

Devkumar G. Aggarwal Vs. Collector of Customs (Prev.)

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jan-10-1994

Reported in : (1994)(53)LC395Tri(Mum.)bai

Judge : J T R., P Desai

Appellant : Devkumar G. Aggarwal

Respondent : Collector of Customs (Prev.)

Judgement :

1. Both the Appeals are directed against the Order-in-Original No.DRI/BZU/116/41/91 dt. 30.9.1992 followed by the Corrigendum bearing the same number dt. 5.5.1993 of the Collector of Customs (Prev.), Bombay, Ordering confiscation of 65 gold bars vide Section 111(d) of the Customs Act, 1962, and also imposing personal penalty of Rs. 1,25,00,000/- on Devkumar Aggarwal (hereinafter referred to as the Appellant) vide Section 112(a)(i) and 112(b)(i) of the said Act.

1.2. The Order-in-Original dt. 30.9.1992 only mentioned imposition of personal penalty on the Appellant and did not specifically Order confiscation of 65 gold bars and hence the corrigendum dt. 5.5.1993 was issued whereunder absolute confiscation of the gold bars was Ordered.

2.1. Pursuant to the intimation received from the Income Tax Authorities, to the effect that on their search on 20.2.1991, of a bungalow at Lonawala,

owned/occupied by the Appellant, they had recovered 65 gold bars with markings of foreign origin, the officers from Directorate of Revenue Intelligence (DRI), accompanied by two panch witness went to the office of the Assistant Commissioner of Income Tax, on 28.6.1991. The Appellant was present there at that time, and in his presence, the officers from D.R.I, effected seizure of those gold bars under a reasonable belief of they being of foreign origin and smuggled nature, under a regular Panchnama which was also endorsed by the Appellant in token of his being present throughout the process of seizure. Immediately thereafter, the statement of the Appellant was recorded vide Section 108 of the Customs Act, 1962 when he admitted the possession and ownership of the seized gold bars and stated that he had acquired the same within the period of about 9 to 10 months, by purchasing them in small quantity to 2 to 3 bars each time, for the purpose of safe investment, from different sources, whose names and addresses he did not know. Out of the 65 gold bars seized, 32 had markings "Credit 999.9 suisse", 28 had markings "Johnson Mathey 999.0 London 10 Tolas" and 5 had markings "Swiss Bank-10 Tolas 999.0". One bar from each of the three varieties was taken as a representative sample and they were sent to India Government Mint for assay, from where the report was received, which showed sample G-8396 (Credit suisse) having fineness of 999.2, sample G 8397 (Johnson Mathey) having fineness 998.8 and sample G 8398 (Swiss bank) having fineness 999.0.

2.2. Notice to show cause against the proposed confiscation of the seized gold bars and imposition of personal penalty, under the provisions of the Customs Act 1962, was issued on 24.12.1991 and was sent by Registered post at the Appellants given residential address, and the same was reportedly received on 27.12.1991 by Mrs. Prabha D.Aggarwal, the wife of the Appellant, who vide here letter of same date, returned the same mentioning that she was not authorised to receive the same. The said Show Cause Notice was returned to the Appellant at the same address vide covering letter from the Deptt. dt. 6.1.1992, and personal service thereof was effected on 7.1.1992. The Appellant submitted his reply to the same on 12.2.1992 contending that considering the fineness as certified by the Mint, there was no evidence that the seized gold bars were of foreign origin and pleaded that they were actually of Indian origin bearing fake markings, and as such, there was no contravention of any of the provisions of the Customs Act,

warranting confiscation of the gold burs and imposition of personal penalty on him, He also contended that the Show Cause Notice was not served within the period of six months after the seizure, and hence also, the proceedings deserved to be quashed.

2.3. Adjudication proceedings were conducted, and on conclusion thereof, the impugned Order-in-Original dt. 30.9.1992 was passed. The Appellant thereupon filed the present Appeal C/2/93-Bom. and also applied for stay against the recovery and waiver of pre-deposit of the penalty imposed on him. Probably because, during the hearing of the stay petition, as also by way of grounds of objections in the Appeal, an issue was raised that there was no Order for confiscation of seized gold, it was realised by the Adjudicating Authority that some omission had occurred in the Order-in-Original and hence the corrigendum was issued on 5.5.1993, also Ordering confiscation of the seized gold bars.

3. Besides the Appeal No. C/2/93-Bom. filed by the Appellant, challenging the entire Order, both of confiscation and imposition of penalty on him, at a later stage, the Departmental Authority have, issued in exercise of the powers invested in them vide Section 129-D(i) of the Act, from the Central Board of Excise and Customs, filed an application as contemplated under the said Section, in relation to the legality of the Order in view of issuance of the corrigendum. The same has been accepted as an Appeal vide Section 129D(4) of the Act, and is numbered as C/336/93-Bom. This Appeal from the Deptt. came to be filed while the final hearing of the Appeal filed by the Appellant was in progress, and as both the Appeals were in relation to the same Order-in-Original, both were listed together, and were accordingly heard, and both of them are being disposed of by this common Order.

4.1. The Departmental Authorities appear to have been motivated to invoke powers invested vide Section 129D(1) of the Act, by becoming apprehensive of the legality of the Order-in-Original and the corrigendum issued vide Section 154 of the Act, and have therefore, sought the reliefs as under: (a) After taking into consideration the facts of the case as stated above, it may be decided whether the said Order of Collector of Customs (Preventive) including the corrigendum is legally correct or proper.

(b) If not, whether by an Order passed under Section 129-B of the Customs Act, 1962 the Tribunal should set aside the Order by instructing the concerned Adjudicating Authority to issue a fresh Order or pass such other Order as deemed fit and proper.

Both by the authority Appealing and the authority directing to file the Appeal have raised two of the grounds for preferring the Appeal, which read thus: (2) Though the corrigendum dt. 5.5.1993 was issued Ordering confiscation of the seized gold, it has failed to bring out the fact as to how non confiscation of gold in the original Order dt.

30.9.1992 was the result of clerical error or accidental omission or a slip.

(3) The corrigendum as issued could be read as amending the earlier Order dt. 30.9.1992 and therefore, invoking the provisions of Section 154 of the Customs Act, 1962, may not be proper. Hence the corrigendum dt. 5.5.1993 may or may not be legally sustained.

4.2. The directions issued by the CBEC in exercise of the powers invested in them vide Section 129D(1) are dt. 21.9.1993 and the application filed pursuant thereto has been received as an Appeal by the Registry of the Tribunal, on 1.11.1993. Before that, the Appellant had already moved the Tribunal, vide C/Misc-73/93-Bom., filed on 11.6.1993, seeking modification in the Order No. 325/93-WRB dt.

17.3.1993 in the stay application No. C/Stay-19/93, where one of the contentions raised was in relation to the legality and validity of the Order, consequent upon issuance of the corrigendum and also pleading the corrigendum as being not legal and valid and contending to have been issued by an authority who was functus officio. The said Misc.

Application however, stood disposed of vide Order No. 1076/93-WRB dt.

28.6.1993, where this Bench (as a prima facie view) observed that provisions of Section 154 of the Customs Act, clearly permitted corrections of the type, and that the Adjudicating Authority was empowered to and was justified in issuing such corrigendum, and the legality and propriety of the Order passed was in no way

affected. One fails to understand as to how, with the clear opinion expressed by this Bench, as early as 28.6.1993, the concerned authorities were motivated to file an Appeal of this type, and one cannot resist attributing the same to non-application of mind to the issue involved.

4.3. Assuming that the Order of this Bench dt. 28.6.1993, may not have been brought to the notice of the concerned authority, as is sought to be solicited by the Id SDR, for seeking approval of the Bench but which does not appear conscionable, even going by the text of the Order-in-Original dt. 30.9.1992, with specific reference to para 8 of the Order, which has also been specifically referred to in the corrigendum issued, in the lines preceding the line added by the said corrigendum, the Adjudicating Authority has observed "since Shri Devkumar Aggarwal has failed to produce any permit from Reserve Bank of India or any valid import licence, the aforesaid 65 gold bars weighing 7,582.250 (K?) gms. valued at Rs. 28,28,190/- are liable to confiscation under Section 111(d) of the Customs Act, 1962". Such a specific observation in the Order-in-Original can hardly require any right thinking person to realise that absence of the words "I Order accordingly" could only be an accidental slip or omission, leaving practically no scope to interpret it any other way, non-mention in the corrigendum as to how the omission occurred, could also not affect the propriety or legality of the Order, as, one which is glaringly obvious, need not be specifically shown, and it is far from convincing to plead that such a corrigendum could tantamount to an amendment of the Order.

4.4. A plain reading of the provisions contained in Section 154 of the Customs Act, 1962, could suffice to eradicate the doubt which even otherwise, should not have cropped up. The said section reads thus: 154. Correction of clerical errors etc: Clerical or arithmetical mistakes in any decision or Order passed by the Central Government, the Board or any officer of customs under this Act; or errors arising therein from accidental slip or omission may, at any time, be corrected by the Central Government, the Board or such officer of customs or the successor in office of such officer, as the case may be.

The phrase "or error arising from accidental slip or omission" included thereunder, clearly empowers the authority to correct all accidental slips as also "the

omissions", and the omission contemplated to be covered under the said provision for correction of the Order, could only be such which, though was running in the mind of the authority passing the Order, but by a sheer accident, was omitted to be specifically mentioned. Interpreting the said provisions of Section 154 of the Act, even without taking any liberty whatsoever, and reading the corrigendum in context of para 8 in the Order-in-Original, there could be no scope to view the said provision as not empowering the Adjudicating Authority to adopt the course of issuance of the corrigendum. On the contrary reading of the said section in a way other than that, may tantamount to misreading of the section.

4.5. Mr. K.M. Mondal, the Ld. SDR, when confronted with this position, during the course of the submissions on the Appeal by the Deptt., made a desperate attempt to justify the filing of the Appeal by pleading that the Departmental authorities only wanted confirmation as to the validity of the Order as a whole, which included the corrigendum issued, and specifically referred to prayer Clause (a) in the reliefs claimed. It could have been possible to endorse with approval, the said submission but for ground No. 2 and 3, in the grounds for Appeal, already reproduced hereinabove, where the corrigendum is depicted as not issued in conformity with the statutory provisions.

4.6. Significantly, after raising this ground in the Misc. application filed and after getting the observation, from the Bench, even as a prima facie view, the Ld. Advocate for the Appellants, who had practically concluded his submissions on merits of the main Appeal, before the Appeal from the Deptt. came to be filed, had not raised this ground to challenge the legality and validity of the Order. It is only now that he has attempted to endorse the view of the Deptt. that the Order as a whole is not legal and has further pleaded that the corrigendum ought to be a speaking one, and the alleged omission that is reported to have occurred could not be taken as an accidental slip and that the corrigendum is in a form of an amendment, and in any case, that ought not to have been issued without hearing given to the affected party and is therefore violative of the principles of natural justice, and that the Appellant would have no objection if the request from the Deptt. is conceded and Order with the corrigendum is set aside and matter is remanded back. It may however be observed that plea raised by the Ld. Advocate

for the Appellant has virtually stood covered up in the observations and findings given hereinabove. Further, Section 154 of the Act does not contemplate granting of any hearing so as to hold non-compliance with the principles of natural justice, and even otherwise, the accidental slip is so glaring that there could be no scope to plead the correction as an amendment in the Order.

4.7. When however, for the reasons stated hereinabove, the Appeal from the Departmental Authorities appears to have been actuated on misconception of the facts and the law, and when the Order-in-Original dt. 30.9.1992 read with the corrigendum dt. 5.5.1993 is held as not assailable on the technical grounds pleaded, remand of the matter, as pleaded cannot be accepted. The Appeal therefore stands disposed of with a restrained observation that the Apex authority controlling the Establishment, ought to have made an in-depth study both on facts and law applicable to the set of circumstances here, before taking any decision and ought to have exercised restraint in challenging the validity of a perfectly legal and valid Order passed in total conformity with provisions of Section 154 of the Customs Act.

5.1. Mr. Jagatiani, the Ld. Advocate for the Appellant, while advancing his arguments on the merits of the Appeal preferred by the Appellant, has submitted that the Appellant is not challenging finding of the subject gold bars from the Lonawala Bungalow of the Appellant, nor is he challenging the seizure thereof by the Income Tax Deptt. where the Appellant has already filed application vide Section 245C(1) of the Income-tax Act, 1961 for settlement, and even here he is claiming the possession and ownership in the seized gold. He has however pleaded that the seizure of the gold bars from the Appellant's possession was only by the Income-tax Authorities and not by the DRI and the custody of the said gold bars is acquired by them only by virtue of handing over to them, by the Income-tax authorities. The Ld. Advocate has referred to the Panchnama dt. 28.6.1991 drawn by the DRI officials at the Income-tax office, and has pleaded that thus, there being no seizure under the provisions of the Customs Act, provisions of Sections 110 and 123 of that Act could not be applied. The Ld. Advocate, elaborating his submissions, has pleaded that seizure always means forcible taking over from physical possession of someone and handing and taking over of an item by one

Govt. Deptt. from another Deptt., could not tantamount to seizure and has referred to the decision of the Supreme Court in *Gian Chand and Ors. v. State of Punjab* , and has pleaded that act of alleged seizure is an unilateral act of the seizing authority. He has also referred to the Supreme Court judgment in *Commissioner of Income Tax v. Tarsem Kumar* , of P and H High Court in *Commissioner of Income Tax v. Ramesh Chandra* , of Calcutta High Court in *Sitaram Agarwala v. State of Gujarat* High Court in *Assistant Collector of Customs v. Makbujussain Ibrahim* 1970 Cr.L.J.1305. In the submission of the Ld. Advocate therefore, the proceedings initiated under the Customs Act, 1962 stand vitiated and the Order passed is required to be set aside.

5.2. The Ld. Advocate for the Appellant has then pleaded that with Section 123 of the Customs Act, 1962, not attracted, the burden lies heavily on the Deptt., of proving that the gold is smuggled into India.

In his submission, considering the evidence on record, the Deptt. has failed to prove that (i) the gold is of foreign origin (ii) of smuggled nature (iii) the Appellant knew that it was smuggled, (iv) he was instrumental in smuggling, and (v) had the required mens rea. In his submission, Section 138A of the Act, providing for raising presumption as to culpable mental state is meant to be applied only to the prosecution in the Magisterial Court and not to the adjudication proceedings. Referring to the decision of the Supreme Court in *Collector of Customs v. D. Bhoormull* , the Ld.

Advocate has submitted that the ratio of the said decision would not stand attracted here, firstly because, the same is given in relation to the provision of Section 167(8) of the Sea Customs Act, 1878, and that too, when the Adjudicating Authority came to the conclusion of the contraband nature of the goods. According to the Ld. Advocate, the said decision does not consider whether any person could be deemed to have been concerned with smuggling of the goods. The said judgment, as is pleaded by the Ld. Advocate, is the judgment "in rem" and not the one "in personem".

5.3.1. It is also pleaded that mere markings of foreign origin on the gold bars, could not make them or prove them to be of foreign origin, and for that, he has

referred to the decision of Gujarat High Court in *Asstt. Collector of Customs v. Mukbujusain* (supra) and of Kerala High Court in *Asstt. Collector of Customs v. Pratap Rao* Suit 1972 Cr.L.J.1135. In his submission markings are only a hearsay evidence.

5.3.2. Referring to assay report from the India Govt. Mint, the Ld.

Advocate has pleaded that the markings as to fineness on the gold bars, do not tally with the assay report, and this indicates that markings are not correct. In his submission, the Gold, if it was really issued by those whose names have been inscribed on them, there could not have been any variation between the purity inscribed and purity actually found, and as such, the markings by themselves do not indicate genuineness thereof so as to raise any presumption as to the foreign origin.

5.3.3. It is further pleaded that, even due examination/testing is not done of all the subject gold bars, as only one piece from each lot of identical markings has been tested, whereas each of the gold bars is required to be proved as of foreign origin and smuggled into India, and that, examination of each individual bar was all the more essential here, when the fineness inscribed thereon, does not tally with the fineness assayed. The Ld. Advocate has also produced literature published as *Souvenir Handbook* commemorating the First International Exhibition of Gold Bars Worldwide at the Australian Gold Conference 1992.

5.3.4. The assay report, as is pleaded by the Ld. Advocate, does not tally with the fineness inscribed, and hence, *ex-facie*, it indicates that variations exist and has questioned the validity of the approach of the Adjudicating Authority to the effect that the variation is just marginal, and cannot dislodge the presumption. He has pleaded that in dealing with precious metal like gold, every minutest decimal point counts.

5.3.5. In the submission of the Ld. Advocate, markings on the gold, its fineness as also non-disclosure of the source from which the gold bars were acquired by the Appellants could have some bearing, if at all, the burden was on the Appellant, but with non-applicability of the provisions of Section 123 of the Customs Act, the

foreign origin and smuggled nature of the gold bars has to be proved by the Deptt. and considering the fact that even the purity found does not match with the purity mentioned, which could not be the case, if the gold is from the institution/Bank, the names of which are inscribed thereon, the presumption is that the gold bars are not genuinely of foreign origin.

The Ld. Advocate also pleads that a person investing his unaccounted money, certainly, would not keep any record for purchase but that aspect is within the jurisdiction of the Income-tax Authorities and not for the Customs Authority.

5.4. Without prejudice to the main contention, and as an alternative plea, the Ld. Advocate for the Appellant has pleaded that the Show Cause Notice is served beyond a period of six months after the alleged seizure of gold by the authorities. He pleads that the record clearly indicates that the notice was served on the Appellant only on 7.1.1992, though it might have been issued earlier. In his submission "giving of notice" conveys actual receipt of the same by the noticee, and to substantiate the same, the Ld. Advocate has referred to the Supreme Court judgment in K. Narasinhiah v. H.C. Singri Gowda and to the Gujarat High Court Judgment in Ambalal Morarji Soni v. Union of India , Orissa High Court judgment in Shri Nathulal Agarwalla v. Deputy Collector , and Allahabad High Court judgment in Prem Nath Khanna v. Collector, 1987 (28) ELT 9 (Allahabad). The Ld. Advocate has referred to the letter from Mrs.

Prabha Aggarwal, and also to the subsequent covering letter from DRI serving the notice to the Appellant, and has pleaded that the Deptt.

does not say that notice was already validly served on Mrs. Prabha. He has referred to the judgment from Rajasthan High Court in Mool Chand v. Union of India , from Kerala High Court in C.D. Govinda Rao v. Additional Secretary 1982 ELT 270 (Kerala) : 1982 ECR 484D (Kerala). The Ld. Advocate has referred to the Order from the Tribunal in Nayankumar P. Shah v. Additional Collector , and has pleaded that the same has not considered the judgments of the Supreme Court and Gujarat High Court and hence the same cannot stand attracted here.

5.5. Pleading that, in view of the circumstances as brought out the gold is not liable to confiscation and no personal penalty is imposable the Ld. Advocate has in the alternative pleaded that even otherwise the penalty imposed is disproportionate to the contravention. In his submission, even going by the allegations against the Appellant, he may be guilty of investment of his unaccounted money in gold of foreign origin and not the one of having indulged himself in activity of actual smuggling of gold or trading in such gold. As is pleaded, this is not the case where exemplary or deterrent type of punishment is called for, and as such, even assuming that the Appellant is found to have contravened the provisions of the Customs Act, it is in relation to only possession and such a huge penalty is not warranted, and the same may be substantiality and suitably reduced. In his submission, the Adjudicating Authority is swayed away on sentiments and has developed bias against the Appellant.

6.1. Mr. K.M. Mondal, the Ld. SDR, while supporting the Order, has submitted that the Panchnama drawn by DRI on 28.6.1991 clearly indicates that there is a due seizure of gold under the provisions of the Customs Act. He submits that the said seizure is done in the presence of the Appellant. According to him, if it was merely a Departmental transfer as is alleged by the Appellants, there was no need to keep the Appellant present or to draw the Pachnama of seizure in his presence and to obtain his dt. signature and the endorsement on the Panchnama drawn for the seizure. In his submission, the Appellant filed application for settlement vide Section 245C(1) of the Income-tax Act, 1961, on 26.6.1991 and it was only on 28.6.1991 that the DRI seized the gold bars and this indicates that the Income-tax Authorities no longer required the gold bars and the same would have been returned to the Appellant, and it was at that stage that the DRI seized the same. Thus, in his submission, the seizure by DRI was at a stage when the Income-tax Authorities were in the process of handing over the gold bars to the Appellant. As is submitted by the Ld. SDR, this could not be construed as transfer from one Deptt. to another so as to mean that there was no effective seizure. Effecting such seizure in presence of the Appellant is significant. He has also pleaded that the Appellant had never volunteered to hand over the gold bars, and the same obviously were seized against his wishes. The element of taking custody against the wishes therefore, exists. Referring to the judgment of Allahabad High Court in

Jalil Ahmed v. State 1979 Cr.L.J. 514 he has also pleaded that even handing over of the goods by one Govt. Deptt. to the Customs Deptt. has been accepted by the said High Court as due seizure under the Customs Act.

6.2. In his submission, markings of foreign origin existing thereon and Appellant shown to have acquired them from undisclosed sources and from unaccounted money, justifiably gave rise to the reasonable belief of the gold bars being of smuggled origin. The seizure, as is pleaded by the Ld. SDR, is therefore, legal and valid.

6.3... The Ld. SDR has emphasised that the Appellant has admitted to have acquired and possessed the seized gold bars, and even now claims ownership and release thereof, and this establishes the nexus between the Appellant and the subject gold bars.

6.4. For drawal of the representative samples, the Ld. SDR has pleaded that, neither at the time of drawal of the samples nor at any time during the adjudication the Appellant has objected to the same, nor has he insisted for testing of each of the gold bars individually at that time. The contention raised is according to the Ld. SDR just an afterthought with an attempt to fish out some defence or the other. The Ld. SDR has referred to Supreme Court judgment in *Munshi Ram Nivas v. Collector, Food and Supplies Deptt.*

6.5. The Ld. SDR accepts that the Assay Report shows slightly different fineness than the one inscribed on the gold bars, but pleads that the same is negligible and in any case, the fineness is beyond the permissible fineness for the standard gold bars legally available in India, and when the other circumstances, indicate that the Appellant has not acquired the same by any licit sources, and is not ready to disclose any details in relation thereto, the cumulative effect would be in favour of holding that the gold bars are of foreign origin and of smuggled nature. According to him, merely because the India Government Mint has not specified as to the origin, no inference could be drawn, as the Mint was called upon only to certify the fineness.

6.6. In the submission of the Ld. SDR, the seizure of gold bars is effected by the DRI on 28.6.1991 and the Show Cause Notice for confiscation thereof and for imposition of personal penalty has been issued on 24.12.1992, which is within six months and the same was duly delivered on 27.12.1991 (also within six months) and was received by the wife of the Appellant on the same day. Pleading that the letter dt.

27.12.1991 by Mrs. Prabha and returning the notice on the plea that she was not authorised to receive the same, is just a ploy to plead non service and raise some technical defence. Mrs. Prabha could have refused to accept the same from the postal authorities, as the envelop indicated that it was addressed to the Appellant and was sent by the Customs Authority and further, it is only in relation to this letter that such a plea is raised. In the submission of the Ld. SDR, Mrs.

Prabha did receive the notice for and on behalf of the Appellant on 27.12.1991, and hence the notice be deemed to have been served on the Appellant within six months, as stipulated under Section 110 of the Customs Act. Even otherwise, as is submitted by the Ld. SDR, provisions of Section 124 of the Customs Act, 1962, are independent of those of Section 110 of the Act and proceedings for confiscation, would not stand affected. He has for that purpose, referred to the judgment of the Supreme Court in Harbans Lal v. Collector as also the judgments of Bombay High Court in Mohanlal Devabhai Chokshi v. M.P.Mandkar , of Delhi High Court in Hemant Bahadur Lama v. Union of India 1982 ELT 872 (Delhi) and Shah Chaganlal Gainmalji v.Union of India .

6.7. Referring to the decision of Allahabad High Court in Jalil Ahmed v. State (supra), the Ld. SDR, has pleaded that when dutiable goods having foreign marking are found concealed, in absence of any evidence to substantiate the contrary, markings cannot be taken as false. In his submission, here besides the finding of gold bars having marking of foreign origin, they were not only secreted at the Appellants bungalow at Lonawala, which is not his permanent place of residence but the Appellant has also not been disclosing the names of the parties from whom he has purchased the same, though he admits to have purchased them within the span of 9 to 10 months prior to the seizure. The stand taken by the

Appellant, in the submission of the Ld. SDR, clearly indicates that he is wilfully withholding the names, only because, the suppliers are smugglers and the gold is smuggled gold. The Ld. SDR has then pleaded that even assuming that the burden to prove smuggled nature of gold does not get shifted to the Appellant, and the Deptt. has to prove the same, the Deptt. can prove the same either by direct or by circumstantial evidence, and can even prove the issue from the conduct of the Appellant, and has submitted that the conduct of the Appellant as aforesaid provides due evidence to lead to an irresistible conclusion of the smuggled nature and that the Appellant, who alone could have the special knowledge of licit import, has failed to adduce any evidence in that regard. He has pleaded that unlike criminal proceedings, here the noticee is required to advance specific plea in his defence.

6.8... As to the imposition of penalty, the Ld. SDR, has pleaded that for imposition of penalty under Section 112 of the Act, mens rea is not an essential criteria and even assuming that the same has to be considered, than the behavior of the Appellant coupled with the facts as admitted by him, is sufficient to impute mens rea in him. Justifying the quantum of penalty, he has endorsed the views expressed by the Adjudicating Authority. He pleads that no reduction is called for.

7. Considering the submissions made and going through the records made available, there is no challenge to the finding of 65 gold bars having markings of foreign origin from a steel cupboard of a bungalow at Lonawala, where the Appellant does not reside permanently. There is also no challenge that his permanent residence is in Bombay, and that the Bombay address of the Appellant, as is given by him to various Deptts is the correct address. It is also not in dispute that the search of the said Lonawala Bungalow was conducted by the Income-tax Deptt., and initial seizure of the subject gold bars was by that Deptt.

and that the said gold bars were taken over by the Customs Deptt. from that office premises when the Appellant was present. The Appellant has admitted possession and has even now claimed ownership and release of the same to him.

8.1. The principal ground on which the entire proceedings under the Customs Act are challenged is that there is no "seizure" of the gold bars by the Customs

Officers.

8.2. Referring to the Panchnama dt. 28.6.1991, it is pleaded that the same merely shows handing over of the gold bars by one Deptt. to another and that the "seizure" was only on 20.2.1991, which was only under the provisions of the Income-tax Act, 1961. Several judicial pronouncements have been cited to support the submission.

8.3. The first in the series of judicial pronouncements cited by the Ld. Advocate, is the one from the Supreme Court in *Gian Chand v. State of Punjab* relates to the provisions of the Sea Customs Act, 1878, the same relates to the seizure of the goods initially seized by the Police, which came to be handed over to the Customs Deptt. pursuant to the provisions of Section 180 of the said Act, whereunder the Police Officers were statutorily required to intimate in writing to the Customs Deptt. about the seizure, and hand over the seized goods to the Customs Authorities at the conclusion of the Criminal proceedings.

Further, in the said matter the Customs Authorities had moved the Judicial Magistrate to hand the same over to the Deptt.... The issue whether "seizure" could be said to have been affected has been examined from that angle. Here however, the factual position as is dealt with and discussed hereinafter, is different from those there and the ratio of the decision may not stand attracted.

8.4. The Ld. Advocate has then referred to another judgment of the Supreme Court in *Commissioner of Income Tax v. Tarsen Kumar* 1986 (36) ELT 10 (SC) : 1986 (8) ECR 504 (SC) : ECR C 980 SC : ECR C Cus. 1176 SC. In the said judgment, the Supreme Court have dealt with the provisions of Section 132 of the Income-tax Act and have examined what could constitute seizure under the said Act. There the Indian currency was seized by the Customs Deptt., and the Income-tax authorities by issuance of Authorisation Warrant both to the person from whom they were seized and the Customs Deptt. took the possession of the Indian currency and the Supreme Court, have examined the said provisions in the Income-tax Act, to ascertain as to what could amount to seizure.

Here however, the issue is of examining the provisions of Section 110 of the Customs Act and also the factual position where no warrant similar to one contemplated under Section 132 of the Income-tax Act is issued and the Customs Deptt. have also not invoked the provisions of proviso to Section 110(1) of the Customs Act, by giving any directions to the Appellant that the gold bar seized by the Income Tax Authorities are deemed to have also been seized by the Customs Authorities.

Whatever is done is, in pursuance to Section 110(1). The ratio of the said decision therefore, cannot stand strictly applicable here.

8.5. In the judgment of the P & H High Court, in Commissioner of Income Tax v. Rameshchandra (1974) 93 ITR 450, the facts are that on interception of a car by the Police intimation, was sent to the Income-tax Deptt., and pursuant thereto, a Search Warrant, as contemplated under Section 132 of the Income-tax Act, was issued to search the Police Station and effect the seizure and in due enforcement of such Search Warrant, seizure of the currency was effected on the very same day on which the police authorities had recovered the same, and it is in view of the same that the said High Court has held that there cannot be a seizure of goods. Here however, for what is being discussed in details hereafter, the challenged seizure of the gold bars is not under any Warrant, nor the same is taken custody of immediately after seizure. It is after a period of over four months after the seizure under the Income-tax Act, 1961 and after the Appellant filed an application for settlement vide. Section 245C(1) of the said Act.

Further, the seizure is effected vide Section 110(1) of the Customs Act. The facts before the said High Court were therefore quite different from those here and the ratio of the said decision would not stand attracted here.

8.6. Gujarat High Court, in Assistant Collector v. Mukbujusein Ibrahim 1970 Cr.L.J. 1305 were concerned with the issue of raising presumption under Section 123 of the Customs Act, in relation to the gold seized by the police. The facts, in brief are that the police officers intercepted a passenger and seized gold under a regular Panchnama, under the provisions of the Cr.P.C., and then handed over the person, the gold as also the seizure Panchnama to the Customs Authorities and

the said authorities thereupon drew a fresh seizure Panchnama, and the subsequent seizure has been held by the Gujarat High Court as not the one, which could attract the provisions of Section 123 of the Customs Act. The issue whether the provisions of Section 123 of the Customs Act could or could not stand attracted are separately examined, hereinafter, but so far as the aspect of due seizure is concerned, the factual position is that in the said case, the Police effected the seizure and without any further investigation on their part transferred the entire proceedings to the Customs Authorities, and according to the said High Court, the subsequent Panchnama and seizure by the Customs Authorities were on empty formalities. Here, however, for what is discussed hereinafter, there is no enbloc transfer of proceedings by the Income-tax Deptt. to the Customs Deptt., nor is there any transfer of custody of gold without any action taken by the said Deptt....

Actually the gold is taken in custody of by the DRI only after the Income Tax Deptt. had completed their investigations. On factual aspect therefore the judgment of the Gujarat High Court, cannot be made applicable to the matter here.

8.7. Decision of Calcutta High Court in *Sitaram Agarwala v. State*, is also referred to, by the Ld. Advocate, but that appears to be in relation to raising presumption under Section 178(1) of the Sea Customs Act and interpretation of the word "Smuggled goods" under Section 167 of the said Act.

8.8. The Ld. SDR has on the other hand, cited the decision of Allahabad High Court in *Jalil Ahmed v. State* 1979 Cr.L.J. 514 to show that even handing over of goods by another Deptt. to the Customs officers, and effecting of seizure pursuant thereto by those officers would also tantamount to seizure under the Customs Act. This decision of the Allahabad High Court does not appear to have been considered in any of the judgments referred to by the Ld. Advocate for the Appellants.

8.9.1. The factual position that has emerged out on the record indicates that the Income-tax Authorities searched the Appellant's premises in exercise of their powers under Section 132 of the Income-tax Act on 20.2.1991, and amongst others, seized the subject gold bars, as the property acquired from undisclosed

income. The matter seems to have been investigated into by the said Deptt., whereunder, the Appellant, invoking the provisions of Section 245C(1) of the Income-tax Act, has filed claim for settlement on 26.6.1991 and it is only subsequent thereto that the alleged seizure is effected by the DRI unit of the Customs Deptt. on 28.6.1991.

8.9.2. The DRI unit visited the Income-tax Office on that day pursuant to some intimation received by them. Significantly, at the time of visit of DRI Officers, the Appellant was also present, which makes it clear that he was also informed to remain present at the Income-tax Office, in relation to the seized gold bars. Thus, the visit of DRI Officials was not pursuant to issue of any Search Warrant or by effecting a raid, under any Warrant issued under the provisions of the Customs Act. On the contrary, it was in response to some communication (either written or oral), from the Income-tax Authorities, to both the DRI and the Appellant.

8.9.3. With seizure effected by the Income tax Authorities vide Section 132 of the Income-tax Act, 1961, as per the provisions of the said Act, the said authority had to take appropriate decision within ninety days from the seizure, and vide Sub-section (5) of the said Section, they were required to release other properties, retaining only such from which the Income-tax dues, to be ascertained, could be recovered. The seizure having been effected on 20.2.1991, the said period of ninety days had already stood expired much before 28.6.1991. As is admitted by the Appellant himself, by 26.6.1991 he had already filed application vide Section 245C(1) of the Income-tax Act, for settlement of claim.

This aspect, when considered in view of the fact that it was on intimation from Income-tax Authorities that the DRI officials went there, and the Appellant had also remained present, leads to show that, the Income tax Authorities having completed the investigations no longer required the subject gold bars for their purpose and were to effect the release thereof to the Appellant vide Section 132 (5) of the Income-tax Act, with intimation to DRI officials. This gets substantiated by the very presence of the Appellant at that particular time, which otherwise would not have been necessary. Though the communication received from the Income-tax Authority by either the DRI unit or the Appellant, is not brought on

record, the circumstances, coupled with the time lag between the seizure by the Income-tax Authority and the seizure by the DRI unit of the Customs Deptt., as also effecting of the seizure by the DRI unit only after the Appellant filed his claim for settlement before the Income tax Authorities vide Section 245(C)(1) of the Income-tax Act, leave no scope to view the incident of 28.6.1991 from any angle other than the one that the Income-tax Authorities were following the provisions of Section 132(5) of the Income-tax Act, 1961. Therefore, it is not possible to accept the contention that it was a mere transfer from one Govt. Deptt. to another Govt. Deptt. On the contrary the circumstances existing as also the fact that the Appellant has also remained present all throughout the drawal of the Panchnama for seizure, by the DRI officials, lend support to hold that the seizure by DRI officials was effected simultaneously with the release of the gold bars by the Income-tax Authority, in favour of the Appellant, though not clearly reflected in the panchnama, it could be construed that the Income tax Authorities released the gold bars to the Appellant and the DRI officials effected seizure from him. Such a deeming action appears unescapable in the present set of circumstances.

8.9.4. The other elements of "seizure" required to be ascertained as per the judgments referred to by the Ld Advocate, appear to be existing. The Appellant has never come forward to make any voluntary declaration and the gold bars have not been voluntarily surrendered.

The seizure has been effected under the statutory authority invested in the seizing officers. The search was not effected because the location was known, and the Appellant did not put any resistance because, being an educated person, he knew the provisions of law.

8.9.5. The seizure effected is the actual seizure as contemplated under Section 110(1) of the Customs Act, and not by issuance of any detention Order as contemplated under proviso to that Section. If the seizure by DRI was in addition to the seizure by the Income-tax Authority, it would have been done under proviso to Section 110(1) of the Customs Act. Here however, the seizure being actual and that too, in the presence of the Appellant himself, provides additional support to the conclusion drawn hereinabove.

8.9.6. In the result, the seizure effected by the DRI unit of the Customs Deptt. on 28.6.1991, has to be accepted as the seizure under the provisions of the Customs Act, as contemplated under Section 110(1) of the said Act and cannot be taken as a mere inter Departmental transfer so as to make the ratio of various decisions cited by the Ld.

Advocate, as applicable.

9.1. The seizure to be effected under the provisions of the Customs Act, has to be under a reasonable belief of the goods being smuggled goods, and such reasonable belief has to exist at the time of seizure.

9.2. Reasonable belief is always a matter for subjective satisfaction of the seizing officer and may ordinarily be not interfered with, if the same is based on some rational consideration, even if it may appear that different approach could be probable. Further the seizure has to be on the reasonable suspicion, and not the proof therefore. The Appellate Authority could only consider whether there was sufficient data available for a person of rational thinking to bona fide believe that the item could be smuggled one.

9.3. Here, the gold was in the form of bar or "biscuits" as is popularly understood. When seized by the Income-tax authorities, the same was found secreted in a bungalow at Lonawala which admittedly, is not the usual place of residence. The acquisition thereof from undisclosed income is duly admitted by the Appellant before the Income Tax Authorities and all the 65 bars had markings of foreign origin inscribed thereon. These circumstances which undisputedly existed at the time of the seizure by the DRI officials, clearly provided adequate data for the seizing officers to cater a reasonable belief that the gold bars could have been the smuggled gold, as gold bars of the type were not the marketed commodity in India and were not claimed as licitly acquired by the Appellant, who was present at the time of seizure.

9.4. The element of seizure of subject gold bars under a reasonable belief therefore also stands established. This also gets support from the view expressed by the Allahabad High Court in Jalil Ahmed v. State (supra) where it is held that

when the dutiable goods having foreign markings are found concealed, in absence of evidence of duty payment, the same would give rise to the presumption of smuggled nature thereof.

10.1. With gold bars seized under reasonable belief that they are smuggled goods, and with gold being the item specified in Section 123 of the Customs Act, the burden would lie on the Appellant to prove the licit import thereof and no evidence is adduced by the Appellant who even now claims the ownership, to show the licit import.

10.2. The argument is advanced that the markings of foreign origin by themselves, would fall within the category of hearsay evidence, the same cannot be accepted as a piece of evidence and further, the markings indicated purity as 999 whereas the assay report from the India Government Mint shows different purity. In the submission of the Ld. Advocate, though variation is marginal) the very fact that the variations exist clearly indicate that they do not bear the correct marking and it is clear that some one has passed over the goods under the fake markings, and that the main object of the Appellant being only to invest his unaccounted money, he had gone, not on the markings, but on the real purity of the gold, and it could be the gold bars made in India.

10.3. As is held by the Allahabad High Court in Jalil Ahmed v. State (supra) markings of foreign origin do provide prima facie presumption of foreign origin. Together with that, though the India Government Mint assay report show, some variations, the difference is of only 002, and in any case, the gold bars of such purity are not legally available in India. Coupled with this, even according to the Appellant, he acquired them by purchasing 2 to 3 bars at a time, meaning thereby that he had contacted various sellers for about 15 to 20 times within the span of 9 to 10 months. In spite of that, he has not disclosed their names, even though disclosure of their names would have provided him a very strong defence, if it was established that gold bars with fake markings were prepared out of gold lying within India. When a person does not disclose any fact which is within his special knowledge, presumption adverse to him has to be drawn. The disclosure of that could not have even attracted the provisions of Gold (Control) Act, 1968, which

had stood repealed without replacement with effect from 7.6.1990, i.e.

prior to the subject seizure. Further the same is prior to relaxation in the policy permitting import of gold which became effective from 1.3.1992. With purity being more than the one permissible for marketing gold in India, and the gold bars bear marking of foreign origin, the presumption of their being of foreign origin becomes irresistible. It could be that the gold may have been attempted to be passed over as the one from the reputed companies of which the names are inscribed, by the persons who smuggled them, but by no means, the probability of their being of Indian origin can be accepted. The Appellant has merely raised a probability and no proof is adduced. The Appellant is not an "accused" in relation to the adjudication proceedings, so as to rest by only raising the probability.

10.4. It is also significant to note, that according to the Appellant, he purchased them in lot of 2 to 3 bars at a time. He does not specify as to which bars were purchased when, and in any case, for 5 bars bearing marking of "Swiss Bank", the assay report perfectly tallies with the purity inscribed thereon, and there could be no scope to doubt about their foreign origin on the plea as is raised. When they are proved to be of foreign origin, the others purchased in the same way could also reasonably be taken to have been falling in the same category as they are also purchased from the same undisclosed sources.

Non-disclosure of the names of the sellers, coupled with high purity of even other gold bars and non-availability of gold bars of such high purity in the Indian market strengthens the conclusion that the gold bars are of smuggled nature. The hearsay evidence, thus is supported by strong circumstantial evidence making it acceptable as evidence, and besides the markings, the purity coupled with other circumstances also lead to hold the gold as not of Indian origin.

10.5. Plea is also raised that it was only a sample checking done, and that in Order to ascertain purity each one of the gold bar ought to have been examined. A request was made to get the gold bars produced before the Tribunal, which of course, stood rejected. The plea however appears to be just an afterthought, only with a view to raise some defence at the appellate level. During the taking of the samples, the Appellant who was present all throughout, never desired to get each

of the bar tested for purity. If he was certain that the gold bars were of Indian origin and of permissible purity, acquired by him just to invest his unaccounted money or that he felt the purity of each one differing from the other, he being the person having specific knowledge about it, and being the person from the educated society, would have, without being overawed by the Customs officials, demanded accordingly. One sample is drawn from each lot having the same type of markings, and the same could reasonably be accepted to be representing the whole lot. The view gains support from the Judgment of the Supreme Court in *Munshi Ram Nivas v. Collector Food Supplies* (supra). This plea also does not appear to have been raised even at the adjudication stage. The contention raised therefore stands rejected as an afterthought.

10.6. On raising presumption vide Section 123 of the Customs Act, the Appellant has failed to discharge the burden of proving the subject gold bars as licitly imported, into India.

11.1. Even assuming that under the given set of circumstances, and applying the ratio of the judicial pronouncements cited by the Ld.

Advocate for the Appellants, the burden of proof would not stand shifted on the Appellant, then also, the Deptt. has been able to show that the subject gold bars could only be of foreign origin, and thereby attracting the ratio of the Supreme Court judgment in *Collector v. D.Bhoormull* (supra). In appreciating this, two basic concepts ought to be noted, (i) the smuggling activity is being carried out with precision and near perfection, with all efforts to see that no traces remain and (ii) the Deptt. with limited sources at their disposal, has to pierce and penetrate through the same. The Supreme Court in the aforementioned case, have visualised the same and have laid down the guidelines as to the degree of proof required to be adduced by the Departmental Authorities. It may also be noted that as per the Evidence Act, the burden to prove the facts which are within the special knowledge of a person, lies on him. Further contrary to the position in the criminal proceedings, in the adjudication proceedings, the party alleged to have contravened the provisions of law is not supposed to remain silent, throwing the entire burden on the prosecuting authority to prove everything beyond all

reasonable doubts but is supposed to provide reasonable explanation about his possession and acquisition of goods.

Moreover, it is a cardinal principle of law, that the burden of proof could stand discharged by considering the totality of circumstances and some conclusions could also be based on the explanations provided by the party other than the one on whom the burden lies.

11.2. The gold bars seized here have markings of foreign origin. Purity is also higher than the one for a standard gold bar. Source of acquisition remains undisclosed. When initially seized, they were found secreted at the place which is not the usual place of residence for the Appellant. These are therefore the grounds which could be treated as providing sufficient indications for drawing a positive conclusion, and not a mere presumption, that they are of foreign origin, and as per the ratio of the Supreme Court judgment in *Re: D. Bhoormal* (supra) the burden shifts on the Appellant to prove the licit import, which as is discussed hereinabove, he has failed to discharge.

12. Considering the submissions and also various judicial pronouncements cited, and from the discussions made hereinabove, there is no scope to hold that the findings arrived at by the authority below, as to the smuggled nature of gold bars is contrary to the evidence or 'is devoid of reasoning or that appreciation of evidence is contrary to set principles of procedural law applicable to the adjudication proceedings.

13.1. Attempt is also made to challenge the validity of the entire proceedings, by pleading that the Show Cause Notice is not served within the period of six months from the dt. of seizure.

13.2. The seizure by the Income-tax Deptt. has been effected on 20.2.1991. The seizure by DRI officials of the Customs Deptt. is effected on 28.6.1991. The Show Cause Notice is issued on 24.12.1991 and was received at the residential address of the Appellant by his wife Mrs. Prabha on 27.12.1991. She however sent back the same, (not by way of refusal to receive the envelope containing the notice as was delivered by the postal authority but by sending back the notice after due

receipt from the postal authority), and the same Show Cause Notice was served by personal service to the Appellant on 7.1.1992.

13.3. The notice dt. 24.12.1991, is the one issued vide Section 124 of the Customs Act, for proposed confiscation of gold bars, and imposition of personal penalty. Even assuming that there is some substance in what has been pleaded, which possibly may not be accepted, the contention now raised has squarely stood negatived by various judgments of the Supreme Court, the latest being in Harbans Lal v. Collector , where it is clearly held that barrier of six months laid down in Section 110 of the Customs Act, 1962 cannot effect the notice under Section 124 of the Act and the proceedings can legally be sustainable. This view of the Supreme Court, also supported by similar view expressed by some High Courts, referred to by the Ld. SDR, therefore, makes the entire question and the plea raised thereunder, as not sustainable.

13.4. This being the position, the question whether receipt of notice by Mrs. Prabha on 27.12.1991 and by the Appellant himself on 7.1.1992, and the consequential effect thereof, becomes rather redundant, and of purely academic interest, and need not be considered. It may only be observed that the notice sent by post had reached the residence of the Appellant and was accepted by none else but the wife of the Appellant.

14. Taking all these aspects into consideration, the only inescapable conclusion is that the Appellant had acquired and possessed the smuggled gold, and that the seized gold has been correctly held liable to confiscation under Section 111(d) of the Act and is correctly Ordered confiscation. The same therefore calls for no interference and is confirmed. The penal liability under Section 112 of the Act of the Appellant is also sustainable and is therefore sustained. The very fact that the purchased the gold with markings of foreign origin leaves no scope to challenge the mens tea, which otherwise also is not an essential criteria.

15.1. It has however been pleaded that in imposing personal penalty, the authority below has been guided away by some extraneous grounds, and plea is also raised that there is an element of vindictiveness and prejudice. Apart from pleading that the penalty imposed is disproportionate to the gold found, it is further pleaded that

the Appellant has also been proceeded against under the provisions of Income-tax Act, and that though he acquired gold, he may have been induced to believe the same to be licitly imported. In any case, as is submitted by the Ld. Advocate, the Appellant had purchased the same in India, only with a view to invest his unaccounted money and not for trading in gold, and had no profit motive in view, and there is absolutely no evidence that the Appellant was directly or indirectly involved in the act of smuggling the same.

15.2. The Ld SDR on the other hand, has justified this type of different penalty pleading that persons from elite class, who contravenes the law of the land and directly or indirectly encourages the anti national activity having, far reaching effect on the national economy, ought to be visited with severe consequences, so that others may get a lesson and desist themselves from indulging in such activity.

15.3. The personal penalty imposed is Rs. 1.25 crores for acquisition of gold bars worth Rs. 28,28,180/-. Though the Adjudicating Authority has given reasons for imposing penalty to this extent, and the Ld. SDR has tried to justify the same, and it cannot be denied that the activity affecting national economy ought not to be viewed lightly, particularly when the same is undertaken by persons from elite society, the penalty should commensurate with the gravity of contravention. The Appellant is proved to have only acquired the smuggled gold. There is neither allegation nor any proof adduced to show that he was directly or indirectly connected in smuggling thereof. There is also no allegation made or evidence adduced to show that he was dealing in the smuggled gold. His consistent plea before, both, the Income-tax Authority and the Customs Authority, is that he purchased them for investing his unaccounted money. For acquisition of unaccounted money the proceedings are going on before the competent authority and appropriate decision will be taken by that authority. The same should not prejudice the adjudication under the provisions of the Customs Act.

In relation to the Customs Act, it could only be Clause (b) of Section 112 of the Act, which could stand attracted and though, the authority below may not be exceeding his jurisdiction in imposing the penalty to the extent that he has done, he does appear to have overweighed the gravity in assessing the penalty amount.

The penalty of Rs. 1.25 crores for possession of gold worth Rs. 28.28 lacs does appear disproportionate and considering the circumstances, the same is reduced to Rs. 28,00,000/- (Rupees twenty eight lacs only). In arriving at the figure, the fact that the entire gold is Ordered confiscation, as also the fact that subsequently, even the Govt. has liberalised the policy for import, are taken into consideration.

16. Under the circumstances, the Appeal is partly allowed, and while the Order of absolute confiscation of 65 gold bars is confirmed, the personal penalty imposed on the Appellant is reduced to Rs. 28,00,000/- (Rupees Twenty eight lacs only). Consequential reliefs if any to follow.

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