

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH - COURT NO.I

Customs Appeal No.70221 of 2022

(Arising out of Order-in-Appeal No.80-CUS/APPL/LKO/2022 dated 07.02.2022 passed by Commissioner (Appeals) Customs, CGST & Central Excise, Lucknow)

**Commissioner of Customs (Preventive),
Lucknow**

.....Appellant

(5th Floor Kendriya Bhawan, Sector-H, Aliganj Lucknow)

VERSUS

M/s Sai Max Jewelers,

....Respondent

(2nd Floor, 2605, Besides Ashoka Photographer,
Beside Bank Street, Karol Bag, New Delhi-110005)

WITH

Customs Appeal No.70222 of 2022

(Arising out of Order-in-Appeal No.80-CUS/APPL/LKO/2022 dated 07.02.2022 passed by Commissioner (Appeals) Customs, CGST & Central Excise, Lucknow)

**Commissioner of Customs (Preventive),
Lucknow**

.....Appellant

(5th Floor Kendriya Bhawan, Sector-H, Aliganj Lucknow)

VERSUS

M/s Sai Max Traders,

....Respondent

(2605/4, 2nd Floor, Gali No.4, Beadonpura,
Karolbagh, New Delhi-110005)

AND

Customs Appeal No.70223 of 2022

(Arising out of Order-in-Appeal No.80-CUS/APPL/LKO/2022 dated 07.02.2022 passed by Commissioner (Appeals) Customs, CGST & Central Excise, Lucknow)

**Commissioner of Customs (Preventive),
Lucknow**

.....Appellant

(5th Floor Kendriya Bhawan, Sector-H, Aliganj Lucknow)

VERSUS

Shri Shiv Raj Singh,

....Respondent

(Khasra No.1092/1063, Gali No.9, Kadi Vihar,
Kadipur, Distt.-Narela West Delhi-110036)

APPEARANCE:

Shri Santosh Kumar, Authorized Representative for the Revenue
Shri Amit Awasthi, Advocate for the Respondents

**CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**

FINAL ORDER NOs.- 70092-70094/2024DATE OF HEARING : 12 October, 2023
DATE OF DECISION : 27 February, 2024**P. K. CHOUDHARY:**

These appeals have been filed by the Appellant-Revenue assailing the Order-in-Appeal passed by the Commissioner (Appeals) Customs, CGST, Lucknow. Since all the three appeals are against the common Order-in-Appeal they are taken up together for hearing and disposal. These appeals pertain to seizure of gold bullion weighing 5999.820 Grm. valued at Rs.1,83,59,448/- under Section 110 of the Customs Act, 1962¹. On 23.07.2018 Police Officer of GRP, Mughalsarai Railway Station intercepted the passenger namely Shri Shiv Raj Singh S/o Shri Ram Prasad Singh of Bulandshahar at platform No.6 and allegedly recovered six pieces of gold bars. After preparing the final Fard (Baramadgi), by the GRP Police Officer on the same date, the impugned gold alongwith the passenger were handed over to the Customs Officer of Customs (Preventive), Division Varanasi for further investigation. No document regarding sale purchase/transportation of the recovered six pieces of foreign origin gold bars was produced by Shri Shiv Raj Singh who was immediately arrested, who allegedly confessed as per the Panchnama proceedings and the custodial statement that the recovered foreign origin bars have been brought into India from Bangladesh, through off route by way of smuggling, thus, there was the sufficient alleged reasons to believe that the gold bars have been brought into India from Bangladesh in violation of the provisions of Section 7(1)(c), Section 11, Section 46 of the Act, read with the Section 123 of the Act. Impugned gold bars were seized. Shri Shiv Raj Singh informed that he works as driver of Shri Hariom Sehgal, owner of M/s Sai Max Jewelers.

¹ The Act

The modus operandi of the present case was that on tickets arranged by Shri Hariom Sehgal, he reached Kolkata by flight from New Delhi, stayed at a lodge and intimated the name of the lodge to Shri Hariom Sehgal. The very next day on directions given on phone call by Shri Hariom Sehgal, Shri Shiv Raj Singh collected the said gold bars from a person outside his lodge of stay and was on his way to deliver the same to Shri Hariom Sehgal before getting busted. He further stated that on another previous occasion, he received 03 gold bars from the same person which were later on delivered by him to M/s Sai Max Jewelers on the directions of Shri Hariom Sehgal. It was also stated by Shri Shiv Raj Singh that Shri Azad Pandey and Shri Pradeep Pandey were engaged in carrying smuggled gold bars from Kolkata to New Delhi twice a week. He was remanded to judicial custody after being produced before the Special CJM (Economic Offences), Varanasi. Thereafter, on 31.07.2018, Shri Shiv Raj Singh filed a bail application before the Court of Special Chief Judicial Magistrate (Economic Offences), Varanasi stating that Shri Hariom Sehgal was the Proprietor of M/s Sai Max Traders who had sent 06 kgs gold to his other firm M/s Ambey Trading Company, 193, 2nd Floor, Ravindra Sarani, Kolkata-700005 (hereinafter referred to as "M/s Ambey Trading Co.") through his worker Shri Azad Pandey on 17.07.2018 for manufacture of jewellery but the jewellery could not be manufactured and thus, Shri Shiv Raj Singh was on his way to return the same from Kolkata where in-between he was apprehended by GRP Officers. In the meantime, on request of Customs Division Varanasi, subsequent follow up was conducted by Customs House, New Delhi on 13.09.2018 at the residential premises of Shri Hariom Sehgal and Shri Shiv Raj Singh and the premises of M/s Sai Max Jewelers and Sai Max Traders. Their report dated 19.09.2018 in respect of follow up revealed that neither contraband goods nor incriminating documents were recovered from the residential premises, M/s Sai Max Jewelers was found to be locked, copy of certain Income Tax Returns,

invoices and a laptop at the time of follow up visit at M/s Sai Max Traders were seized. M/s Netplanet, 7/118 'c', Swaroop Nagar, Near Model Bakery, Kanpur-02 (hereinafter referred to as "M/s Netplanet") was requested by the Appellant to open the laptop seized from the premise of M/s Sai Max Traders on 14.11.2018 with the intent to retrieve data in presence of Shri Hariom Sehgal. However, on the scheduled date, Shri Hariom Sehgal failed to turn up and in due proceedings M/s Netplanet recovered bill No.SM#8 dated 17th July 2018 and revised credit note dated 22nd July 2018 in deleted tally folder whose date of generation was impracticable to be found. Accordingly, a Show Cause Notice dated 17.01.2019 was issued proposing therein confiscation of the said seized foreign gold along with baniyan used for concealing the said gold under Sections 111(b) & (d) and 119 of the Act, respectively. Penalties were also proposed to be imposed upon M/s Sai Max Jewelers, Shri Hariom Sehgal and Shri Shiv Raj Singh under Section 112(b) of the Act. The Adjudicating Authority vide Order-in-Original No.03/ADC/2020-21 dated 15.06.2020 ordered for absolute confiscation of the said 06 pieces of gold bars and imposed penalty of Rs.60,00,000/- on M/s Sai Max Jewelers, Rs.60,00,000/- on M/s Sai Max Traders and Rs.10,00,000/- on Shri Shiv Raj Singh. Aggrieved with this order, M/s Sai Max Jewelers, M/s Sai Max Traders and Shri Shiv Raj Singh filed appeal before the First Appellate Authority which was decided by Order-in-Appeal No.198-200-CUS/APPL/LKO/2020 dated 25.11.2020 remanding the matter back to the adjudicating authority with the observation that M/s Sai Max Traders vide their letter dated 12.09.2018 had submitted purported sale/purchase bills, stock registers etc. in the Customs office Varanasi to prove lawful procurement of the impugned gold and the Order-in-Original No.03/ADC/2020-21 dated 15.06.2020 was passed without examining the documents submitted in defense. The Adjudicating Authority on re-adjudicating the matter vide the

impugned order dropped all the proceedings against M/s Sai Max Jewelers, M/s Sai Max Traders and Shri Shiv Raj Singh.

2. Being aggrieved by the adjudication order dated 22.07.2021, the Department preferred appeals before the learned Commissioner (Appeals) and the Commissioner (Appeals) vide the impugned order upheld the Order-in-Original dated 22.07.2021 and dismissed the Department's appeals before him. Hence the present appeals before the Tribunal.

3. The learned Departmental Representative reiterated the grounds of the appeals and submitted that M/s Sai Max Traders, Delhi sent gold to M/s Ambey Trading, Kolkata vide invoice SMT#8 dated 17.07.2018 but the same was revised on 22.07.2018 and found in deleted tally folder of laptop recovered. On inspection of both the invoices, it was observed that in invoice dated 17.07.2018, there was no reference of Buyer, order no. and supplier reference, invoice no. in SMT#8 and the same was rectified as Credit Note No.1 in place of invoice no. and Buyer's reference in place of supplier ref no.. The actual date of change of invoice is not ascertainable as per the report of M/s Netplanet dated 20.11.2018.

4. Learned Advocate appearing on behalf of the Respondent filed written submissions alongwith relied upon decisions and some other documents. He submitted that it is an established fact that the impugned gold bullion never had any foreign marking nor was 24 carats and in fact the purity of the gold was 99.3/99.4 carats. To the Deputy Commissioner of Customs Preventive, Varanasi, claim application dated 10.09.2018 was filed by the Respondent, wherein not only the action of the GRP as well as Customs Department was assailed, the Respondents enclosed copies of Invoice No. SMT-8 dated 17.07.2018 followed by the copy of revised Invoice dated 23.07.2018. Documents relating to the additional place of business Kolkata, i.e. M/s Ambey Trading Company, Kolkata, its registration and other related documents from Kolkata was filed with the Authorities, copy of stock register, copy of the GSTR-1 and GSTR-2 returns were also filed,

and the all the documentary evidence on record and the question of allegations was hence mired into controversy and release was sought. That it is also a fact on record that follow-up enquiry was taken up by the Office of Commissioner of Customs (Preventive), Kolkata, in respect of the trading Company M/s Ambey Trading Company, 01, Ravindra Sarni, 2nd floor, Kolkata, pertaining to the seizure of impugned gold bullion (In the report dated 04.10.2018 issued in C No. VIII (54) 10/ miscellaneous- ENQ / Varanasi / Gold / B &I / CCP-WB/2018-19/1287) and in para 1 and 2 the Learned Superintendent of Customs Preventive Kolkata made the following observation. It is the grievance of the Respondents that in spite of repeated request the said primary report on the follow-up enquiry by the Kolkata Customs, masking the repeated reminders, was never provided to the Respondents, who compelled by circumstances laid hands through the Right to Information Act, along with the copy of the statement recorded under Section 108 of the Act, by Kolkata Customs as Proprietor of M/s Sai Max Traders, Delhi and M/s Ambey Trading Company, Kolkata, respectively. In addition to the follow-up report by the Kolkata Customs, statement of Mr. Hari Om Sehgal, the Proprietor of M/s Sai Max Traders and M/s Ambey Trading Company respectively was also recorded. It has been submitted that the Kolkata Customs during their follow-up verification with regard to Ambey Trading Company, the additional place of business of Kolkata had also examined the documents in support thereof, after which the subjected report was forwarded.

- a) The first documents is the Tax cum-challan of M/s Promise Marketing who has sold a Mettler Toledo Electronic Weighing Scale with the model and serial No. costing 46,000/-, vide Taxable Invoice No. BM/701/2017-18 dated 09.01.2018.
- b) Acknowledgment of the payment by M/s Promise Marketing, Kolkata to M/s Sai Max Traders, the proprietor of Ambey Trading Company.

- c) The said Electronic Weighing instrument used for gold ornaments/ jewellery and bullion certified by the Office of Controller of Legal Metrology Act, Kolkata (West Bengal), being Serial No.133975.
- d) Registration with Kolkata Municipal Corporation (License Department being No. BB 128208 for 2018-19) certifying the nature of trade as wholesaler of the items of Gold, Silver Jewelry and Stone.
- e) Telephone Bill issued by Bharat Sanchar Nigam Limited in the name of M/s Ambey Trading Company, 193, Ravindra Sarni, 2nd Floor, Kolkata.
- f) Certificate by Kolkata Municipal Corporation (permanent) for the enlistment in the Municipal Area for trading as wholesaler of Gold, Silver Jewellery.
- g) Copy of Lease Agreement of the premises owned by Mr. Hari Om Sehgal the Proprietor of M/s Sai Max Traders and Ambey Trading Company executed between the land-lord.
- h) Copy of License Agreement of Leave and License between Mis Varsha Gupta Licenser and Mr. Hari Om Sehgal, the Licensee.
- i) Copy of Ledger Account of M/s Ambey Trading Company.
- j) Copy of Ledger Account of M/s Sai Max Traders, the claimant/ owner.

Because the Respondent/ Claimant of gold M/s Sai Max Traders, as per the assessed Balance Sheet, Ledger Account, had been entering into Barter transaction which has also been examined by both the Authorities below from M/s Surya Jewelers. The Respondent enclosed copy of Ledger Account, Copy of Tax Invoices, issued by M/s Priya Jewelers, and copy of Tax Invoices issued by M/s Sai Max Traders, in this case aligning with the Barter transaction, gold bullion was purchased from M/s Surya Jewelers, and by way of barter/ payment of consideration, Jewelry was sold under cover of proper Tax Invoice, copy GST

Registration of Surya Jewelers is also enclosed. Copy of the bank statement of M/s Sai Max Traders, which was already submitted to the Appellate Authorities as well as the Kolkata Customs is re-submitted before us.

- (a) that it is re-affirmed that M/s Sai Max Traders, the Respondent, had also purchased the gold bullion from M/s P C Jewellers, copies of the ledger account along with Tax Invoice are produced.

Further in support thereof, the Respondent M/s Sai Max Jewelers, also submits its ledger account, supported with the copy of purchase and sale Invoices to establish the credibility of the business. Statement of Hari Om Sehgal was also recorded.

Mr. Hari Om Sahgal affirmed that he had transferred 6 kgs of gold bullion to Kolkata to his own concern, and in the following question and answer he also affirmed the credential of one Mr. Dharma Raj as authorized person of M/s Ambey Trading Company who have received 6 Kgs of gold.

- Question No.13 was the question by Kolkata Customs regarding the function and profile of M/s Ambey Trading Company, to which Mr. Hari Om Sahgal averred that it was engaged primarily on job basis for making of Gold Jewelry.
- In Question No.14 he eventually denied M/s Ambey Trading Company having any concern with the business of 24 carat Gold along with M/s Ambey Trading Company conducting no trading activities of gold jewelry except for the work on job basis.
- In Question No.19 it was asked about the person who delivered gold to Shiv Raj Singh, the employee, to which Mr. Hari Om Sehgal confirmed the name of Shri Dharma Raj.
- In Question No.21 on specific query relating to the statutory registration of M/s Ambey Trading Company, Kolkata, Mr. Hari Om Sehgal confirmed registration under the Trade License.

- In Question No.24 Department asked as to why the gold ornaments could not be manufactured in Kolkata to which Mr. Sehgal replied that the gold smith who was the assigned with the job of making gold Jewellery sought time more than that was stipulated, along with demanding of excess consideration, and as such the subjected 6 Kgs of gold bullion of Indian origin was called back to M/s Sai Max Traders.
- Question No.25 query was raised relating to the purchase Invoice of M/s Ambey Trading Company, to which Mr. Hari Om Sahgal replied since the firm had no GST registration, for this reason the entire work had been taken up only in Delhi, and as such there was no sale or purchase being effected form the company, except for job work.
- In reply to Question No.28 he confirmed Mr. Dharam Raj to be the Manger supervising Kolkata office of M/s Ambey Trading Company.
- And in concluding Question and Answer No.30, he requested the Customs Department that all the document and papers submitted may kindly be verified and the gold bullion may kindly be returned and he confirmed that subsequently the business in Kolkata had been closed.

Documents which were submitted to the Adjudicating Authority were a registration with Kolkata Municipal Corporation, in serial No.17/542741, Telephone Bill of Bharat Sanchar Nigam Limited. There was a follow-up action by Customs Preventive, New Customs House, New Delhi to whom while letter dated 17.09.2018 the following submission were made as detailed in internal para 4 along with the copies of documents

"Para 4: As desired by the said Summon dated 13.09.2018, I am also enclosing herewith certified copy of (1) Bank Statement

for the period from 01.04.2018 to 14.09.2018 obtained from the Central Bank of India, Branch Code-307, Karol Bagh, New Delhi in respect of my firm M/s Sat Mix Trades 2605/4 2nd Floor, Beadon Pura, Karol Bagh, New Delhi having Current Account No.3588847671 al (2) Bank Statement for the period from 01.04.2018 to 14.09.2018 having Current Account No.3589954273, obtained from the Central Bank of India in respect of my wife Ms. Seema Rani Sehgal's firm M/s Sai Max Jewellers. House No.2652 & 2653. Plot No.40, 41, 42, Bank Street. Naiwala, Karol Bagh, New Delhi and (3) Bank Statement for the period from 01.04.2018 to 14.09.2018 having Overdraft Account No.4007869962, obtained from the Central Bank of India in respect of M/s Sai Max Jewellers, House No.2652 & 2653, Plot No.40, 41, 42, Bank Street, Nawala Karol Bagh, New Delhi."

It is a fact on record and evidence that two respective letter claiming the impugned gold was filed by Respondent No.1, i.e. M/s Sai Max Traders through it proprietor Hari Om Sehgal requesting for the release of gold and, vide letter dated 30.08.2018 the respondent argued it was matter of stock transfer for converting gold bullion to jewelry covered by proper Taxable Invoice No. SMT-A dated 17.08.2018, and was carried back to new Delhi for delivery to M/s Sai Max Traders /the Owner by Shiv Raj Singh, under the revised Invoice dated 23.07.2018, and the reason was that Associate concern M/s Ambey Trading Company, based in Kolkata, due to non availability of workman the processes of conversion of gold jewelry / ornaments could not be done. Respondents averred that the entire case of GRP Police followed by the Customs was without credible formation of reasons to believe, and the drawl

of Panchnama proceedings was only the drawl of proceedings, more appropriately the version of the Department only on the reasonable suspect and the said action not only showed perversity but arbitrariness and the distance between alleged and proved was the onerous duty of the Department.

5. Heard both sides and perused the appeal records.

6. We find that in the current case, pursuant to the issuance of the Show Cause Notice, without verification of the documents, the matter was adjudicated by the Learned Additional Commissioner of Lucknow, in the first round of litigation, wherein, in spite of specific written request, copies of verification as well as follow-up report by Kolkata Customs and statement of Mr. Sehgal was never provided.

Although the proceedings arising of the Show Cause Notice were upheld by the Learned Additional Commissioner in the first round of the litigation, the Learned Commissioner (Appeals) Customs, Lucknow, set aside the impugned order with speaking direction, and remitted the matter for afresh adjudication. In the second round of the litigation before the Learned Adjudicating Authority, the Learned Adjudicating Authority held that the benefit of the presumption under Section 123 does not go in favour of the Department, and the entire case had been made on mere pretence, hearsay evidence and on reasonable suspect, and there was no credible formation of the reasons to believe which was the crux of the issue and the Learned Adjudicating Authority in Para 25.28 held as follows :

"Para 25.28 : From the discussion in aforesaid paras it is amply clear that there are no arguments by the prosecution as to how those gold bars were smuggled into India. To avoid this basic question, prosecution despite repeated directions never made available nor incorporated the report submitted by Kolkata Customs authorities of 4th October 2018 which was eventually procured by RTI by Noticees.

This establishes that the prosecution has failed to discharge burden of proof and thus, it concludes that the said gold bars were not smuggled. Accordingly, based on the above facts and discussion I hold that the seized gold bars were of Indian Origin."

Findings in the Adjudication Order, was challenged by the Revenue before Commissioner (Appeals) Customs, Lucknow in the 2nd round of litigation and the Learned Commissioner (Appeals) held as follows :

"The adjudicating authority had analyzed the stock register of M/s Sai Max Traders, Delhi at length for the period – 01.01.2018 to 31.07.2018 and found the transaction genuine. He elaborated the purchases of gold weighing 2 kg., 3680.200 gram and 1502 gm by M/s Sai Max Traders, Delhi on 21.06.2018, 10.07.2018 & 16.07.2018 respectively and also, the outward entry dated 17.07.2018 of 6000 gms of gold to Kolkata. The adjudicating authority also observed that Invoice No. SMT#8 dated 17.07.2018 was recovered successfully from the laptop resumed from M/s Sai Max Traders, Delhi."

The issue before us in these Revenue Appeals is as follow :-

- A. Whether the evidences available on record prove that the Gold bars / pieces were allegedly smuggled into India from Bangladesh without any legal documents, whether the allegation of alleged smuggling from Bangladesh is tailor made story of the Customs without there being any evidence to the contrary or is simply based on wild inferences?
- B. Whether in the facts and circumstances of the case, the benefit of the presumption under Section 123 of the Act, goes in favour of Revenue or not?

C. Whether the retracted statements of the co-accused can be relied upon to establish the guilt of the Respondents, when the procedure prescribed under section 138B of the Act was not followed?

D. Whether the term "*smuggling*" has been defined under the Customs Act, whether the statements recorded in custody has any evidentiary value in absence of independent corroboration / evidence and whether the Appellant Revenue has preferred the Appeals in most mechanical manner ironing away the statements recorded on 04.10.2018 of Mr. Hari Om Sehgal (owner) by Kolkata Customs, forwarding the verification report, relating to the additional place of business at Kolkata, M/s Ambey Trading Company, whether the observation made by the Adjudicating and Appellate Authority in favour of the Respondents needs to be upheld.

(a) As submission to Question the number framed at Serial No. A, the respondents submit and argue that both the Authorities below have taken a pragmatic view in appreciating all the evidences on record, and also determining the question of law involved in the matter because the Respondents are well established gold and Silver Bullion Dealer along with Jewellery items in Delhi by the name of M/s Sai Max Traders and M/s Sai Max Jewellery, respectively and also had an additional place of business in Kolkata by the name of M/s Ambey Trading Company.

During the currency of this subjected case, it is not a case of any interception at the port area or any land Customs station, but purely a case of town seizure, and the movement of Gold Bullion

from Delhi to Kolkata and its return from M/s Ambey Trading Company back to Delhi to its principal is well established through the document and verification done by the Kolkata Customs, finding support with the forwarding of proper verification report to the Jurisdictional Customs (P), Varanasi along with the copy of Statement of Shri Hari Om Sehgal, who with fortitude confirms his ownership, possession, purchase documents, ledger account, payment of GST, GSTR return, which prior to issuance of Show Cause Notice, had already been detailed and submitted to the Jurisdictional Authorities, supported with documents who were already seized of the matter and here in this case, this is a case of interception by Police/GRP at Railway Station, to create a story and which was eventually snow balled through the Panchnama, which was only the record of proceedings, illegally creating story of the alleged smuggling from Bangladesh, without there being any evidence to the contrary, and purely on unwarranted assumption and presumption, and in any view of the matter reasonable suspect cannot take place of either the proof or for a credible formation of reasons to believe.

- (b) That the Respondent during the currency of the seizure was having the turnover of 300 crores odd and now having a turnover of around 500 crores odd, if any onus with regard to the source of procurement of gold was concerned, not only through the document and submissions dated 07.11.2019 and 02.12.2019 finding support with the verification report of Kolkata Customs, presumably any onus cast was discharged by

the Respondent, and the evidentiary value of the documents on record had candidly been examined by the Authorities below, i.e. during Adjudication as well as by the Learned Commissioner (Appeals).

- (c) As such, both the Authorities below have currently demolished the theory of alleged smuggling from Bangladesh and granted consequential relief to the Respondents.

Answer No. B :

- a) Before we read and interpret Section 123 of the Act, the opening words have two limbs firstly the statute carving out “*reasons to believe*” and second “*smuggling*”.

In the case dealt by Hon’ble Patna High Court in the case of **Ramesh Kumar Baid Vs. CC(P) Patna reported in 2020 (374) E.L.T. 879 (Pat.)** the Hon’ble High Court held thus :

"15. The Appellant stated that the gold pieces/bars were seized on the reasonable belief that they were smuggled into India from Bangladesh. The Adjudicating authority has relied upon the decision of the Hon'ble Supreme Court in the case of Gopal Das Uddhav Das Ahuja v. UOI reported in 2004 (176) ELT 3 (SC) for effecting the seizure on the ground of reasonable belief. However, the said case is distinguishable on the ground, firstly, that the subjected case was during the breathing period of Gold Control Act, wherein possession of primary gold even unmarked had a thrust of burden upon the Assessee. When the Gold

Control Act was repealed without a saving clause, the said decision under the Gold Control Act has no relevancy under the Customs Act. Currently under the Customs Law, the burden has been thrust upon the Department and the presumption under Section 123 of the Customs Act has no application in the present case, as the gold seized is of Indian origin.

16. The Respondent rely upon the decision of the Hon'ble Supreme Court in the case of Tata Chemicals Ltd. v. Commissioner of Customs (Preventive), Jamnagar reported in (2015) 11 SCC 628, which has explained the meaning of the word 'reason to believe' as under:-

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

form a 'reasonable belief that the goods are smuggled from Bangladesh, there must be irrefutable evidence to prove that allegation. In the present case there is no such evidence available to prove that the goods were of foreign origin and smuggled into India from Bangladesh.

17. The Respondent also rely upon the following decisions in support of their argument that the 'reasonable belief must be supported with other independent corroborative evidences.

(1) In Assistant Collector of Customs v. Charan Das Malhotra, 1971 (1) SCC 697, Shelat J., has held and not reasonable believe to be relevant extraneous.

(11) In Kewal Krishan V. State of Punjab, AIR 1967 SC 737, Kapur J., while dealing with identical provisions had clarified that confiscatory power based on 'reason to believe' has to be exercised only on the satisfaction based on certain objective material.

- b) The Respondent relied upon judgment of the Hon'ble Supreme Court in the case of Sita Ram Sao Vs State of Jharkhand reported in (2007) 12 SCC 630, wherein the Hon'ble Supreme Court defined the word 'Corroboration' as under:*

"34. The word 'corroboration' means not mere evidence tending to confirm other evidence. In DPP VS Hester (1972) 3 AIR ER 10.16, Lord Morris said: "The purpose of corroboration is not to give

validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible: and corroborative evidence will only fill its role if it is completely credible....."

19. The Appellants also relied upon the decision of the Hon'ble Delhi High Court in the case of Shanti Lal Mehta VS UOI and Others reported in 1983(14)ELT1715 (DEL), which elaborately"

- c) The basic question is formation of reasonable believe which must be at the time when the goods are sized and not subsequent to the seizure, which was the pre-requisite condition of the power of seizure that the statute confers on the Officers as held by Commissioner of Customs Vs. Sampathu Chetty- AIR 1962 SC 316 followed in the case of M. G. Abrol Vs. Amichand reported in AIR 1961 Bombay 227, wherein it is also held that the condition precedent there was such a reasonable belief, and period to the seizure must exists before the presumption under Section 123 can be evoked.

"16. the Appellants have relied upon the decision of the Hon'ble supreme Court in the case of Tata Chemical Ltd. Vs. Commissioner of Customs (Preventive), Jamnagar reported in (2015) 11 SCC 628, which has explained the meaning of the word 'reason to believe' as under: -

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

The Respondent also rely upon the following decisions in support of their argument that the 'reasonable belief must be supported with other independent corroborative evidences.

(1) In Assistant Collector of Customs v. Charan Das Malhotra, 1971 (1) SCC 697, Shelat J., has held and not reasonable believe to be relevant extraneous.

(11) In Kewal Krishan V. State of Punjab, AIR 1967 SC 737, Kapur J., while dealing with identical provisions had clarified that confiscatory power based on 'reason to believe' has to be exercised only on the satisfaction based on certain objective material. "

- c. Relying upon Hon'ble Delhi High Court in the case of Shanti Lal Mehta Vs. Union of India and other reported in 1983 (14) E.L.T. 1715 (Delhi), which

dealt with the town seizures, the definition of “smuggled goods” along with the interpretation of Section 123 of the Customs Act, 1962, the above questions has been addressed by the Tribunal in the Judgments in the case of Balwant Raj Soni and other VS. CCE, Preventive, Patna, Final Order No.75455-57/2023 dated 18.05.2023 followed by the case of Shreyas Agarwal and others VS. CCP, Kolkata in Final Order No.76044247/2023 dated 12.07.2023, wherein the Tribunal following the law laid down has held in Para 22.8 (Balwant Raj Soni): -

“In view of the above discussions and the decisions cited above, we hold that the burden under Section 123 of Customs Act, to prove that the Gold is not smuggled one, does not lie on the Appellants, in this case.”

Answer No. C :

- a) Hon’ble Bombay High Court in the case of Union of India Vs. Kishan Ratan Singh reported in 2020 (372) ELT 714 (Bombay) held as follows :

“Para 9. Various Courts have kept all these things in mind and come to a conclusion that in the absence of any corroboration by an independent and reliable witness, a statement recorded under Section 108 in isolation could not be relied upon. For this, I find support in State of Maharashtra v. Harshad Vaherbhai Patel & Ors. [2012 (1) Bom.C.R. (Cri) 500] and unreported judgment of this Court in Shri Malki Singh v. Suresh Kumar Himatial Parmar in Criminal Appeal No. 228 of 1999 delivered on 29-11-2019 [2020 (371) E.L.T. 642 (Bom.)]. Paragraph 8 of Malki Singh's judgment reads as under:

"8. It is no doubt true that under section 104 of the Customs Act, 1962, the Customs Officer is vested with power to arrest if he has reason to believe that any person has committed an offence punishable under sections 135 or 135A of the Customs Act. Under Section 108 of the Customs Act, the Customs Officer is also vested with power to summon persons to give evidence documents and all persons so summoned are bound to attend, on being summoned. The statement made to the Customs Officer is not hit by Section 25 of the Indian Evidence Act, 1872, the position of law being very well settled that the Customs Officers are not police officers and resultantly, a statement made to the Customs Officer is not hit by Section 25. At the same time, the position of a retracted confession is also well settled:- without any independent corroboration it cannot sustain a conviction and retracted confession may form basis of conviction without corroboration if it is found to be perfectly voluntary, true and trustworthy. The Court is duty bound to examine whether the statement referred to as a confessional statement meets the test of truthfulness and being voluntary in nature. In absence of any independent material brought on record by the appellant, the Chief Metropolitan Magistrate was perfectly justified in acquitting the accused no. 2. In absence of any evidence corroborating

the statement of the accused no. 2 made before the Customs Officer on 24th March, 1996 under Section 108 of the Customs Act, the statement in isolation do not warrant conviction, particularly when it is retracted with a plea of coercion,"

- b) Further in the case of Balwant Raj Soni, the Tribunal, cited supra in Para 24 addressed this issue with the cover of Judgments, wherein the findings of the Tribunal are as below:

"24. In support of their claim, the Appellants relied upon the following decisions:

i) Mohtesham Mohd. Ismail Vs. Special Director, Enforcement Directorate-2007(220) ELT 3 (SC).

That a confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the Court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of the conclusion deducible therefrom. A confession purported to have been made before an authority would require a closure scrutiny. It is therefore, now well settled that the Court must seek corroboration of the purported confession from independent sources.

ii) Prakash Kumar Vs. State of Gujarat-(2007) 4 SCC 266.

The confession of co-accused by itself is not sufficient to hold the other accused guilty. It has been held repeatedly by this

Court that the confession of a co-accused is a fragile and feeble type of evidence and it could only be used to support the other evidences, if any, adduced by the prosecution.

iii) Assistant Collector of Customs Vs. Amrik Singh 2014 (301) ELT 170 (P&H)

The question arises whether the admission of co-accused under Section 108 of the Customs Act can be basis of conviction of other co-accused. The Ld. Trial Court has rightly held that statement of co-accused under Section 108 of the act against the co-accused with a weak type of evidence and conviction of co-accused cannot be based on the uncorroborated statement of co-accused.

iv) Anisur Rahaman Vs. Commissioner of Customs (Prev.) West Bengal 2003 (160) ELT 816 (Tri-Kolkata).

Non-appearance before DRI Officer in response to summons is not a ground for holding that the appellant is guilty-The entire case is based upon the statement of the Driver which is in the nature of uncorroborated statement of a co-accused and cannot be made the sole-basis for penalizing the appellant.

v) Jahed Mondal Vs. Commissioner of Customs (Prev.), West Bengal- 2002 (149) ELT 319 (Tri.-Kol.) Para 8 & 11.).

Penalty has been imposed upon Shri Jahed Mondal based upon the statement of Bablu Biswas who was intercepted by

the Customs Officer from whose possession one gold biscuit has been recovered. Penalty cannot be imposed on the basis of confession of co-accused unless corroborated by other evidences. Non-appearance in response to Summons cannot be a factor or criteria in determining the guilty conduct of the appellant.

vi) Narayan Das Vs. Commissioner of Customs, Patna- 2004 (178) ELT 554 (Tri.-Kolkata) Para-6.

Mere inculpatory statement of the co-accused about the purchase of gold from the appellant cannot be the basis of imposing penalty under Section 112(b) of the Customs Act, 1962 in the absence of any other corroborative evidence."

Answer No. D :

- a) The term smuggling is not defined under the Customs Act and with regard to the words smuggled the Hon'ble Delhi High Court in the case of Shanti Lal Mehta (supra) in para 60 defined the tem along with the law laid down as follows :

"The word "Smuggled" mans that the goods were of foreign origin and that they had been imported from abroad. Since, in the instant case, there was nothing absolutely from which inference about their origin or recent import could arise nor there was definite evidence to show that the appellant knew or had reason to believe that those items were smuggled, therefore, the presumption under Section

123 of the Customs Act that the goods were "Smuggled" did not arise. (Para 60)"

- b) Because it an established fact that the Respondent as a claimant of Gold has an additional place of business in Kolkata in the name and style of M/s Ambey Trading Company, 193, Ravindra Sarni, 2nd Floor, Bada Bazar, Kolkata, who under investigation by the Kolkata Customs in a follow up inquiry had submitted all the documents in addition to what had already been submitted before the Varanasi Customs, and the Office of the Commissioner Customs (Preventive), through Superintendent (Preventive) who had forwarded his final report of the follow-up inquiry in respect of M/s Ambey Trading Company, Kolkata, wherein the contents of the remarks of the verification report in addition to the statement dated 04.10.2018 of Mr. Hari Om Sehgal, the report by Kolkata Customs and the statement of Mr. Hari Om Sehgal had been masked by the Appellant Department, in the first round of litigation, and same was procured through the Right to Information Act and consequently, in the teeth of proceedings, and candid verification of the report and the statements, the proceeding arising out of the impugned Show Cause Notice were dropped by the Adjudicating Authority and upheld by the Appellate Commissioner.
- c) The role of the Department in not disclosing the content of the report and statement of the Respondent, was quite un-becoming. It is trite to detail the remarks of the report by the Kolkata Customs which demolishes not only the alleged / imaginary concept of smuggling from Bangladesh, and portrays anathema of travesty and of justice. The content of report is as under : -

"Remarks: Prima facie it was revealed as per available records that : -

- (a) M/s Ambey Trading Company, Kolkata-700007 is engaged in manufacturing of gold jewellery in given address.*
- (b) M/s Ambey Trading Company, Kolkata 700007 is sister concern of M/s Sai Max Traders, Karol Bagh, New Delhi.*
- (c) Found that 6000.000 grams gold has been delivered to M/s Ambey Trading Company, Kolkata- 700007 under proper Tex Invoice dated 17.02.2018 issued by M/s Sai Max Traders, Karolbagh, New Delhi.*
- (d) Gold may be received from M/s Sai Max Traders, Karolbagh, New Delhi- 110005 manufacturing cost of gold ornaments is cheap in Kolkata.*
- (e) Apart from above, latest manual designed gold jewelleryes in little weighment of gold available in Kolkata (emphasis / documents enclosed)."*

Because the authorities below have granted relief to the Respondents after candidly examining the documentary evidence on examining the follow-up report by Kolkata Customs and also the question of law, correctly interpreting Section 123 of the Customs Act, wherein in without credible formation of reasons to belief / reasonable believe the benefit of presumption under Section 123 does not go in favour of the Department. Admittedly there is no foreign marking on the gold bars seized from Shri Shivraj Singh. Admittedly, it is case of town seizure and as such the onus was on Customs Officers to establish the allegation of

smuggling which they have not done. No sample of the gold was drawn; the valuer had no mechanism whatsoever and howsoever to check the purity of the gold bullion, in carets and fineness, which not only have been done by drawing of sample, sending it to the laboratory and treating the same with chemical compound which would give the exact purity of gold and its fineness; the same cannot be checked using a touch stone.

7. We find that the impugned gold intercepted, initially taken possession by the officer of GRP and then handed over to Customs. Admittedly, the gold did not have any tell-tale foreign marking and it was merely accused that the markings were removed to hoodwink investigation. The place of seizure is not in Customs area. Hon'ble Supreme Court in the case of Gian Chand & Ors (Supra), wherein in case of seizure by the Police and thereafter the possession was shifted to the Customs Officer, held that the pre-requisite of seizure is not satisfied. We find that the Adjudicating Authority vide Order-in-Original No.27/JC/2021-22 dated 22.07.2021 held as under:-

*"25.1. I have carefully gone through all the documents available on records in form of Show Cause Notice No.72/ADC/2018 dated 17.01.2019 (hereinafter referred to as **the impugned SCN**) along with relied upon documents, written defence and letters submitted by the noticees along with accompanying documents, as evidence, records of personal hearing and other facts as available on record in the instant matter.*

25.2. I find that I have to decide on the following points in the instant case:

- *Whether the impugned 06 pieces of seized gold bars weighing 5999.820 grams valued at Rs.1,83,59,448/- (Rupees one crore eighty three lakhs fifty nine thousand four hundred and forty eight only) are of foreign origin and have been smuggled into India or not?*

- Whether the Noticee No.2, namely, Shri Hariom Sehgal, Prop. of M/s Sai Max Traders, 2605/4, 2nd floor, Gali No.4, Beadonpura, Karolbagh, New Delhi-110005 who has claimed the ownership over the said impugned 06 pieces of seized gold bars weighing 5999.820 grams valued at Rs.1,83,59,448/- (Rupees one crore eighty three lakhs fifty nine thousand four hundred and forty eight only) is involved in the alleged smuggling of foreign origin gold or not?
- Whether Sri Shiv Raj Singh, S/o Sri Ram Prasad Singh, R/o Vill- Pali Anandgadhi, PS. Narsena, Distt. Bulandshahar, is involved in carrying of allegedly smuggled, the aforesaid 06 pieces of gold or not?

25.3. It is evident from the records that on 23.07.2018 at 21:35hrs, GRP, Thana Mughal Sarai, intercepted the Noticee No.3, namely, Shri Shiv Raj Singh on suspicion and recovered the impugned 06 pieces of gold bars at Platform No.06 of Railway Station Mughal Sarai and called upon the officers of Customs. The Officers of Customs arrived there on 24.07.2018 after being informed by the GRP. I find that the Fard dated 23.07.2018 prepared by the GRP alleges that the gold bars appeared to be smuggled as the Noticee No.3, i.e., Shri Shiv Raj Singh could not produce any documents at the time when the GRP made the recovery of the said gold bars from his possession. Thereupon under Supurdiginama dated 24.07.2018 the impugned gold was handed over to the Customs officers for investigation and further action in the matter. **While defense states that the said gold was accompanied with proper returnable invoice/bill of supply/challan, which were not taken into cognisance by authorities.** For valuation of gold, **valuer** was called on railway station in mid night for ascertaining purity of gold while **customs authorities did not draw**

punchnama on the spot and it was drawn next day in customs office.

25.4. I find that the Panchnama dated 24.07.2018 details that on being enquired by the officers of Customs the Noticee No.3, namely, Shri Shiv Raj Singh stated in front of the panchas that the impugned recovered 06 pieces of gold bars weighing 5999.820 grams valued at Rs.1,83,59,448/-. On being asked by the Customs officers he stated before the panchas that he was Shiv raj Singh s/o Sri Ram Prasad Singh, R/o Vill. Pali Anandgadhi, PS. Narsena, Distt. Bulandshahar, and present address was Khasara No.1092/1063, Gali No.9, Kadi Vihar, Kadipur, Distt. Narela, North-West Delhi-110036. He further stated that he works for Shri Hariom Sehgal owner of M/s Sai Max jewelers, 2nd Floor, 2605, beside Ashoka Photographer, beside Bank Street, Karol Bag, New Delhi, r/o Road No.7, Purvi Punjabi Bagh, New Delhi. He went on stating that on 09.07.2018 he went to Kolkata on the directions of Shri Hariom Sehgal and stayed in Sahara Lodge at Howrah. He informed his staying details to Shri Hariom Sehgal on phone. Thereupon at 13.00 hrs Shri Hariom Sehgal asked him on phone to go outside the lodge and collect 03 pcs of gold bar. After receiving the gold, he brought the same to New Delhi and handed over to Shri Hariom Sehgal. ***Therefore it is found that he was a routine employee of Shri Hariom Sehgal and he has carried gold from Kolkata to New Delhi several times in the past also.***

25.5. On being enquired upon he further stated that again he went to Kolkata on 22.07.2018 by flight and stayed in Shivam lodge at Howrah and he informed the same to Shri Hariom Sehgal. Next day, i.e., on 23.07.2018 morning, at about 07.00 hrs, one person came outside the lodge along with 06 pcs gold bars on the direction of Shri Hariom Sehgal. Shri Hariom Sehgal called him on Mobile phone to go outside the Lodge and collect the gold bars and

*simultaneously, he was on talk on other mobile with the person who came with the gold bars. After receiving the gold bars, he kept the same in the Baniyan specially designed for carrying the gold bars and wore it on his body. After receiving the gold bars, he took Duranto Express at 08.30 hrs. for Delhi but at Mughal Sarai, officers of GRP intercepted him and got deboarded him from train. On being further asked he Stated that the instant gold bars were brought into Kolkata after being smuggled from Bangladesh. **I find that earlier in his statement he has stated that he met the person who handed over gold to him at Kolkata for the first time and did not know him, both these statements of Shri Shiv Raj Singh are in mutual contradiction with each other, he could not substantiate as to when and how the said gold was brought into India.***

25.6. Thereupon, the Officers on reasonable belief that the recovered 06 pieces of gold bars weighing 5999.820 grams valued at Rs.1,83,59,448/- were of foreign origin and were smuggled into India and were liable to confiscation under Section 111 of the Customs Act, 1962, seized those 6 piece gold bars under Section 110 of the Customs Act, 1962 vide Seizure Order dated 24.07.2018.

25.7. I find from the records that during investigation summons were issued to Shri Hariom Sehgal, Proprietor of M/s Sai Max Traders, 2605/4, 2nd Floor, Gali No.4, Beadonpura, Karolbagh, New Delhi-110005 for providing documents as well as for recording his statement on 24.08.2018, 04.09.2018 and 12.09.2018 But, Shri Hariom Sehgal did not appear. Several letters were received from him seeking extension on various personal grounds. Shri Hariom Sehgal, proprietor of M/s Sai Max Traders, 2605/4, 2nd Floor, Gali No.4, Beadonpura, Karolbagh, New Delhi-110005 and owner of alleged Foreign Origin 6 kg gold

appeared before Kolkata customs officers and tendered his statement on 4th October 2018.

25.8. I find that Mr Hariom Sehghal had made his claim before the appropriate authorities of Custom Preventive Varanasi, wherein all the documents relating to purchase of the Gold Bullion, on discharge of proper levy of GST, its payment of consideration only through banking channel, copies of Bank Statement, credentials of Ambey Trading Company, Kolkata, a sister concern Bill of Supply/ Invoice being the documents for transfer of gold by way of stock transfer from M/s Sai Max Traders Delhi to Ambey Trading Kolkata, for making of Jewellery on job basis and its return under cover of proper challan was cohesively submitted to the investigating officers. Behoving that at the very first available opportunity, the burden cast in term of Section 123 of the Customs Act, 1962, wherein appropriately the burden was discharged by the Noticee No.2, although it was upon the Customs but the Noticees being assessee of GST provided all the documents for licit purchase of gold bullion, its transfer and even the GST Returns and Copies thereof, regarding the possession of the Gold supported with Bank Statement and its outward Supply for making of Jewellery and receipt back to M/s Sai Max Traders all was noticed and was duly discharged by the Noticee No.2 and not disputed by the Customs. A careful analysis of claim, Documents submitted to Varanasi, Kolkata and Delhi Customs in itself is conclusive enough to provide requisite proof of the claim of Noticee No.3 and fully establish the gold being tax paid and of Indian Origin with purity of 9930/40.

*25.9. I find that the Noticee No.2 Shri Hariom Sehgal proprietor of M/s Saimax trading company and spouse of owner of M/s Sai Max jewellers is **into business of gold jewellery making and having a gross turnover of Rs.300 Cr. Odd and is registered under GST and also***

files regular returns and pays due tax there on to the exchequer.

25.10. I also find that summons were issued under Section 108 of the Customs Act, 1962 to Shri Azad Pandey, working at M/s Sai Max Traders, 2605/4, 2nd Floor, Gali No.4, Beadonpura, Karolbagh, New Delhi-110005 for his statement on 22.08.2018. Shri Azad Pandey did not appear in compliance of the summons. **No effort after this was done to take version of Shri Azad Pandey by investigating officers (I.O.),**

25.11. I also find that no summons were issued to Shri Pradeep Pandey by I.O., **while Shri Shiv Raj Singh had stated that Shri Azad Pandey along with Shri Pradip Pandey used to travel Kolkata and back frequently carrying gold.**

25.12. I find that follow-up action took place at the premises of Notice No.2 and laptop was seized on 20.11.2018 by Delhi Customs Thereupon, M/s NETPLANET, 7/118 'c' Swaroop Nagar, Near Model Bakery, Kanpur-02 was requested to open the Laptop seized to retrieve the data. The Laptop was got opened in the office on 20.11.2018 by the Expert M/s NETPLANET, 7/118 'c' Swaroop Nagar, Near Model Bakery, Kanpur-02 in the presence of two independent witness to retrieve the data. The expert of M/s NETPLANET reported that "as desired by you, I have inspected the given laptop make DELL and retrieved the data from the laptop original as well deleted (i.e. MS office files, pdf files and tally files). **I have given all the related files to the officers, the given bill No. SM#8 dated 17-july-18 and revised credit note No. 22-july-18 was inspected in the given laptop, it was present in the deleted tally folder. This fact gives credence to the fact that the said gold was carried under proper bill.**

25.13. Further as per records the party has submitted additional documents vide their letter dated 18.05.2020, wherein it is mentioned that stock/Item Register of Gold Bar 99.50 provided by the party for the period 01 Jan 2018 to 31 Jul 2018 indicates an opening balance of 1468.373 grams as on 01.07.2018 and further against the column "Inwards Quantity "02 entries appear in the month of July. One entry pertains to Sai Max Jewellers dated 10.07.2018 showing an inward quantity of 3680.200 gram and another entry pertaining to Surya Jewellers dated 16.07.2018 showing an inward quantity of 1502.000 gram corresponding banking transactions have also been provided by the noticees. Further, an entry appears in the Stock Item Register in Column "Outwards Quantity" which shows 6000.000 grams pertaining to STOCK At KOLKATA dated 17.07.2018 and Vch No.1. In this regard, the party in the bail application filed before the Hon'ble High court had earlier submitted issue Voucher No.1 dated 17.07.2018 and Tax Invoice No. SMT#8 dated 17.07.2018 showing transfer of the 6.00 kg Gold Bar to M/s Ambey Trading Co. in Kolkata which was resumed successfully from laptop resumed from M/s Sai Max Traders which was opened on 20.11.2018 by expert in presence of independent witnesses, the expert informed that the said voucher No.1 dated 17.07.2018 and Tax invoice No. SMT#8 dated 17.07.2018 was present in the laptop.

25.14. I also find that Summons were issued on 24.08.2018 and 05.09.2018 under Section 108 of the Customs Act, 1962 to M/s Ambey Trading Company, 193, 2nd Floors, Ravindra Sarani, Kolkata-700005 vide C No. VIII (10)76-CUS/VNS/SEIZ-GOLD/2018/1338 for providing relevant documents as well as for recording the statement on 05.09.2018. The summons received back undelivered with postal remark on the envelop **"Absent/Addressee moved"**.

25.15. I find that the defence has procured the report dated 04.10.2018 pertaining to follow up conducted by the Kolkata Customs through RTI and the said report is submitted as evidence during the personal hearing on 05.12.2019. The said report contains statement of Shri Hariom Sehgal, proprietor of M/s Ambey Trading Co Kolkata recorded under Section 108 of the Customs Act, 1962. Further I find that Shri Hariom Sehgal, Proprietor of Noticee No.2 firm M/s Sai Max Traders, New Delhi & M/s Ambey Trading Co. Kolkata and spouse of Shri Hariom Sehgal, namely, Mrs Seema Sehgal, the proprietor of Noticee No.1 namely M/s Sai Max Jewelers, New Delhi has appeared in person on 04.10.2018 under summons for and recorded their statement under Section 108 of the Customs Act, 1962.

25.16. I find the report of Superintendent Customs Kolkata is of paramount importance as it clearly states the facts of the case it is as follows: Remarks prima facie it was revealed as per available records that:-

[a] M/s Ambey Trading Company, Kolkata-700007 is engaged in manufacturing of gold jewelleries in the given address.

[b] M/s Ambey Trading Company, Kolkata-700007 is a sister concern of M/s Sai Max Traders, Karolbagh, New Delhi.

[c] Found that 6000.000 grams of gold has been delivered to M/s Ambey Trading Company, Kolkata-700007 under proper tax invoice dated 17.07.2018 issued by M/s Sai Max Traders, Karolbagh, New Delhi.

[d] Gold may be received from M/s Sai Max Traders, Karolbagh, New Delhi 110005 as manufacturing cost of gold ornament is cheap in Kolkata.

(e) apart from above, latest manual designed gold jewellery in little weight of gold is available in Kolkata.

vide this report it is crystal clear that indeed the said quantity of gold was sent from M/s Sai Max Traders, Karolbagh, New Delhi-110005 to its sister concern to M/s Ambey Trading Company, Kolkata -700007 under proper tax invoice dated 17.07.2018 for manufacture of jewellery.

The, investigating officers also have nowhere disputed the report submitted by Kolkata Customs.

25.17. I find that verification report of Kolkata Customs was deliberately hid by authorities to deliberately make out a case of nothing. This fact is amply recorded in the file, since even being enquired by the then adjudicating authority several times and reminders there of, **investigating team never sent the desired follow up report of Kolkata customs for his perusal and consideration. The noticees sought adjournment several times on this pretext to argue their case. Eventually noticees had to procure the follow up report from Kolkata Customs under RTI and made it a part of their defense reply.** The genuineness of RTI reply was cross checked and it was found to be authentic on mail dated 23 dec. 2019 by Kolkata Customs. **It appears that had the Kolkata Customs report made available to the then adjudicating authority earlier, even no Show cause notice could have been issued, he was deliberately kept in the dark.**

25.18. I find that in the impugned Show cause notice M/s Ambey Trading Company, Kolkata 700007 was shown as dummy, fictitious or bogus non existant unit, while follow up report of Kolkata Customs found it working.

25.19. I find that M/s Ambey Trading Company Kolkata was sister unit of M/s Sai Max Traders, Noticee No.2 as an additional place of business and it had already seen the

horizon by way of **proper verifications done by the Kolkata Customs for which the report was never made a RUD to the Show Cause Notice.**

25.20. I further find that the defence has provided GST invoices of purchase of gold bars as well as GST Returns to prove the impugned gold bars were legal and of Indian origin. As per record of the findings of Follow up report dated 04.10.2018 of Kolkata Customs the existence of M/s Ambey Trading Company, Kolkata is established as they have attached request application of the said firm for registration in Nagar Nigam and Landline telephone bill adding that the said firm is a sister concern of the Noticee No.2, namely, M/s Sai Max Traders, New Delhi.

25.21. I further find that Delhi Customs team in the follow up found both the firms M/s Sai Max Traders, New Delhi and M/s Sai Max Jewelers, New Delhi on their given address and recovered a laptop from the spot and **reported through there letter dated 19/09/2018 that nothing incriminating nor any contraband item was found in both the firms and at residential premise of Shri Shiv raj singh, meaning thereby business of the firms were authentic. They also cross checked the bank statements of the firms and found them proper.**

25.22. I find that M/s Sai Max Traders have purchased gold bars from Surya Jewellers, New Delhi, M/s Sai Jewellers, New Delhi. It has sold gold bars to M/s Bedi Jewels International, New Delhi, M/s S.B Jewellers, New Delhi, M/s Maharaja Jewellers, Jaipur, (twice) M/s Sai Jewellers, New Delhi (twice). It has also submitted a copy of sale invoice of gold bars to M/s Ambey Trading Co, Kolkata. The said invoice has also been revised. **I find that the transactions of M/s Sai Max Traders, and M/S Sai Max jewellers New Delhi, as provided in the form of purchase register stock register GST returns**

appears to be genuine. As regards the said quantity of gold following transactions were done by the firms:

- That on 21.06.2018 Gold weighing 2 kg, valued at 6,26,7000/- had been bought by Sai Max Traders / Noticee No.2 from PC Jewellers against Invoice No. TI001333, GSTIN No.07AADCP5443Q1ZW on which tax has duly been discharged.
- Further on 10.07.2018 gold weighing 3680.200 gram valued at 11563234/- had been purchased under Invoice NO. SMJ# 13 from M/s Sai Max Jewelers, 2652-2653, Plot No.40, 41 & 42, Bank Stereet, Karol Bagh, New Delhi 110005 and tax has been discharged under GSTIN NO.07AETPS4340E1Z9.
- That on 16.07.2018 again gold weighing 1502 gram. Valued at Rs.47,21,180/- had been purchased under cover of Invoice No GST-26 from M/s Surya Jewellers, 248B/8, 2nd Floor Beadon Pura, Karol Bagh Delhi - 5 and due tax has been discharged under GSTIN NO. 07AWZPA8374Q1ZD for making of Kolkata specialized jewellery on job basis from goldsmith.

I find that all the transaction as submitted by the defence were with firm that were having GSTIN.

25.23. Further from the CDRs of the mobile of the Shri Azad Pandey, it is quite evident that he used to visit to Kolkata carrying gold and back to Delhi frequently, which was corroborated by statement of Shri Shiv Raj Singh dated 24.07.2018.

25.24. I find that the Gold of 6 Kg had been taken by Mr. Azad Pandey along with Invoice No. SMT#8 dated 17.07.2018, for its delivery to Kolkata and he started journey, vide Railway Ticket/ PNR No.2448956082 dated 17.07.2018, Train No.12302 (Kolkata Rajdhani)

25.25. I find that foreign origin gold is of 99.999% purity and country of make is embossed on it, while **the said gold that is recovered from Shri Shiv Raj Singh is of 99.5% purity**

and no country of origin embossed over it, it is mixed with 1.5 % silver as is usually found in Indian origin gold. Therefore allegation of authorities that it is smuggled foreign origin gold, does not appears to contain any substance.

25.26. I find that there is no evidence provided by the I.O. in order to prove that the said 6 gold bars were illegally imported into India and were smuggled. The gold is one of the goods, which is specified in **Section 123 of the Customs Act, 1962, wherein its sub-section (1)(a) provides that the burden of proving that gold is not smuggled goods shall lie on the person who has claimed ownership thereof, but this clause does not apply for handover cases in heart of the state by police. There is nothing on record to substantiate from which International border it crossed into India and how and when?** However, the Noticees of the impugned SCN have been successful to prove that the said 6 gold bars are not smuggled, instead those were procured through legal means. The Noticees have provided documents proving that the said gold was procured through legal means and Lawful GST has already been paid on the said gold.

25.27. **Reliance can be placed on judgement of Honorable Mumbai High court in the case state of Maharashtra Vs Prithviraj Pokhraj Jain reported in (2000 (126) E.L.T. 180 (bom))** has held that in the absence of presumption under section 123 of the Customs Act, 1962, on the initial seizure of the goods by police, **the burden of proof that the goods are smuggled lies entirely on prosecution.** This order has attained its finality. Thus, it is clear that in handed over cases by the police or any other agencies (in this case GRP Mughalsarai) to the Customs the burden of proving that the goods are of smuggled nature lies entirely upon the prosecution. Hon'ble High court judgement has already been accepted **I find that in a**

similar case of Gold handover by GRP Mughalsarai to the Customs Varanasi, CESTAT Allahabad Bench in Lokesh Kumar Chaudhari Vs. Customs Lucknow has allowed the appeal of the party on the grounds of non embossing of country of make on gold bullion and department of able to establish the smuggled nature of the seized foreign origin gold.

25.28. **From the discussion in aforesaid paras it is amply clear that there are no arguments by the prosecution as to how those gold bars were smuggled into India.** To avoid this basic question, prosecution despite repeated directions never made available nor incorporated the report submitted by Kolkata customs authorities of 4th October 2018 which was eventually procured by RTI by noticees. **This establishes that the prosecution has failed to discharge burden of proof and thus, it concludes that the said gold bars were not smuggled. Accordingly, based on the above facts and discussion I hold that the seized gold bars were of Indian origin.**

25.29. I find that in the instant case there is no violation of the provisions of Section 7 (1) (c), 11 and 46 of the Customs Act for the reason that Sec 7(1)(c) relates to appointment of Customs port and in the current case except for suspicion, surmises and conjecturers there is no evidence of smuggling, **moreover seizure of the said gold has been made at Mughalsarai railway station ie in heart of the country, which evidently is too far (several hundred kilometers) from any international border or Customs area, hence Section 7 (1) (c), 11 and 46 of the Customs Act does not apply in this case.**

25.30. I find that entire case by the Customs authorities has been made on mere pretence, hearsay evidence and on suspicion, surmises and conjecture, which howsoever strong cannot take place of proof. **"Reason to believe" the**

cornerstone of any detention or seizure is missing in totality in this case.

25.31. *I find that this case was remanded back by Commissioner Appeals to the adjudicating authority to abide by principles of natural justice and to hear the noticees afresh and pass speaking order considering all documents of the appellants which were overlooked earlier.*

25.32. *In view of the aforesaid discussion, evidences and case laws I find that the said seized 06 pcs gold bars weighing 5999.820 grams valued at Rs.1,83,59,448/- (Rupees One Crore Eighty-Three Lakhs Fifty-Nine Thousand Four Hundred Forty-Eight only) were of Indian origin and were not smuggled into India therefore are not liable to confiscation under Section 111 (b) & (d) of the Customs Act, 1962. I order release of the seized gold bars to its lawful owner I also hold that the Noticees No.1, No.2 and No.3 are not guilty hence no penalty under Section 112 (b) of Customs Act, 1962 leviable. Hence, order for dropping of proceedings against them under provisions of Customs Act, 1962.*

26. *Accordingly, based on the above discussion and findings, I pass the following order:*

ORDER

I drop all the proceedings against all the three noticees under provisions of Customs Act, 1962. I order release of the seized gold bars to its lawful owner."

8. On appeal by the Department, the learned Commissioner (Appeals) while upholding the Order-in-Original has observed as under:-

"I have gone through the case records. By the impugned order, the adjudicating authority has dropped all the proceedings against M/s. Sai Max Jewelers, M/s Sai Max Traders and Shri Shiv Raj Singh which has been contested by the Appellant department on the basis of grounds of appeal detailed above. The respondent has submitted that the present appeal may be decided on the basis of documentary evidences available on record.

I find that 'Gold' is a notified item under Section 123 of the Customs Act, 1962, where burden of proving that the said goods is not the smuggled one, is either on the carrier or on the owner. The adjudicating authority had discussed this issue at length in the impugned order. The adjudicating authority had observed that the respondent had made claim before the Customs authority, Varanasi submitting all the documents relating to purchase of Gold bullion & its payment, credential of M/s Ambey Trading Co., Kolkata (a sister concern), Invoice for transfer of the impugned gold from M/s Sai Max Traders, Delhi to M/s Ambey Trading, Kolkata for jewellery making & its return under challan etc. Further, Shri Hariom Sehgal, Proprietor of M/s Ambey Trading Co., Kolkata in his statement dated 04.10.2018 tendered before Kolkata Customs stated that 6000 grms of gold (99.5%) was issued by M/s Sai Max Traders, Delhi to M/s Ambey Trading, Kolkata vide invoice no SMT#8 dated 17.07.2018.

The adjudicating authority had analyzed the stock register of M/s Sai Max Traders, Delhi at length for the period - 01.01.2018 to 31.07.2018 and found the transactions genuine. He elaborated the purchases of gold weighing 2 Kg, 3680.200 gram and 1502 gm by M/s Sai Max Traders, Delhi on 21.06.2018, 10.07.2018 & 16.07.2018 respectively and also, the outward entry dated 17.07.2018 of 6000 grms of gold to Kolkata. The adjudicating authority also observed that Invoice No. SMT#8 dated 17.07.2018 was recovered successfully from the laptop resumed from M/s Sai Max Traders, Delhi.

The adjudicating authority also took note of report dated 04.10.2018 of the Kolkata Customs forwarding therewith the statement dated 04.10.2018 of Shri Hariom Sehgal, Proprietor of M/s Ambey Trading Co., Kolkata. The Customs officials also reported that 6000 gms of gold was delivered to M/s Ambey Trading Co., Kolkata under proper tax invoice dated 17.07.2018 issued by M/s Sai Max Traders, Delhi. The adjudicating authority also observed that the team had not submitted the said report to the then adjudicating authority for his consideration. He also pointed out that in the impugned show cause notice, M/s Ambey Trading Co., Kolkata was shown as dummy/non-existent unit whereas the same was found as working in the said follow-up report investigating

I also find that the impugned gold did not bear any mark as pointed out by the adjudicating authority. Further, seizure of the said gold was effected at Mughalsarai

Railway station, which is far away from any international border or Customs area. The department had also failed to bring on record any documentary evidence against the aforesaid claim submitted by the respondent in their support. Instead, it appears that the Customs was concealing the said report of the Kolkata Customs in order just to sustain their case.

In view of above, I am in complete agreement with the findings of the adjudicating authority as elaborated in the impugned order that the respondent had discharged their obligation as required Section 123 of the Customs Act, 1962 by providing requisite details/documents with respect to procurement of the impugned gold in legitimate manner.

As regards the department's reliance on the statement of Shri Shiv Raj Singh confessing the smuggling of the impugned gold, I find that the respondent had submitted the necessary documents with respect to purchase and movement of the impugned gold from their Delhi based firm to Kolkata based sister concern. These documents were found in order by the adjudicating authority after examination. Kolkata Customs report dated 04.10.2018 also speaks of in favour of the respondent. Thus, I am of the opinion that the respondent had fulfilled the burden of proof that the impugned gold was not the smuggled one as stipulated under Section 123 of the Customs Act, 1962. In these circumstances, the statement of Shri Shiv Raj Singh loses its relevance as his statement appears to be based more on conjectures and surmises than any reliable facts.

In the light of foregoing paras, I do not find any force in the departmental appeal and consequently, I upheld the impugned order as just & proper. The departmental appeal is, thus, dismissed."

9. Accordingly, it is held that the circumstances as required under the Customs Act are not satisfied and consequentially the whole burden or onus to establish the smuggled nature of gold is on the Revenue. In addition to the above, fact remains that the gold did not have any foreign marking; Department under established that the same has been smuggled. The situation would certainly create reasons to believe that the impugned gold could be smuggled one, necessitated further prove. It does not

constitute reasonable belief to seize the gold under Section 123 of the Act.

10. In view of the above, we do not find any reasons to interfere with the impugned Order-in-Appeal passed by the learned Commissioner (Appeals) and accordingly, the same is sustained. The appeals filed by the Department are thus dismissed. We further direct the Commissioner to return the gold seized forthwith/if the gold has been disposed, to return sale proceeds alongwith interest as per rules, within six weeks of the date of receipt/ service of the copy of this order.

(Order pronounced in open court on – **27th February, 2024**)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

LKS