner further submits that in disembarkment card, there is no provision of mentioning the same. Petitioner further relied upon Circular No.12 of 2000 issued by Government of India, Ministry of Finance, which states that tourists are allowed to bring their personal effects without endorsement on the passports and without payment of duty, subject to the terms and conditions prescribed in the Rules. Petitioner also submits that Respondents are not justified in relying upon Rule 3 of the Baggage Rules, 1998 for justifying the impugned action. Petitioner, *inter alia*, therefore, submitted that the impugned order to the extent that it confirms the redemption fine and personal penalty of Rs.20,00,000/- and Rs.15,00,000/-, respectively, be quashed and Respondents be directed to refund the said sum of Rs.35,00,000/-. Petitioner has not prayed for interest in the petition.

4. Submissions of Respondents:-

Respondents submitted that Petitioner is in the business of jewellery and, therefore, he has brought this chain with pendant in which diamonds are embedded for sale in India. Respondents further submitted that the said chain with pendant cannot be treated as “personal effects”, so as to permit import of the same into India without payment of duty. Respondents further submitted that on a conjoint reading of Rule 7 with Appendix-E and Rule 3 with Appendix-A, Respondents could not have brought the said chain with pendant embedded with diamonds without declaring and paying the duty thereon. Respondents, therefore, supported the order of the Appellate and Revisional Authority and prayed for dismissal of the present petition.

5. Analysis and Conclusion:-

Before we proceed, it will be useful, for ease of reference, to reproduce relevant Rules of Baggage Rules, 1998:-

“RULE 2. Definitions – In these rules, unless the context otherwise requires-

(i) ...

(ii) “resident” means a person holding a valid passport issued under the Passports Act, 1967 (15 of 1967) and normally residing in India;

(iii) “tourist” means a person not normally resident in India, who enters India for a stay of not more than six months in the course of any twelve months period for legitimate non-immigrant purposes, such as touring, recreation, sports, health, family reasons, study, religious pilgrimage or business;

(iv) ...

(v) ...

RULE 3. Passengers returning from countries other than Nepal, Bhutan, Myanmar or China - An Indian resident or a foreigner residing in India, returning from any country other than Nepal, Bhutan, Myanmar or China, shall be allowed clearance free of duty articles in his bona fide baggage to the extent mentioned in column (2) of Appendix A.

[Provided that such Indian resident or such foreigner coming by land route as specified in Annexure IV, shall be allowed clearance free of duty articles in his bonafide baggage to the extent mentioned in Column (2) of Appendix "B"].

RULE 4 – Passengers returning from Nepal, Bhutan, Myanmar or China - An Indian resident or a foreigner residing in India, returning from Nepal, Bhutan, Myanmar or China, other than by land route, shall be allowed clearance free of duty articles in his bona fide baggage to the extent mentioned in Column (2) of Appendix B.

RULE 6. Jewellery - A passenger returning to India shall be allowed clearance free of duty jewellery in his bona fide baggage to the extent mentioned in column (2) of Appendix D.

RULE 7. Tourists - A tourist arriving in India shall be allowed clearance free of duty articles in his bona fide baggage to the extent mentioned in column (2) of Appendix E.

APPENDIX - A

(See rule 3)

(1)	Articles allowed free of duty (2)
(a) All passengers of and above [10 years] of age and returning after stay abroad of more than three days.	(i) Used personal effects, excluding jewellery, required for satisfying daily necessities of life. (ii) [Articles other than those mentioned in Annex. I upto a value] of [Rs.25,000] if these are carried on the person or in the accompanied baggage of the passenger.

APPENDIX - D

(See rule 6)

(1)	Jewellery (2)
Indian passengers who has been residing abroad for over one year.	(i) Jewellery upto an aggregate value of Rs.10,000 by a gentleman passenger, or (ii) Upto an aggregate value of Rs.20,000 by a lady passenger.

APPENDIX - E**(See rule 7)**

(1)	Articles allowed free of duty (2)
[(a) Tourists of Indian origin coming to India other than tourists of Indian origin coming by land routes as specified in Annexure IV] (b) Tourists of foreign origin other than those of Nepalese origin coming from Nepal or of Bhutanese origin coming from Bhutan or of Pakistani origin coming from Pakistan. (c) Tourists Nepalese origin coming from Nepal or of Bhutanese origin coming from Bhutan. [(d) Tourists - (i) of Pakistani origin coming from Pakistan other than by land routes; (ii) of Pakistani origin or foreign tourists coming by land routes as specified in Annexure IV; (iii) of Indian origin coming by land routes as specified in Annexure IV.]	(i) used personal effects and travel souvenirs, if (a) these goods are for personal use of the tourist, and (b) these goods, other than those consumed during the stay in India, are re-exported when the tourist leaves India for a foreign destination. (ii) articles as allowed to be cleared under rule 3 or rule 4. (i) used personal effects and travel souvenirs, if - (a) these goods are for personal use of the tourist, and (b) these goods, other than those consumed during the stay in India, are re-exported when the tourist leaves India for a foreign destination. (i) used personal effects and travel souvenirs, if - (a) these goods are for personal use of the tourist, and (b) these goods, other than those consumed during the stay in India, are ex-exported when the tourist leaves India for a foreign destination. (ii) articles upto a value of [Rs.6,000] for making gifts.

6. The only issue which arises in the present petition is whether Petitioner can bring into India a gold chain with pendant in which diamonds were embedded in accordance with Baggage Rules 1998. In our view, for more than one reason, the orders passed by the Original, Appellate and Revisional Authority holding confiscation of goods and permitting re-export of the same on payment of redemption fine and penalty are erroneous and bad in law. In the writ petition challenging the impugned order, we would have not examined the investigation

carried out by Respondents but for the fact that Respondents did not carry out the investigation which they ought to have. The inconsistency and lack of diligence the way investigation has been carried out compelled this Court to give its findings on the investigations made by Respondents.

(i) In the panchnama drawn on 7th May 2007, it is mentioned by the panchas that they were called upon by the Intelligence Officer, Customs at the exit gate of arrival hall, Terminal 2A of the C.S.I. Airport, Mumbai at 22:00 hours on 6th May 2007. Petitioner, they were informed, arrived by Delta Airlines from New York to Mumbai and the said Airlines has certified on 15th March 2008 that DL-16 landed from New York in Mumbai at 22:04 hours on 6th May 2007. If the flight in which Petitioner was travelling landed at 22:04 hours then we fail to understand as to how the panchas were called by the Intelligence Officer of Customs at 22:00 hours at the exit gate of the Arrival Hall, Terminal 2A of the Airport. A passenger travelling in flight cannot arrive at the exit gate of arrival hall before landing and, therefore, there is a serious infirmity in drawing up the panchnama which on the face of it appears to be an afterthought. The said certificate issued by the Airlines has not been controverted by Respondents.

(ii) In the cross-examination of Mr. Pravin Mahale, Preventive Officer,

who has drawn panchnama, he has stated that he noticed Petitioner around 10:00 p.m. to 10:15 p.m. and the witnesses were called immediately after interception. The said officer in his cross-examination stated that the flight DL-16 arrived at 9:40 p.m. and he further stated that it is possible to arrive at the arrival gate within 30 minutes and he noticed Petitioner in the arrival hall at around 10:00 p.m. In our view, the statement of Mr. Mahale-Preventive Officer is contrary to the certificate issued by the Airlines certifying the landing time of flight DL-16 was 22:04 hours. Therefore, Mr. Mahale who has drawn the panchnama has failed to justify the correctness of the statement of the panchnama drawn. We have no doubt that what is recorded in panchnama is incorrect. If we accept Mr. Mahale's statement that the flight landed at 9:40 then by the time the flight reaches the towing point and the gates are opened for the passengers to disembark the plane it atleast takes sometime and, therefore, the statement of Mr. Mahale, Preventive Officer that he noticed Petitioner at 10:00 p.m. cannot be believed.

- (iii) On 7th May 2007, Respondents called Prashant Sangvi and Sarju Shah, whom Respondents have termed as experts of diamond's trade and got the diamonds valued at Rs.1,20,35,000/- on the basis of which further impugned proceedings have been initiated. The details of these two persons are not mentioned either in the

show cause notice or in any of the subsequent orders. They are baldly described as experts in diamond trade. It is not the case of Respondent that these two gentlemen are Approved Government valuers to value the diamond. We fail to understand as to why a Government Approved Valuer was not called by Respondents to value the gold chain and diamonds. The fact that they are experts in diamond trade does not mean that they are experts in valuation of diamond. These two gentlemen were not produced for cross-examination inspite of clear directions by Tribunal confirmed by High Court. In our view, therefore, even on this count, the whole edifice on the basis of which value of Rs.1,20,35,000/- is arrived at falls to ground on account of Respondents not following the correct procedure.

- (iv) In the panchnama, it is stated that the panchas Pradeep Sawant and Mukesh Khanna were called at 22 hours (10:00 p.m.) on 6th May 2007, whereas in the cross-examination of Mr. Pradeep Sawant, he has stated that he was called at around 12:30 p.m. in the arrival hall by Mr. Mahale-Preventive Officer. This is material inconsistency between what is stated in the panchnama signed by Pradeep Sawant and what he has stated in the cross-examination. In light of the aforesaid inconsistency, the Panchas Pradeep Sawant cannot be treated as a reliable witness. It is also important to note

that Respondents did not offer Mr. Mukesh Khanna to be cross-examined by Petitioner and, therefore, even on this count, the veracity of the panchnama in the absence of the cross-examination is in serious doubt.

- (v) In the show cause notice dated 12th October 2007, Respondents have invoked Rule 6 of the Baggage Rules 1998 for coming to the conclusion that Petitioner cannot be allowed to import free of duty jewellery above Rs.10,000/-. The said show cause notice dated 12th October 2007 culminated into Order-in-Original and it was further subject matter of appeal to the Tribunal. The Tribunal, vide its order dated 8th October 2009, held in paragraph 5 of its order that Rule 6 of the Baggage Rule 1998 is not applicable to the Petitioner's case since Petitioner was not an Indian resident who visited U.S.A. and returned to India and Rule 6 is applicable to an Indian returning to India from foreign tour. This finding of the Tribunal has attained finality since it was not challenged by Respondents before the High Court in Customs Appeal No.31 of 2010. Therefore, in our view, further adjudication, in remand proceedings on the basis of Rule 7 of the Baggage Rule 1998 would amount to travelling beyond the show cause notice and it is settled position that the Order-in-Original cannot go beyond the show cause notice. Even in remand proceedings nothing is shown to us

which would show invocation of rule 7 by issuance of fresh show cause notice. Therefore, even on this count, the Order-in-Original dated 12th July 2010 is required to be quashed. The Tribunal in its order dated 8th October 2009 has also recorded this fact that Rule 7 has not been invoked in the original show cause notice.

(vi) The counsel for Respondents has sought to justify the orders of the lower authorities by relying upon Rule 3 and Rule 4 of the Baggage Rules 1998. In our view, both these rules would not apply to Petitioner. Rule 3 applies to an Indian resident or a foreigner residing in India. It is admitted position that Petitioner is neither an Indian resident nor a foreigner residing in India. Similarly, Rule 4 is not applicable because Petitioner is not returning from Nepal, Bhutan and China. In any case, there is no invocation of Rule 3 or Rule 4 in the show cause notice and, therefore, even on this count, Respondents cannot justify and support the orders of the lower authorities by placing reliance on Rules 3 and 4 of the Baggage Rules.

(vii) The next contention raised by respondents that Appendix-E to Baggage Rules 1998, column 2-(ii) refers to articles allowed to be cleared under Rule 3 or Rule 4 and when one goes to Rule 3, it in turn refers to Appendix-A. Appendix-A(a)(ii) refers to articles allowed free of duty upto a value of Rs.25,000/- other than those

mentioned in Annex-I. It was their contention that Annex-I is not applicable to ornaments and, therefore, it is their contention that jewellery upto value of Rs.25,000/- is only allowed free of duty and since the value in the present case is more, the action is justifiable. We are afraid, we cannot accept this submission since, as observed by us above, Appendix-A would apply only if Rule 3 applies and since Rule 3 is not applicable to Petitioner, the question of applying Appendix-A does not arise. Even otherwise, assuming Appendix-A is made to be applicable to Petitioner's case then when Appendix E(a)(ii) refers to articles allowed to be cleared under Rule 3, it would be those articles other than Jewellery for the purpose of Appendix-E. This is so because in Appendix-A(a)(ii), the jewellery is included in article because in (i), jewellery is excluded from personal effects and in Annex-I, the ornaments are excluded for calculating the cap on the value of article to be imported free of duty. However, in Appendix-E(a)(i), jewellery is not excluded from personal effect and, therefore, when in Appendix-E(a)(ii) articles as allowed to be cleared under Rule 3 is referred, same will have to be construed to mean articles other than what is covered in Appendix E(a)(i) and since (i) includes within its fold, jewellery, therefore, Appendix E(a)(ii) would not be applicable to the facts of the present Petitioner. In Appendix A and B, jewellery is excluded from personal effect whereas in Appendix

E, jewellery is not excluded from personal effects but on the contrary, as per Circular No.72 of 1998 dated 24th September 1998 explaining Baggage Rules, 1998, it is clarified that personal jewellery is included within the meaning of the term “personal effects”. Therefore, even if in Appendix E(a)(ii), there is a reference to article as allowed to be cleared under Rule 3, same would not be applicable to the facts of the Petitioner’s case.

(viii) Appendix E(a)(i) refers to articles allowed free of duty and as observed above, jewellery is included within personal effects, if the jewellery is used for personal use and are re-exported when the tourist leaves India for a foreign destination. In the instant case, the chain along with pendant in which diamonds were embedded is “used” jewellery which was worn by Petitioner when he landed at the Mumbai Airport and, therefore, same will be allowed free of duty, irrespective of the value since there is no cap under Appendix E(a)(i) when compared with entries in other Appendix, where the legislature had put a cap on the value of the article to be brought into India free of duty, which is not the case in Appendix E(a)(i).

(ix) In the petition, Petitioner has annexed disembarkment card which is required to be filled when a passenger arrives in India. The disembarkment card filled by Petitioner does not require to disclose jewellery, but it only requires the value of dutiable goods

being imported to be disclosed. On the contrary, the Notes to the disembarkment card specifies that tourist can import jewellery free of duty, if they are re-exported at the time of departure. In the instant case, the chain along with pendant which was worn by Petitioner was his “personal effect” and, therefore, same was not dutiable . Therefore, the allegation of Respondents that the chain along with pendant was not disclosed in the disembarkment card is not sustainable. It is also important to note in this connection, Circular No.12 of 2000 dated 18th February 2000 issued by Ministry of Finance, Government of India, which states that no endorsement on the passport is required to bring in personal effects without payment of duty. The said circular is issued in the context of Rule 7 of the Baggage Rules 1998 read with Appendix-E and further read with Circular of 1998 which states that jewellery falls within the term “personal effects”. It is also important to note that paragraph 4 of Circular No.72 of 1998 dated 24th September 1998 reads as under:-

“4. It may kindly be noted that while Notification No. 45/92 defined personal effects as articles both new or used and Rule 11 of Baggage Rules 1994 allowed personal effects of tourists for duty free import, the Baggage Rules 1998 allows only used personal effects of the tourists. It is not the intention of the Board to verify the newness of every product which a traveler brings so long as it is not prima facie new goods in their original packaging which can be disposed of off hand.”

- (x) Petitioner has produced an invoice dated 22nd October 1989 to prove that the diamonds which were embedded in the pendant,

were purchased by him from a U.S.A. jeweller. The said invoice is rejected by Respondents only on the ground that the invoice is not signed by the seller. In our view, merely because the invoice is not signed by the seller could not have been a ground for rejecting the evidence. The adjudicating authority could have inquired from the seller from New York by writing a letter on the genuineness of the said invoice. However, no such steps were taken by the authorities and merely because the invoice did not bear the signature, the same came to be rejected. It is not uncommon that many times, the invoices are unsigned, but that cannot be the sole basis for rejecting the same.

- (xi) The phrase “personal effect” has to be construed in the context and cannot be interpreted de hors the facts of a particular case, more particularly when what is being considered is the value of the article. In the instant case, one cannot lose sight of the fact that Petitioner is engaged in the business of jewellery in U.S.A. for last 25 years and has been declaring income in the U.S.A. of USD-1,50,000/-. A person of such background could wear a chain with a pendant of high value. For a High Net Worth individual, an expensive watch of “Rolex” made would be his personal effect, but same may not be the case if a person is of a mere means. Therefore, in the context of Petitioner’s case merely by ascribing

high value, the customs authorities were not justified in initiating the impugned proceedings and contend that same is not his used personal effects, moreso, because the diamonds were valued at (assuming) price prevailing on date of Petitioner's arrival whereas the diamonds were purchased in 1989, although we have already observed above as to how the exercise of valuation carried out by the Customs Authorities is vitiated.

(xii) Petitioner is justified in placing reliance on the decision of the Supreme Court of India in *Directorate of Revenue Intelligence Vs. Pushpa Lekhumal Tolani*¹, where on very similar facts, the Supreme Court quashed the proceedings initiated by the Customs Authorities for seizing the jewellery. Paragraph 9 of the said decision which squarely applies to the present case:-

"9. Insofar as the question of violation of the provisions of the Act is concerned, we are of the opinion that the respondent herein did not violate the provisions of Section 77 of the Act since the necessary declaration was made by the respondent while passing through the Green Channel. Such declarations are deemed to be implicit and devised with a view to facilitate expeditious and smooth clearance of the passenger. Further, as per the International Convention on the Simplification and Harmonization of Customs Procedures (Kyoto 18-5-1973), a passenger going through the green channel is itself a declaration that he has no dutiable or prohibited articles. Further, a harmonious reading of Rule 7 of the Baggage Rules, 1998 read with Appendix E(2) (quoted above), the respondent was not carrying any dutiable goods because the goods were the bona fide jewellery of the respondent for her personal use and was intended to be taken out of India. Also, with regard to the proximity of purchase of jewellery, all the jewellery was not purchased a few days before the departure of the respondent from UK, a large number of items had been in use for a long period. It did not make any difference whether the jewellery is new or used. There is also no relevance of the argument that since all the jewellery is to be taken out of India, it was, therefore, deliberately brought to India for taking it to Singapore. Foreign tourists

1 2017 (353) E.L.T. 129 (S.C.)

are allowed to bring into India jewellery even of substantial value provided it is meant to be taken out of India with them and it is a pre-requisite at the time of making endorsements on the passport. Therefore, bringing jewellery into India for taking it out with the passenger is permissible and is not liable to any import duty. Learned senior counsel brought to our notice that even as per EXIM Code Numbers 7113 19 20 and 7113 19 30 of ITC (HS) Classification of Export and Import items as on 1-4-2002, the import of gold jewellery studded with diamonds or with other precious stones, is freely allowed. Similarly, learned senior counsel rightly submitted that the invocation of Section 80 of the Act is of no use as this Section applies only to dutiable and prohibited goods. The accusation of not declaring the goods to the customs authority and evading duty alleged to be due thereupon has no legal basis.”

(xiii) Our views are also fortified by the decision of the Kerala High Court in ***Vigneswaran Sethuraman Vs. Union of India***², where on identical facts the confiscation, etc. was quashed.

7. We now propose to deal with the written note submitted by Respondents on the judgments brought to the notice of Respondents by the Court. Respondents sought to distinguish the decision of Kerala High Court in ***Vigneswaran Sethuraman Vs. Union of India***³ on the ground that decision primarily dealt with the fact that under the 1998 Baggage Rules, there was no provision which prohibited a passenger to wear the jewellery and enter India. We, however, do not agree this line of distinction because the Kerala High Court gave various reasoning and one of the reasoning was that a passenger wearing jewellery would not be covered by the Baggage Rules. We, however, have not given any opinion on this aspect of the reasoning by the Kerala High Court but have relied on the other reasons. In any case, Respondents themselves have admitted in the note that this reasoning of the Kerala High Court

² (2014) 308 ELT 394

³ 2014 SCC OnLine Ker 28775

has been rectified in 2016, and they have admitted that prior to 2016, there was no such prohibition on a foreign tourist wearing a gold chain and entering India and since in the present petition we are concerned with pre 2016 Baggage Rules, distinction sought to be made does not survive. Insofar as the decision in the case of *Jasvir Kaur Vs. Union of India*⁴ is concerned, that decision was concerned with Baggage Rules, 1978, whereas we are concerned with the Baggage Rules 1998 and both these Rules, i.e., 1978 and 1998 are materially different and, therefore, this decision cannot come to the rescue of Respondents. We may further observe that our decision is not based solely on the interpretation of the 1998 Baggage Rules, but also the way in which the investigation was carried out which we have already observed above. Therefore, looking at the facts of the present case, in our view, the justification sought to be made by Respondents to support the orders cannot be accepted.

8. In view of above, Rule that was granted on 11th November 2014 is made absolute in terms of prayer clause (a) to (e) which reads as under:-

- “(a) Quash and/or set aside the impugned order dated 21 February 2012 passed by the Joint Secretary to the Government of India, under Section 129DD of the Customs Act;
- (b) Hold that the Pendant is eligible to duty free clearance under Rule 7 of the Baggage Rules, 1988;
- (c) Hold that the Pendant is not liable to confiscation under Section 111(d) and (I) of the Customs Act, 1962;
- (d) Hold that the Petitioner is not liable to penalty under Section 112

4 1991 SCC OnLine Del 625

of the Customs Act, 1962;

(e) Direct for refund of redemption fine of Rs.20,00,000/- and penalty of Rs.15,00,000 paid by the Petitioner.”

9. The Respondents are directed to refund the sum of Rs.35,00,000/- deposited by the Petitioner within a period of four weeks from the date of uploading the present order.

[JITENDRA JAIN, J.]

[K. R. SHRIRAM, J.]